THE HIGH COURT

IN THE MATTER PF S.57CL OF THE CENTRAL BANK ACT 1942 AS INSERTED BY S. 16 OF THE CENTRAL BANK

AND

FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004

No. 289/2012 MCA

BETWEEN:

HUGH GOVERNEY

Appellant

And

FINANCIAL SERVICES OMBUDSMAN

Respondent

And

IRISH BANK RESOLUTION CORPORATION LIMITED

(Formerly Anglo Irish Bank/Anglo Irish Assurance Company)

Notice party

Judgment of Mr. Justice Hedigan delivered the 26th of August 2013.

The Parties

1. The appellant is a retired insurance broker who resides in Palmerston Road, Dublin 6. The respondent is a statutory officer empowered to deal independently with complaints from members of the public regarding their individual dealings with all

financial services providers. The notice party, now known as the Irish Bank Resolution Corporation (or "IBRC"), is the former Anglo Irish Bank and Anglo Irish Insurance Company ("Anglo"), which has its registered company address at 5th Floor, Connaught House, 1 Burlington Road, Dublin 4.

1.2 The appellant seeks the following relief: -

(1) An order pursuant to s.57CL (2) (B) of the Central Bank Act 1942 as amended setting aside the finding of the Respondent dated the 23rd July, 2012 and in lieu thereof an order directing the notice party to return to the appellant the premium of €500,000 which was paid by the appellant to the notice party in two instalments of €250,000 on the 23rd and 24th January, 2006 in respect of investment bond INB/0003229.

(2) In the alternative an order pursuant to s. 57CL (2) (c) of the Central bank Act 1942 as amended remitting the said finding to the respondent for review.

Background

1.3 In or around December, the appellant made an investment of €500,000 in a property based fund promoted by the Anglo Irish Assurance Co. Ltd ("Anglo"). This was a highly geared investment scheme in the Kennet Shopping Centre ("Kennet") in Newbury, England.

1.4 The investment was not a successful endeavour. Part of the reason for this arose out of the development of a new shopping centre in Newbury, the Parkway Centre, which was attracting lucrative tenants away from the Kennet Centre. Dialogue was initiated between the appellant, the notice party and Alanis, the property

investment company utilised by the notice party. A complaint letter dated the 5th August 2010 was subsequently sent to the notice party.

1.5 The essence of the appellant's complaint was that, as the investment had been structured in the form of a life assurance policy, the contractors were to be held to the principles of utmost good faith (*uberrime fidei*), and therefore full disclosure of all risks had to be made or else the contract would be open to rescission. The appellant argued that while the Parkway Centre was referred to in the investment brochure for the Kennet Centre investment, it was never disclosed that it would be a risk to the viability of the investment.

1.6 Anglo rebutted this claim by way of letter dated the 6th September 2010 where it set out the grounds upon which it claimed the complaint was unsubstantiated. It argued that it had disclosed all material facts to the appellant and that the Parkway Centre was not seen as a risk, but rather a potential positive effect on the Kennet Centre, as it would increase footfall in the town. Reference was made to professional advice received by the Notice party from Savills and also from a policy document issued by West Berkshire District Council entitled "A Vision for Newbury Town Centre 2025".

1.7 The notice party also made reference to the appellant's professional experience as a risk management adviser, and that the investment was highly geared and advertised as a high risk venture.

1.8 A response was written by the appellant's solicitors on 13th September 2010.They sought a copy of the advices obtained from Savills. This was rejected by letter on the 28th September 2010 as Anglo stated it was not in a position to fulfil the request due to a confidentiality agreement attached to the report. The appellant decided to proceed with a complaint to the respondent (the FSO). The extent of his

complaint was an assertion that the reason for the failure of the Kennet investment was the development of the larger Parkway Centre and that the notice party ought to have disclosed that the Parkway centre was a risk which could have had negative effects on the Kennet Centre and a result of this non-disclosure he had not had the opportunity to consider it as a material risk to his investment. He also complained that Anglo failed to disclose the advice given to it by Savills. If he knew about the proximity of Parkway to Kennet he never would have proceeded with the investment.

