APPROVED **[2023] IEHC 74**

THE HIGH COURT

2021 No. 290 MCA

BETWEEN

CHUBB EUROPEAN GROUP S.E.

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

RAPPEL ENTERPRISES
TRADING AS ARKLOW MARINE SERVICES

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 February 2023

INTRODUCTION

1. This matter comes before the court by way of a statutory appeal from a decision of the Financial Services and Pensions Ombudsman. The decision under appeal had been to dismiss a complaint made by an insured against their insurance provider.

NO REDACTION REQUIRED

2. The unusual feature of the appeal is that the appellant, the insurance provider, had been the *successful* party before the Ombudsman, at least insofar as the formal outcome of the investigation of the complaint against it had been concerned. Notwithstanding that the complaint against it has been dismissed, the insurance provider nevertheless contends that the Ombudsman's decision contains a number of findings which are, potentially at least, adverse to it. The decision purports to give an interpretation to a form of policy wording which has been employed in a number of other insurance policies entered into by the insurance provider. It is also said that the findings in the decision trigger, potentially at least, certain obligations under the Central Bank's supervisory framework for Covid-19 and business interruption insurance.

3. The Ombudsman submits that the appeal is inadmissible in circumstances where, or so it is said, the underlying legislation does not allow for what might be described as a "*winner's appeal*". The question of who has standing to bring an appeal is one of the principal issues for determination in this judgment.

OMBUDSMAN'S JURISDICTION

4. 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 in this judgment to a section of an Act are intended to refer to the FSPO Act 2017.

5. The statutory regime is broadly similar to that which had applied to the financial services ombudsman under the Central Bank Act 1942 (as amended). The latter office has since been dissolved and its functions transferred to the financial services and pensions ombudsman (referred to throughout this judgment as "***the***

Ombudsman"). The establishment date under the FSPO Act 2017 is 1 January 2018.

6. The Ombudsman's jurisdiction to consider and determine complaints in respect of the conduct of a financial service provider is extensive. The Ombudsman can consider not only complaints made in respect of the provision of a financial service, but can also consider complaints in respect of conduct involving an *offer* to provide a financial service, or involving the *failure* to provide a particular financial service requested by the complainant. In such circumstances, the Ombudsman has jurisdiction to uphold the complaint on the grounds, *inter alia*, that the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant.

7. The Ombudsman's jurisdiction is thus not confined to circumstances where there is a contractual relationship between the financial service provider and the complainant. Indeed, the complaint might be precisely that the financial service provider *refused* to provide a particular service, with the consequence that no contract was ever entered into between the parties.

8. Section 60(2) of the FSPO Act 2017 provides as follows:

> "A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:
>
> (a) the conduct complained of was contrary to law;
>
> (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
>
> (c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was based wholly or partly on a mistake of law or fact;

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

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

9. The Ombudsman enjoys what might be described as a hybrid jurisdiction, whereby he may adjudicate not only on contractual disputes, e.g. where a complainant alleges that the conduct of a financial service provider in refusing to honour a claim is in breach of contract, but may also make determinations and direct remedies in respect of conduct which, while not contrary to law, is found by the Ombudsman to be "*unreasonable*" or "*unjust*".

10. The breadth of the Ombudsman's jurisdiction has been pithily described as follows by the High Court (Hyland J.) in *Danske Bank v. Financial Services and Pensions Ombudsman* [2021] IEHC 116 (at paragraph 27):

> "Those subsections make it clear that the Ombudsman both has jurisdiction to uphold on grounds involving what I might describe as black letter law issues i.e. contrary to law, or based on a mistake of law but also to uphold on grounds where there has been no breach of law at all, including quite strikingly upholding a complaint where the conduct is in accordance with law, but the Ombudsman holds that the application of that law was detrimental to the complainant. The breadth of the Ombudsman's jurisdiction under s.60(2) cannot be underestimated: he or she is effectively given a jurisdiction to override the law in certain situations, in the sense that although a complainant may have no remedy in law, including under the law of contract, nonetheless they can have their complaint upheld. In other words, a financial service provider can act perfectly lawfully but nonetheless find that a complaint is upheld against it carrying with it an obligation to make specified redress."

11. The statutory regime governing the Ombudsman's statutory predecessor, the financial services ombudsman, had entailed an equally broad jurisdiction. The nature of the jurisdiction under the former legislation was commented upon as follows by the Supreme Court in *Governey v. Financial Services Ombudsman* [2015] IESC 38, [2015] 2 I.R. 616 (at paragraphs 39 and 40 of the reported judgment):

> "Thus it may be seen that, while the F.S.O. [Financial Services Ombudsman] is given a jurisdiction to consider, and if appropriate to find substantiated, complaints which involve issues based purely on questions of legal rights and obligations, the jurisdiction is much broader than the determining of such legal questions. It is absolutely clear that the F.S.O. retains a jurisdiction to find a complaint substantiated even though there has been no breach of the legal entitlements of the complainant.
>
> It is also clear from the provisions of s. 57CI(4) [of the Central Bank Act 1942] that the range of remedies which can be imposed by the F.S.O. in the event that a complaint is substantiated are wide and go beyond (but do include) the form of redress which might be available in the case of someone whose legal rights have been interfered with."

12. The judgment of the Supreme Court in *Governey* goes on then to reference a provision of the Central Bank Act 1942 (as amended) which permitted the financial services ombudsman to *decline* to investigate a complaint where there is an alternative and satisfactory means of redress in relation to the conduct complained of. The equivalent provision under the FSPO Act 2017 is to be found at section 52(1)(d) as follows:

> "The Ombudsman may decline to investigate, or discontinue an investigation of, a complaint where, in the opinion of the Ombudsman—
>
> […]
>
> (d) there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of […]".

13. The judgment in *Governey* then continues as follows (at paragraph 42):

> "I draw attention to these provisions for the purposes of observing that the range of issues which the F.S.O. can investigate and the range of remedies available go far beyond the type of case which can be brought to a court as a result of an alleged breach of legal rights or failure to meet legal obligations. But the remit of the F.S.O. does, potentially, include cases which involve (and may only involve) the establishment and determination of such rights and obligations and the payment of compensation for loss in respect thereof. Obviously, some cases might be such as could be considered hybrid with some issues involving legal questions but others involving the general reasonableness of the course of conduct between the relevant financial institution and the complainant. 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."

14. It is imperative that the Ombudsman identify the jurisdictional basis upon which a complaint has been decided. More specifically, the decision should record whether the complaint has been upheld on the grounds that the conduct of the financial service provider was contrary to law, or, alternatively, on the grounds that the conduct was unreasonable, unjust, oppressive or improperly discriminatory. As stated by the Court of Appeal in *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2022] IECA 77 (at paragraph 114), when upholding a complaint, the Ombudsman should, when explaining his

decision, expressly refer to the statutory ground or grounds upon which each element of a complaint is upheld, and on what basis.

15. The failure to record the grounds for a decision, in the context of a complaint relating to an insurance policy, has recently been criticised by the High Court (Burns J.) in *Hiscox S.A. v. Financial Services and Pensions Ombudsman* [2022] IEHC 557. The decision in that case had contained a clear statement that the insurance provider's failure to admit the claim was contrary to the contractual provisions in place between the parties. The court observed that this appeared to be a finding that the provider had acted in breach of contract and, as such, the conduct complained of was contrary to law. Yet the decision recorded that the complaint had been upheld on the grounds prescribed in section 60(2)(b) and (g) of the FSPO Act 2017.

16. Burns J. observed that much of the controversy generated in the proceedings had arisen from the failure on the part of the Ombudsman to specifically and expressly uphold the complaint on the ground that the conduct complained of was contrary to law as provided for by section 60(2)(a) of the FSPO Act 2017. Whilst acknowledging that a decision of the Ombudsman is not required to have the structure or level of detail that a court judgment may be expected to have, it is nevertheless a matter of great importance to the parties concerned and so should be structured in such a way that the reasoning and evidential support for the reasoning may be discerned without undue difficulty.

THE IMPUGNED DECISION

17. These proceedings have their genesis in a complaint made by an insured against their insurance provider. In brief, the complaint was to the effect that the

insurance provider had wrongfully declined a claim made by the insured pursuant to a policy of insurance. The essence of the dispute is that the policy of insurance allowed the insured to recover in respect of business disruption during the coronavirus pandemic.

18. The question of whether or not payment was due under the policy of insurance turns largely on the interpretation of an "*extension*" to the policy. To assist the reader in understanding the discussion which follows, it is necessary to set out the wording of the extension. Insofar as relevant to the issues in these appeal proceedings, the extension reads as follows:

> "Restrictions on the use of the Premises
>
> for loss resulting from interruption of or interference with the **Business** carried on by the **Insured** at the described **Premises** following the intervention of a public body authorised to restrict or deny access to the described **Premises** arising from:
>
> a the occurrence of any **Notifiable Disease** either at the described **Premises** or attributable to food or drink supplied from the described **Premises**;
>
> b the discovery of any organism likely to result in the occurrence of a **Notifiable Disease** at the **Premises**;
>
> c the discovery of vermin or pests at the described **Premises**;
>
> d an accident causing defects in the drain or other sanitary arrangement at or within 250 metres of the described **Premises**;
>
> e an enforcement action taken in the Republic of Ireland by the Food Safety Authority of Ireland or in Northern Ireland under the Food Safety Order 1991 against products of the **Insured** which subsequent analysis establishes are not contaminated and are safe for human consumption;
>
> f the malicious deposit at the described **Premises** of radioactive isotopes that will cause **Bodily Injury**; or

g murder, manslaughter, suicide or grievous **Bodily Injury** at or within 250 metres of the described **Premises**.

This Extension includes costs and expenses incurred to clean air conditioning and water supply equipment and the removal or disposal of contaminated **Stock**.

In respect of point d above, the amount payable under this Extension shall be the sale value of all products of the **Insured** which cannot be produced or sold in consequence of the enforcement action, less any sum:

i. saved in respect of such of the charges and expenses of the **Business** as may cease or be reduced in consequence of the enforcement action; and

ii. payable to the **Insured** as compensation under the terms of the Food Safety Authority of Ireland Act 1998 as amended or the Food Safety Order 1991 (and any subsequent amendments) or otherwise."

*Emphasis in original

19. The term "*Notifiable Disease*" is defined elsewhere under the extension. I will return to consider this definition at paragraph 27 below.

20. As appears, the extension consists of an overarching "*stem*" which sets out qualifying criteria to be met in all instances, followed by a series of alternatives identified by the letters "*a*" through to "*g*".

21. Insofar as relevant to the appeal to the High Court, one of the principal disputes which fell to be determined by the Ombudsman as part of the complaint had been whether the insured was entitled to recover under subclause (b) above. This required that the insured had suffered a loss resulting from interruption of or interference with the business carried on by it at the insured premises following the intervention of a public body authorised to restrict or deny access to the premises arising from the discovery of any organism likely to result in the occurrence of a notifiable disease at the premises.

22. The resolution of the dispute necessitated the consideration of a number of issues. The first issue was whether access to the insured premises had been restricted following the intervention of a public body authorised to do so. This turned, largely, on the question of whether the insured was exempt from the restrictions, which would otherwise have applied to the movement of customers and employees, on the basis that it was providing an "*essential service*" within the meaning of the regulations made pursuant to the Health Act 1947 (as amended).

23. The insurance provider, in its submissions in response to the complaint, had placed emphasis on the fact that the insured was providing an "*essential service*" within the meaning of the regulations and was thus entitled to remain open for business. The Ombudsman accepted this submission but nevertheless went on to find that the claim was not excluded:

> "[…] It seems accordingly that [the] Complainant Company's business may have been permitted to remain open, despite the measures announced by the Government in March 2020 and the regulations introduced in April 2020, as the Complainant Company is likely to have been considered to be providing an essential service.
>
> The Complainant Company points out however that its business comes '*from across the whole of Ireland and from the UK*', and points to the risk which would have been created by such persons coming on to its premises. Whatever those risks, I do not accept that the Complainant Company's decision to close on 26 March 2020, in the context of the Government announcement of additional measures designed to curb the spread of COVID-19, and in circumstances where it considered itself to have been forced to close, means that it is prevented or barred from making a claim for business interruption losses under the policy, because it is now arguable that the Complainant Company might have remained open. I take the view that if, in late March 2020, it had been clear that the Complainant Company was entitled to remained open for business, on the basis of being an essential service, then the Provider is likely to have

> referenced its position in that respect, when it transmitted its email on 8 June 2020."