1.9 A final response was sent by the notice party on the 25th January 2011, stating that the appellant was aware of the risks involved in the venture. It also expressed the opinion that Kennet declined as a result of the general trend around the UK in 2009 whereby shopping centres were the poorest-performing sub-sector in the retail market. It was their submission that Parkway did not have an adverse effect on Kennet, and that mention of the centre was also made in the fund brochure and that professional advice given to them opined that Parkway represented an opportunity and not a risk. Finally, they noted that the appellant was an experienced investor. With receipt of the final notice, the office of the Ombudsman was able to begin an investigation into the appellant's investment with the notice party, with both sides being afforded ample room for submissions and rejoinders. Solicitors for the appellant wrote to the respondent on the 15th February 2011, raising the issue of the contract, the principles of utmost good faith and that, while Anglo asserted that it had disclosed all material fact, it was patently obvious to them that Parkway represented a significant risk which Anglo ought to have disclosed. They also challenged the assertion that the decline in Kennet's value was due to the poor performance of shopping centres in the UK, as the fall experienced by the Kennet Centre was disproportionate to the overall index. The kernel of the appellant's argument at this juncture was described as:-

"... the key issue in this matter is whether the proposed opening of the Parkway Centre represented a potential risk to the investment of which our client [the Appellant] should have been informed"

1.10 The respondent wrote to the parties advising that he would now proceed to investigate the claim. What followed was a number of exchanges between the appellant's legal team and the notice party where a number of disputes arose as to the content of the Savills' report and that the investment provided by the notice party was incorrect in its figures regarding the percentage of tenants in Kennet that had leases that were to expire and/or break clauses. The Anglo brochure put this figure at 19% where in reality the figure is closer to 40%. The reality of Newbury's potential prosperity was also questioned in light of a document produced by the West Berkshire District Council entitled "A Vision of Newbury Town Centre 2025" where the decline of Newbury was examined and measures to counter act this decline were postulated. Further to this submission were complaints that the appellant had not been made aware of the professional advice from Savills until it was revealed over the course of the responses made by Anglo to the complaint.

1.11 The appellant's solicitor also sought to have a copy of a credit paper as part of a collection of certain documents which were meant to cast light upon the "investment rationale" that Anglo employed with regard to this investment. There was a file memorandum dated 26th September 2011 from Mr. Neil Lindsay which made reference to an initial list of queries and also to a credit paper present before the bank's credit committee in August 2005. While this was sought, it is apparent that the appellant decided to carry on with his complaint, without the credit paper.

1.12 Anglo responded by letter in their submission of the 30th September 2011, that the appellant and his wife had been taken through the detail of the fund by Mr.

Lindsay; an employee of the notice party. It was asserted that the high risk nature of the venture had been explained to the appellant and that there was an element of gambling to the investment. Anglo also responded to the errors in the percentage of tenants with a break clause, stating that they had taken their figures from the Savills' valuation, and that all figures and statistics were reproduced from external reports, and that Anglo did not accept any responsibility for any errors in these reports. It was also submitted that no documentation had been withheld from the appellant. This was later refuted by the appellant who claimed that knowledge of the Savills valuation only arose out of legal compulsion.

1.13 The respondent issued a Finding dated the 23rd July 2012 where the Ombudsman decided that the appellant's complaint against the notice party was not substantiated pursuant to s. 57 CI (2) of the Central Bank and Financial Services Authority of Ireland Act 2004. The appellant has appealed this finding to the Court.

The Nature of such an appeal to the High Court

2.1 Appealing a decision of the Ombudsman is a unique type of application, finding itself somewhere between an appeal on the facts and a judicial review of the decision, with the balance being closer to that of a judicial review. The test, which is well-established at this stage, is set out in *Ulster Bank v. Financial Services Ombudsman & Ors* [2006] IEHC 323, where Finnegan P described the test 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 series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Respondent."