24. There was some debate at the hearing before me as to what precisely the Ombudsman had decided in respect of this issue. Counsel on behalf of the Ombudsman submitted, on instructions, that the decision found no more than that the insured was not precluded from lodging a claim. It was submitted that the Ombudsman made no finding as to whether such a claim would have been valid. Put otherwise, it was submitted, on instructions, that the Ombudsman had reached no conclusion on one of the principal issues in dispute between the parties to the complaint, namely whether the insurance provider had acted in breach of contract by declining cover.

25. With respect, this submission is not supported by the wording of the decision. The natural and ordinary meaning of the decision is that the Ombudsman had found that the *subjective* views of the insured were somehow relevant to this issue. More specifically, the decision found that the insured was not prevented or barred from making a (valid) claim for business interruption losses under the policy in circumstances where it considered itself to have been forced to close.

26. The only reasonable interpretation of these passages is that the Ombudsman had decided that a business which was providing an "*essential service*" as defined—and thus not subject to the restrictions introduced by the Minister for Health under the covid regulations—could nevertheless meet the qualifying threshold under the insurance policy of being a premises to which access had been restricted or denied by a public body. Indeed, it is obvious from the structure of the decision that such a finding must have been reached. Were it otherwise, then it would have been entirely unnecessary for the Ombudsman to go any further: the claim would have fallen at the first hurdle, and it would have been redundant

to consider the additional contractual criteria. The very fact that the Ombudsman went on to address these criteria confirms that the first issue had been determined in favour of the insured.

27. The second issue addressed in the decision concerned the concept of a "*notifiable disease*". The term is defined, under the schedule, as meaning illness sustained by any person resulting from: (a) food or drink poisoning; or (b) any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them, but excluding, *inter alia*, severe acute respiratory syndrome (SARS) and/or atypical pneumonia or any mutant variation thereof. The dispute centred on whether it was sufficient for the exclusion to apply that SARS-CoV-2 can be said to cause atypical pneumonia in *some*, but not necessarily all, patients. The Ombudsman resolved this issue against the insurance provider, finding that the exclusion is not applicable in circumstances where SARS–CoV–2 may or may not cause a group of clinical symptoms in patients, which may, in layman's terms, be described as an atypical pneumonia.

28. The third issue addressed in the decision concerned the *location* at which an organism, likely to result in the occurrence of a notifiable disease, had to be discovered. The dispute here centred on whether the organism (on the facts, SARS–CoV–2) had to have been discovered on the insured premises itself, or, whether, alternatively, it was sufficient that the organism have been discovered elsewhere but be likely to result in the occurrence of a notifiable disease at the premises.

29. Again, the Ombudsman resolved this issue in favour of the insured:

> "While there is an 'at the premises' requirement in sub-clause (b), it is clear from the language used, that this was

> intended only in respect of the likelihood of the occurrence of the notifiable disease and not the discovery of the particular organism. In my opinion, if the Provider wished to limit the discovery of the organism to the Complainant Company's premises, it could have easily done so, but no such restriction was imposed in the policy provisions. It seems to me that it was open to the Provider to provide for cover under the policy instead, in the event of the discovery of any organism at the Premises, likely to result in the occurrence of a Notifiable Disease. The Provider however did not do so.
>
> The wording selected by the Provider for the policy cover, made no such restriction. Having considered the provisions of the Restrictions Extension, I am of the view that, taking their natural and ordinary meaning from the words, the appropriate interpretation of sub-clause (b) is that the organism likely to result in the occurrence of a notifiable disease does not have to be discovered at the Complainant Company's premises.
>
> However, I do not believe this to mean that the discovery of an organism anywhere in the world would potentially trigger cover. For instance, sub-clause (b) still requires the Complainant Company to demonstrate that the discovery of the organism is <u>likely</u> to result in the occurrence of a notifiable disease <u>at its premises</u>."
>
> *Emphasis in original

30. This is a very significant finding and greatly widens the circumstances in which a valid claim might be made under the insurance policy. Notwithstanding its significance, however, there is very little by way of reasoning for this finding. Much of the content of the three paragraphs above consists of begging the question, i.e. it is assumed, without explanation, that the policy does not require that the organism have been discovered on the insured premises. Having made this assumption, the decision then suggests that different wording should have been employed had the insurance provider wished to limit the discovery of the organism to the insured premises.

31. Crucially, this finding was reached on an analysis which was confined to the wording of the specific subclause itself. Having taken the view that the language of the subclause is "*clear*", the Ombudsman dispenses with any analysis of the text in context. The decision fails to engage at all with the argument, advanced on behalf of the insurance provider, that in circumstances where all of the other subclauses deal with something that occurs at, or something that is discovered at, the insured premises, the reasonable reader would understand subclause (b) as similarly only being triggered by the discovery of the organism at the insured premises.

32. The decision goes on to hold that the insured must show that discovery of the organism within the territorial limits of the policy, i.e. the Republic of Ireland, is "*likely*" to result in the occurrence of the notifiable disease at the insured premises.

33. The decision ultimately holds that the insured has failed to discharge the evidential burden in this regard:

> "[…] the Complainant Company has not made available any details of occurrences of COVID-19 in its County [redacted], in the town where its premises is located or in the vicinity of its premises. Neither has it supplied any details of staff or customers present on its premises, during the relevant period, or any evidence of where, within the State, these people reside or in the case of non-staff, where they work, or the prevalence of COVID-19 in those areas, such that the presence or suggested presence of Covid-19 in these areas was '*likely to result in the occurrence of a Notifiable Disease'* at its premises."

34. In summary, the Ombudsman determined three important issues of contractual interpretation in favour of the insured. On the Ombudsman's interpretation, the insured was entitled, in principle, to recover under the policy provided that it could demonstrate that there was a likelihood that Covid-19 would occur at the

premises. The Ombudsman ultimately concluded that the insured had failed to put forward evidence to establish such a likelihood. Put otherwise, the Ombudsman determined all the issues of contractual interpretation in favour of the insured but held, ultimately, that the claim failed because of an evidential deficit.

STATUS OF THE FINDINGS IN THE DECISION

35. In the course of this appeal, the Ombudsman has, perhaps surprisingly, sought to downplay the findings set out in the impugned decision. In the written legal submissions, these findings are described as "*more in the nature of 'observations'*". With respect, this characterisation is inaccurate and fails to recognise the legal status which a decision of the Ombudsman enjoys.

36. The Ombudsman has purported to reach conclusions in respect of the interpretation of a form of wording which affects not only the instant policy, the subject-matter of the complaint, but also affects other similarly worded policies issued by the insurance provider. The uncontradicted affidavit evidence indicates that over 500 businesses in Ireland have been insured under this particular policy. It is also averred that a further 1,586 businesses in Ireland and the United Kingdom have been insured using wording that is materially the same.

37. It is self-evident that a published decision of the Ombudsman which has reached conclusions on the interpretation of a particular form of policy wording will, at the very least, represent a persuasive precedent in respect of other complaints based on similarly worded policies.

38. The Ombudsman has filed an affidavit which suggests that the doctrine of precedent does not apply to decisions of his office such as applies to judgments of a court. In a subsequent affidavit, it is averred that although the office of the Ombudsman strives to be consistent in its general approach to complaint investigations, nevertheless every complaint must be investigated upon its own individual merits, based on the evidence and submissions of the parties. It is further averred that it is the *conduct* of a financial service provider that is being considered during the course of a complaint investigation, and that it is the conduct complained of which bears upon the finding in a decision. If and insofar as it is intended to suggest that a finding in respect of one complaint cannot be relevant to another, this latter submission may overstate the position somewhat. One of the grounds upon which a complaint may be upheld is that there has been a breach of contract: a finding in respect of contractual interpretation may thus have implications for other complaints based on the same policy wording.

39. It is not necessary, for the purpose of resolving the present appeal, for this court to reach a concluded view on the question of whether the doctrine of precedent applies to decisions of the Ombudsman. It is sufficient to the purpose to observe that the Ombudsman, as with any other quasi-judicial tribunal, is required to act reasonably. This implies a general obligation to act consistently by treating like cases alike unless there is good reason for not doing so. As discussed earlier, the Ombudsman exercises a hybrid jurisdiction which allows him, should he choose to entertain such a complaint, to determine matters which might otherwise have been pursued by court proceedings for breach of contract.

40. Here, the Ombudsman has made a determination on a question of law, namely the interpretation of a contract of insurance. This has been done in circumstances

where the uncontradicted evidence establishes that there is a large number of contracts in place which employ the same or similar wording. The existence of an earlier decision on the form of policy wording is, at the very least, a relevant consideration in the context of a subsequent complaint based on the same or similar wording. It would undermine confidence in the integrity of the decision-making process were the Ombudsman to dismiss an earlier decision, on the same question of law, as immaterial. This is not to say that the existence of an earlier decision will necessarily be determinative of a subsequent complaint. There may well be grounds, in a given case, for distinguishing the decision or indeed departing from it. However, it is to put the matter too far to suggest that an earlier decision, which is directly on point, does not have the status of at least a *persuasive* precedent.

41. Aside entirely from its status as a persuasive precedent, the impugned decision has the potential to trigger obligations under the Central Bank's supervisory framework for Covid-19 and business interruption insurance. In brief, this supervisory framework indicates that the Central Bank has a clear expectation that where a "*legal action*" has been concluded and the final outcome/s has a wider beneficial impact for other similarly impacted customers, regulated financial service providers will be required to take remedial action to ensure that those customers obtain the benefit of the final outcome/s. A "*legal action*" is defined as including, relevantly, proceedings before the Ombudsman, and is regarded as "*concluded*" where there has been a final decision.

42. The affidavit evidence indicates that the insurance provider apprehends that if the impugned decision is not successfully appealed, then it would be necessary to carry out a beneficial impact assessment on the basis of the decision. This

would necessitate identifying any person who is similarly situated to the insured in this case. For example, if a claim had been denied on the basis of an interpretation of the policy which required that the organism must have been found on the insured premises, then the insurance provider would have to revisit the decision.

43. In summary, I am satisfied that notwithstanding that the formal outcome may have gone in favour of the insurance provider, the decision contains a number of findings which are, potentially at least, prejudicial to its position. The insurance provider thus has a *bona fide* interest in pursuing an appeal against the decision which raises issues of genuine and legitimate concern to it.

THRESHOLD ISSUE: STATUTORY RIGHT OF APPEAL

44. The statutory right of appeal to the High Court is provided for under section 64(1) of the Financial Services and Pensions Ombudsman Act 2017 as follows:

> "A party to a complaint before the Ombudsman may appeal to the High Court against a decision or direction of the Ombudsman."

45. A "*decision*" is defined under section 63 as meaning a decision of the Ombudsman under section 60.

46. The Ombudsman's contention that the statutory right of appeal is confined to an appeal against the *outcome* of the investigation of a complaint is largely predicated on the wording of section 60(1) of the FSPO Act 2017. This subsection provides as follows:

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

(a) is upheld,

(b) is substantially upheld,

(c) is partially upheld, or

(d) is rejected."

47. The Ombudsman submits that this subsection describes a "*decision*" in narrow terms, by reference solely to the outcome of the complaint. With respect, it is artificial to seek to read this subsection in isolation, separate from the specific section within which it appears. It is obvious from a reading of section 60 as a whole that the concept of a "*decision*" bears a wider meaning. This is evident from the provisions of section 60(3) as follows:

> "(3) A decision of the Ombudsman under this section shall be communicated to the parties by the Ombudsman and such decision shall include the following:
>
> (a) the decision under subsection (1);
>
> (b) the grounds for the decision under subsection (2);
>
> (c) any direction given under subsection (4)."

48. As appears, the concept of a "*decision*" includes not only the outcome of the complaint but also the grounds for the decision and any direction given to the financial service provider.

49. For the reasons which follow, I have concluded that the statutory right of appeal is not confined to an appeal against the outcome of a complaint. The appeal is against the "*decision*" described under section 60(3) and thus embraces the outcome and the grounds for that outcome.

50. First, this interpretation accords with the ordinary and natural meaning of the language of sections 60, 63 and 64. The word "*decision*" would normally be understood as meaning more than simply an outcome; rather, it carries a

connotation of a reasoned resolution of an issue (here, a complaint). This sense coincides broadly with the definition of "*decision*" under section 60(3), i.e. as embracing not only the outcome of the complaint but also the grounds upon which that outcome has been reached.

51. It is correct to say that the term "*decision*" is employed in a narrower, technical sense under section 60(1). The term is thus employed in two different senses within the context of a single section of the legislation. Given that the broader sense coincides more closely with the ordinary meaning of the word, however, the reader encountering further occurrences of the word would assume that this was the sense intended, unless the context indicated otherwise.

52. Secondly, there is an obvious resonance between the language of section 60(3) ("*decision of the Ombudsman under this section*") and that of section 63 ("*a decision of the Ombudsman under section 60*"). This confirms that the nature of the decision under section 60 is that defined under section 60(3) rather than the narrow, technical sense in which the term is employed under section 60(1). The right of appeal thus applies to the decision and grounds. Had it been intended to restrict the right of appeal to an appeal against outcome then the definition under section 63 would have referred instead to a decision "*under subsection 60(1)*".

53. Thirdly, it would result in anomalies and absurdities were the statutory right of appeal to be confined to an appeal against outcome. As correctly observed by counsel for the insurance provider, this narrow interpretation would preclude an appeal against the *grounds* upon which a decision is made. This narrow interpretation would also make redundant much of the statutory language in respect of appeal remedies. To elaborate: a non-exhaustive list of the orders that may be made by the High Court on the hearing of an appeal is provided under

section 64(3) of the FSPO Act 2017. The orders include, *inter alia*, an order affirming the decision of the Ombudsman subject to modifications, and an order amending the decision of the Ombudsman. The notion of the modification or amendment of a decision makes little sense if the decision means no more than the outcome of a complaint. Similarly, the notion of remitting a decision to the Ombudsman, for review in the light of the opinion of the High Court on the matter, makes little sense if the decision means no more than the outcome of a complaint.

54. Fourthly, if and insofar as the fact that the term "*decision*" bears two different meanings under section 60 might be said to give rise to an ambiguity as to the scope of the appeal, any such ambiguity must be resolved in favour of ensuring access to the courts for the following reasons. The scheme of the FSPO Act 2017 allows for the possibility of contractual disputes being determined by a quasi-judicial tribunal. Disputes of this nature are normally heard and determined by a court of law. The existence of a statutory right of appeal allows for the possibility of the dispute being brought before a court. The logic of the Ombudsman's interpretation, if followed to its conclusion, is that there is no right of appeal against a finding on contractual interpretation, which might adversely affect a party's interests, unless the outcome of the complaint has also gone against that party. It would require clear statutory language to achieve such a result.

55. Finally, for completeness, it is necessary to address an argument on behalf of the Ombudsman to the effect that the question of whether a successful party can appeal has previously been determined by the High Court. More specifically, the Ombudsman seeks to rely on an *ex tempore* judgment said to have been

delivered by Kearns P. in proceedings entitled *FBD Insurance plc v. Financial Services Ombudsman* (High Court 2010 No. 52 MCA).

56. There is no formal record of this *ex tempore* judgment such as, for example, an agreed note of counsel or a transcript. The most that has been put before this court is an email from a solicitor, which had been sent to what was then the financial service ombudsman, reporting upon orders made by the High Court on 26 July 2010.

57. The email reads as follows:

> "There was one matter which was in for a short hearing today - FBD v. FSO & Moorehouse.
>
> Kearns P had some sympathy for FBD insofar as they said that they were getting inconsistent decisions on the scope of the duty of disclosure and that they wanted a ruling on it. However, he eventually accepted [counsel's] submission that you cannot appeal a case you have won and that they can litigate this issue on the facts of some other case eg by way of case stated or prohibition. Kearns P also accepted [counsel's] argument that the law on the duty of disclosure is not unambiguous and that its scope can depend on the wording of the questions asked on a proposal form. He said he understood the concern of the FSO that a new list of appeals by persons who have won cases would not now commence. Thus, the President said he would not grant the appeal. [Counsel] sought costs and pointed out that we had set out our position in writing, but FBD had chosen to run the point anyway and had lost. However, Kearns P made no Order. He also made the point that he had not made any ruling on whether FBD or the FSO was correct on the disclosure issue."
>
> *Emphasis (underlining) in original

58. It is correct to say that, in accordance with the principles identified in *In re Worldport Ireland Ltd* [2005] IEHC 189 and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, [2012] 2 I.L.R.M. 392, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. The

principle only properly applies, however, where the first judgment has been arrived at after a thorough review of all of the relevant authorities. It is essential, therefore, that there be a record of the first judgment which is sufficient to allow a subsequent judge to understand the rationale for the first judgment and to confirm that all relevant case law and statutory provisions had been considered. There is no such record available in the present case. I simply do not know the precise basis upon which the first ruling was reached, nor the extent of the arguments considered. It should also be explained that the judgment was delivered in the context of the differently worded provisions of Part VIIB of the Central Bank Act 1942 (as inserted in 2004). This legislation referred to a "*finding*" of the financial services ombudsman, rather than a "*decision*", and the right of appeal had been confined to a party who is "*dissatisfied with a finding*". It may well be that the *ex tempore* judgment was influenced by the particular wording of the then legislation.

59. There is a second, related reason for saying that an unrecorded *ex tempore* judgment does not attract the principle in *Worldport Ireland Ltd*. Part of the mischief to which the principle is directed is the avoidance of a situation where, in consequence of there being inconsistent judgments, judges and practitioners alike are unable to say with clarity what the state of the law is in any given area. (*A v. Minister for Justice and Equality* [2020] IESC 70). No such mischief arises in circumstances where no record of the earlier judgment is available and same has not, for example, been referred to in any textbook on the area. The principle only applies where the earlier judgment has been reduced to writing—whether as a reserved judgment or an agreed note—and is generally available.

60. In circumstances where the question of whether a successful party can bring an appeal has been fully argued before me, I must adjudicate on the issue. It would be inappropriate for me to treat the jurisdictional issue raised, in the context of the FSPO Act 2017, as one which has been concluded by the former President of the High Court by reference to an *ex tempore* ruling delivered in the context of the previous legislative regime and in respect of which there is no record of the reasoning nor the arguments.

DO POLICY CONSIDERATIONS MILITATE AGAINST AN APPEAL

61. In addition to advancing arguments based on the literal wording of the FSPO Act 2017, the Ombudsman submits that to allow an appeal by a successful party would run contrary to the statutory scheme's purpose. The judgment in *De Paor v. Financial Services Ombudsman* [2011] IEHC 483 (at paragraph 18) is cited in support of this proposition:

> "If the Court was to treat matters such as this as an appeal on quantum in the usual sense, it is likely that such appeals would frequently come before the courts arising out of decisions of the Ombudsman. If that were permitted, it would have the effect of frustrating the purpose of the scheme which is aimed at informal resolution of consumer issues. The whole purpose of the legislative scheme is to keep the process – so far as possible – out of the courts."

62. With respect, the Ombudsman seeks to read too much into this passage. The judgment in *De Paor* was concerned with the standard of review to be adopted on an appeal, and not with the separate threshold question of who has standing to bring an appeal. It is a *non sequitur* to say that it must follow from the fact that the standard of review is deferential (save on questions of law) that standing to bring an appeal must be interpreted narrowly. The legislation expressly provides for a right of appeal to the High Court, and it is inaccurate, therefore,

to suggest that the legislative intent is to restrict access to the courts. The standing requirement for an appeal must be identified by reference to the statutory language actually used. It is incorrect to approach the task of statutory interpretation on the basis of a preconceived notion that the legislature must have intended to restrict the right of appeal which they themselves created.

63. Both sides referred me to the judgment of the Court of Appeal of England and Wales in *Morina v. Secretary of State for Work and Pensions* [2007] EWCA Civ 749, [2008] 1 All E.R. 718. The Court of Appeal emphasised that there is a traditional reluctance to permit an appeal at the behest of a litigant who has succeeded and who seeks to take issue with the reasoning of the decision rather than with its outcome. Nevertheless, in the particular circumstances of the case, the Court of Appeal held that the Secretary of State had standing to bring an appeal against a decision on a social security matter notwithstanding that he had been successful on the merits. The appeal had been directed to the very jurisdiction of the decision-maker to entertain the matter.

64. The Court of Appeal characterised the impugned "*decision*" as constituting, in reality, two decisions: first, a decision that the decision-maker had jurisdiction to hear the matter, and, secondly, a decision that the matter should be dismissed on the merits. The Secretary of State was seeking to change the formal decision recorded in the first paragraph of the decision document by establishing that the matter should have been rejected for want of jurisdiction rather than dismissed on the merits. The Court of Appeal held that whilst it would be difficult to imagine circumstances in which the Secretary of State, having succeeded on the merits, should be permitted to appeal in relation to some aspect of the reasoning

of the decision-maker on the merits, this did not necessarily preclude an appeal by him on a fundamental legal issue of jurisdiction which he lost.

65. Reference was also made at the hearing before me to the judgment of the Court of Appeal of England and Wales in *Floe Telecom Ltd v. Office of Communications* [2009] EWCA Civ 47. The Court of Appeal, having referred to the well-established general principle that appeals should be against orders rather than against the reasons given for, or findings made along the path to, the impugned order, nevertheless agreed to entertain a winner's appeal. In doing so, the Court of Appeal emphasised that the tribunal, from which the appeal was brought, had made wide ranging findings which were unnecessary for the purpose of determining the matter before it, and that these findings had created uncertainty in the operation of the relevant regulatory regime.

66. These two judgments of the Court of Appeal were reached by reference to specialist statutory regimes each of which created a right of appeal in language vastly different to that employed under the FSPO Act 2017. Moreover, the judgments were reached against the wider backdrop of a different constitutional framework. There can be no question, therefore, of attempting to "*read across*" the principles in this case law to the present proceedings. The most that can be said is that the Court of Appeal judgments illustrate that there is a distinction, in principle, between the order of a decision-maker and the findings and reasoning leading up to that order, and that in many instances a statutory right of appeal, properly interpreted, will only lie where a party seeks to vary the order. Any supposed traditional reluctance to allow an appeal by a successful party should not, however, be elevated to a presumption of statutory interpretation, whereby one approaches the construction of a legislative provision in the expectation that

an appeal will be so confined. The nature and extent of a statutory appeal in any particular instance will depend on the wording of the relevant legislative provisions. For the reasons explained earlier, I have concluded that the right of appeal under the FSPO Act 2017 is against the "*decision*" described under section 60(3) and thus embraces the outcome and the grounds for that outcome.

SUMMARY OF CONCLUSION ON JURISDICTIONAL ISSUE

67. In summary, therefore, the statutory right of appeal against a decision of the Ombudsman is not confined to an appeal against the overall outcome of the investigation of a complaint but also allows for an appeal against the grounds for the decision and an appeal against a direction. However, as with any proceedings, the court has an inherent discretion to dismiss an appeal as frivolous and vexatious. An appeal by a party who has been successful on the outcome may be dismissed if that party is not at least potentially prejudiced by the decision. As discussed at paragraphs 35 to 43 above, the appellant in the present case has pointed to two areas of potential prejudice, namely that the impugned decision might represent a persuasive precedent in other complaints and might trigger the review obligation under the Central Bank's supervisory framework. I am satisfied, therefore, that the appeal is not frivolous or vexatious.

STANDARD OF REVIEW APPLICABLE TO AN APPEAL

68. The right of appeal under section 64(1) of the FSPO Act 2017 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.

69. 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), are 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 from.

70. 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*."

71. 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 in *Ulster Bank* 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."

72. 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 and *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2022] IECA 77. In the latter judgment, the Court of Appeal also confirmed that the principles in *Fitzgibbon v. The Law Society* [2014] IESC 48, [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment) apply to a statutory appeal under the FSPO Act 2017.

73. There is a refinement to the standard of review which is directly relevant to the issues which arise in the present case. This refinement 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. […]"

74. Similar sentiments have been expressed by the Supreme Court in *Governey v. Financial Services Ombudsman* [2015] IESC 38, [2015] 2 I.R. 616, 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 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."

SERIOUS AND SIGNIFICANT ERRORS IN IMPUGNED DECISION

75. For the reasons which follow, I have concluded that the approach to contractual interpretation taken under the impugned decision is vitiated by serious and significant errors. First, the decision fails to apply the established legal principles governing the interpretation of contracts and, in particular, contracts of insurance. These principles have been authoritatively stated as follows by the High Court (McDonald J.) in *Brushfield Ltd (T/A The Clarence Hotel) v. Arachas Corporate Brokers Ltd* [2021] IEHC 263, [2022] Lloyd's Rep IR 638 (at paragraph 109):

> "(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;
>
> (b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;
>
> (c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;
>
> (d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;
>
> (e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As Lord Hoffmann

explained in the *Investors Compensation Scheme* case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context. That said, in the present case, no argument was made about the relevant legal or regulatory context against which the policy of insurance was put in place;

(f) While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;

(g) As O'Donnell J. made clear in the *MIBI* case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-

'*It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later*.';

[…]".

76. The Ombudsman failed to apply these principles in interpreting the policy of insurance. The first finding had been to the effect that the *subjective* views of the insured were somehow relevant to the question of whether access to the insured premises had been restricted following the intervention of a public body authorised to do so. The Ombudsman fails to explain why it is that a form of policy wording which, on its ordinary and natural meaning, posits an objective test should be interpreted as allowing for consideration of the subjective views

of the insured. The Ombudsman fails to identify what principle of contractual interpretation he relied upon to displace the ordinary and natural meaning of the policy wording. The Ombudsman does not say, for example, that his interpretation is derived from a consideration of the contract of insurance as a whole or from a consideration of the relevant context (both factual and legal) at the time the contract was put in place.

77. This omission to properly identify and apply the principles of contractual interpretation is all the more surprising in circumstances where the insurance provider had laid great emphasis on this issue in its submission in response to the Ombudsman's preliminary decision. The insurance provider, having referred to the finding in the preliminary decision that the insured's decision to close its business, in circumstances where it could lawfully have remained open, did not mean that it was subsequently prevented or barred from making a claim for business interruption losses under the policy, stated as follows:

> "It is respectfully submitted that this conclusion is clearly inconsistent with the requirement for a restriction/denial of access which forms part of the peril insured by the Restrictions Extension. Given that this requirement was not satisfied in the present case, this is fatal to any claim under the Restrictions Extension. The matter ends there. A voluntary decision to close the premises and business, when it was not the subject of an order restricting or denying access thereto – as the provider of an Essential Service – is not an insured peril, whether under the Restrictions Extension or the Policy more generally.
>
> […]
>
> For the above reasons, Chubb respectfully submits that the FSPO, on the evidence before it, should decide that the Complainant's business was an Essential Service to whose premises access was neither restricted nor denied for Restrictions Extension purposes. The Complainant's claim for coverage under the Restrictions Extension accordingly fails, and no further consideration of the Restrictions Extension is required."

78. The Ombudsman does not meaningfully engage with this submission in the impugned decision.

79. The second and third findings in the Ombudsman's decision can conveniently be considered together. It will be recalled that these findings concerned (i) the *location* at which an organism, likely to result in the occurrence of a notifiable disease, had to be discovered; and (ii) the concept of a "*notifiable disease*".

80. The finding in respect of the location of the discovery of the organism was reached based on a reading of the specific subclause in isolation. This is contrary to the "*text in context*" approach. As explained earlier at paragraphs 29 to 31 above, the Ombudsman's decision fails to engage at all with the argument, advanced on behalf of the insurance provider, that in circumstances where all of the other subclauses deal with something that occurs at, or something that is discovered at, the insured premises, the reasonable reader would understand subclause (b) as similarly only being triggered by the discovery of the organism at the insured premises.

81. Similarly, the finding in respect of the exclusion for "*atypical pneumonia*" was reached on a narrow analysis of the wording of the subclause. There is no recognition in the decision that subclause (a) is undoubtedly directed to the occurrence of a notifiable disease at the insured premises and that a reader might therefore consider subclause (b) is to similar effect; nor that it is, at the very least, arguable that the determination of whether the "*notifiable disease*" exclusion applies must be approached on a case-by-case basis by reference to individual patients. The decision does not engage with this issue nor with the insurance provider's argument that it goes too far to say that cover can never be excluded

in circumstances where a person had Covid-19, not even where the symptoms that that particular person manifested were of atypical pneumonia.

82. For all of these reasons, I have concluded that the Ombudsman committed a serious and significant error in his approach to contractual interpretation.

83. There is a second, separate reason for saying that the decision is vitiated by serious and significant errors. These findings were reached in breach of fair procedures in that the Ombudsman did not properly engage with the various submissions made on behalf of the insurance provider and/or failed to provide any reasoning for not following those submissions. The test in this regard is set out in the judgment of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367 (at paragraph 57):

> "[…] It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

84. Having regard to the failure to apply the well-established principles of contractual interpretation and the failure to observe fair procedures, I have concluded that each of the three impugned findings made by the Ombudsman in relation to the interpretation of the insurance policy cannot stand.

85. Finally, for completeness, it is necessary to address the Ombudsman's argument that the threshold of a "*serious and significant*" error requires an appellant to demonstrate that the *outcome* of the investigation of a complaint might have been different if the error had not been made. In support of this argument, the Ombudsman cites a number of judgments which speak, variously, of the decision

being "*vitiated*" by a serious or significant error and of whether the error was "*material*" to the decision or "*central*" to the conclusion. The judgment most favourable to the Ombudsman's argument is that in *Molloy v. Financial Services Ombudsman* (High Court 2010 No. 182 MCA). (There does not appear to be an attested copy of this judgment available, but it has been referred to with approval in a number of subsequent judgments). There, the High Court (MacMenamin J.) stated that, put in simple terms, the question is if the errors had not been made, would it reasonably have made a difference to the outcome.

86. With respect, these submissions fall into the trap of treating a form of wording in a judgment as if it has the same immutable status as a statutory provision. In none of the judgments cited was the court being asked to address the specific issue which arises in these proceedings, namely whether it is permissible to impugn the grounds for a decision without also seeking to set aside the outcome. The case law goes no further than confirming that, in order to be "*serious and significant*", an error must be material to the decision-making process, thus out ruling errors in respect of matters which were peripheral to the decision-making process. It goes too far to suggest that no matter how wrongheaded or unfair the decision-making process may have been, it cannot be set aside on appeal unless the appellant is also seeking to set aside the formal outcome. It is possible, in principle, that a decision-maker may, fortuitously, have stumbled upon the correct outcome albeit without applying the proper legal principles or observing fair procedures. The fortuity of its having reached the right answer for the wrong reasons does not provide a shield against an appeal.

SHOULD COURT NOW INTERPRET INSURANCE POLICY ITSELF

87. The next question which arises is whether or not this court should undertake its own assessment of the correct meaning of the insurance policy. It is, of course, possible that notwithstanding the serious and significant errors identified above, the Ombudsman's findings might nevertheless have been correct, albeit for the wrong reasons. Were this court now to embark upon its own detailed analysis of the terms of the insurance policy, applying the principles of interpretation identified in *Brushfield Ltd (T/A The Clarence Hotel) v. Arachas Corporate Brokers Ltd* (cited above), it might come to the same ultimate conclusion as the Ombudsman albeit 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.

88. A similar issue had arisen for consideration in *Molyneaux v. Financial Services and Pensions Ombudsman* [2021] IEHC 668. For the reasons explained in that judgment, I concluded that 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. I am satisfied that the same logic applies equally to the present proceedings.

89. The case law on the standard of review applicable to an appeal has been discussed in detail at paragraphs 70 to 74 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. 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 under the previous heading above.

90. 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 will normally be vindicated by setting aside the impugned decision. If appropriate, the court could also make an order for remittal directing the Ombudsman to reconsider the matter and to reach a fresh decision in accordance with the opinion of the court.

91. 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.

92. 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).

93. It would seem to follow that where a serious error is identified, the complaint should, normally, be remitted for reconsideration by the Ombudsman, rather than for the High Court to decide the complaint *de novo*. 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*.

94. There is a further complicating factor in the present case as follows. Counsel on behalf of the insurance provider points out, correctly, that it is a general principle of administrative law that a decision-maker cannot supply additional or supplemental reasoning *ex post facto*. This would appear to have the practical consequence that counsel for the Ombudsman would be limited in the arguments which he could legitimately advance on the issues of contractual interpretation. Moreover, the insured has chosen, as is its prerogative, not to participate in these appeal proceedings. Accordingly, there is a risk that if this court were to embark

upon its own determination of the issues of contractual interpretation, it would be deciding them without the benefit of full argument and in the absence of a *legitimus contradictor*. This would be highly unsatisfactory. The questions of contractual interpretation are not straightforward and any ruling on same by the court has the potential to affect a great number of individual policyholders.

FORM OF RELIEF

95. For the reasons explained above, I have concluded that the Ombudsman's decision is vitiated by serious and significant errors. I have also concluded that it would be inappropriate for this court to determine the questions of contractual interpretation *de novo*. The court will not, therefore, be taking a blue pencil, as it were, to the impugned decision and substituting the court's own findings for those of the Ombudsman. Rather, the principal relief to be granted will be an order setting aside the Ombudsman's decision. This will have the practical effect that the offending findings made against the insurance provider will be expunged and the impugned decision cannot be relied upon as a precedent nor as triggering the insurance provider's obligations under the Central Bank's supervisory framework.

96. The more difficult question is whether the court should go further and make an ancillary order remitting the matter to the Ombudsman with a direction that he reconsider the complaint having regard to the opinion of the court. This would require the Ombudsman to engage properly with the submissions made on behalf of the insurance provider and to produce a properly reasoned decision, one way or another, on the merits.

97. In many cases, an order for remittal will be appropriate in that it will allow for a fresh decision to be made on a complaint. However, there is a distinguishing feature of the present case which suggests that an order for remittal *might* not be suitable. More specifically, it would appear that the complaint in this case must inevitably be dismissed, regardless of what fresh findings might be made on the three disputed issues of contractual interpretation. This is because there has been no challenge made to the fourth finding reached by the Ombudsman, namely that the insured failed to discharge the evidential burden on it to show that the discovery of the organism, which gives rise to Covid-19, within the territorial limits of the policy, i.e. the Republic of Ireland, had been "*likely*" to result in the occurrence of a notifiable disease at the insured premises.

98. In the circumstances, the practical effect of an order for remittal would be to require the Ombudsman to decide points of contractual interpretation which are moot as between the parties to the complaint. Indeed, the insured might well choose not to participate further in the proceedings for the very reason that the outcome of the complaint will not change. It would seem unsatisfactory to direct the Ombudsman to decide these important points of contractual interpretation, which have a significance which transcends the individual complaint, in the context of what appears to be a moot.

99. My *provisional* view is that the appropriate order is to set aside the Ombudsman's decision *simpliciter* with no order for remittal. I emphasise that this is only a provisional view, and the parties will be afforded an opportunity to address me on the final form of order.

SUMMARY OF CONCLUSIONS AND PROPOSED FORM OF ORDER

100. The statutory right of appeal against a decision of the Ombudsman is not confined to an appeal against the overall outcome of the investigation of a complaint but also allows for an appeal against the grounds for the decision and an appeal against a direction. However, the court has a discretion to dismiss an appeal as frivolous and vexatious, and an appeal by a party, who has been successful on the overall outcome of the investigation of a complaint, may be dismissed if that party is not at least potentially prejudiced by the decision. The appellant in the present case has pointed to two areas of potential prejudice, namely that the impugned decision might represent a persuasive precedent in other complaints and might trigger the review obligation under the Central Bank's supervisory framework.

101. The impugned decision is vitiated by serious and significant errors. First, the Ombudsman purported to make findings on the interpretation of the relevant contract of insurance without applying the proper principles of contractual interpretation. Secondly, these findings were reached in breach of fair procedures in that the Ombudsman did not properly engage with the various submissions made on behalf of the insurance provider and/or failed to provide any reasoning for not following those submissions.

102. It would be inappropriate for this court to determine the questions of contractual interpretation *de novo*. The court will not, therefore, be taking a blue pencil, as it were, to the decision and substituting the court's own findings for those of the Ombudsman. Rather, the principal relief to be granted will be an order setting aside the Ombudsman's decision.

103. My *provisional* view is that the appropriate order is to set aside the Ombudsman's decision *simpliciter* with no order for remittal. I emphasise that this is only a provisional view, and the parties will be afforded an opportunity to address me on the final form of order.

104. These proceedings will be listed, for mention only, on Monday 27 February 2023 at 10.30 am to hear counsel on the next procedural steps.

Appearances

Declan McGrath SC and Christopher Mills for the appellant instructed by Clyde & Co Ireland Solicitors
William Abrahamson SC and Francis Kieran for the respondent instructed by Fieldfisher LLP

Approved