Extrapolating from this judgment, the elements of the test may be described as follows:

(1) the burden of proof is on the Appellant;

(2) the onus 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) in light of the above principles, the onus is on the appellant to show that the decision reached was vitiatedby error; and

(5) in applying this test the Court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman.

2.2 The nature of these appeals are aptly described in the words of MacMenamin J in *Hayes v. Financial Services Ombudsman* (Unreported, High Court 3 November 2008):

> ". . . while a statutory appeal is a not a judicial review, and where the decision maker is acting with is own area of professional expertise, the test set out by Finnegan P suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as that error falls short of being one which is serious and significant . . .. What has been established, therefore, is an informal expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issues."

The views of MacMenamin J were approved by McMahon J in *Square Capital v. Financial Services Ombudsman* [2010] 2 IR 514, where the Court observed:

> "From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act of 2004, it is obvious that the office of the Ombudsman is different from an ordinary court discharging its lawful function... It is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the Court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature of the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

Submissions of the Appellant

2.3 The appellant submits that the decision of the respondent was vitiated by a number of errors so serious and basic as to compel the Court to set aside the decision of the Ombudsman. The main contention against the finding of the respondent was that the decision did not fully consider the facts at hand, did not disclose how the respondent came to make that decision, and that the respondent was not mindful of the material fact of the *uberrime fidei* principle in relation to contracts of insurance/assurance.

The decision did not fully consider the facts at hand and did not explain the rationale for the decision

2.4 The appellant's initial contention against the respondent's decision related to its brevity. It is seven pages long. The appellant submits that it lacks any analysis or reasoning as to why the appellant's complaint was rejected, and it is their submission that, as a whole, the finding shows a lack of understanding of the issues that were to be decided. This is argued in a number of ways. The appellant finds fault with the manner in which the respondent has analysed the facts adduced before him, citing in written submissions to this Court that the respondent should have considered the questions of hearsay evidence, unsubstantiated assertions and not furnishing the credit note, by way of oral hearing. The appellant is also dissatisfied that the respondent did not appear to take the negative risk of the Parkway Centre into serious consideration in his finding, despite mentioning over the course of the finding that Parkway could indeed divert business away from Kennet.

2.5 The appellant finds fault with the phrase *"The impact could have been positive rather than negative"* as used in the finding, and it is submitted by the appellant that this constitutes a finding that the Parkway centre posed a risk to the Kennet Centre. It is further submitted that if the Ombudsman realised the significance of that finding to the complaint, such understanding was not apparent on the face of the decision. The respondent, he contends, failed to consider the material risk of Parkway on the Kennet Centre and yet proceeded in his decision without any consideration of that issue. The appellant seeks to rely on the case of *Hyde v. Financial Services Ombudsman* [2011] IEHC 422, where Cross J found that a finding of fact in such a case as this, that was unwarranted on the evidence constituted a serious error.

2.6 The appellant also finds fault with the Ombudsman's decision regarding the percentage of tenancies that were subject to impending break clauses. The respondent put that figure at 10% within five years, Anglo stated it was 19% and the real figure is somewhere in the region of 40%.

2.7 The appellant finds that the brevity of the decision shows a lack of understanding, especially in the material nondisclosure element to his complaint, which the appellant cites in written submissions as being found at page 5 of the Ombudsman decision and being "extremely brief".

2.8 The appellant also took issue with being described as an "*experienced investor and high net worth individual*", with counsel stating to the court that the appellant had never engaged in property investment before this venture. It is the contention of the appellant that, bearing in mind the principle of *uberrime fidei*, such a statement was not material to the case at hand.

<u>The rationale for reaching the decision is not disclosed</u>

2.9 A second thread to the appellant's appeal against the Ombudsman lies in the contention that the Ombudsman fails to explain and disclose the manner in which he arrived at his decision. Once again, the brevity of the finding is referred to in order to illustrate that. There is no exhaustive exploration of the facts and evidence adduced before the Ombudsman. It thus does not become apparent from the decision as to how the Ombudsman decided the complaint was unsubstantiated. The appellant takes issue with the following passage, which states: -

> "I do not consider that it can fairly be said that Anglo misrepresented the nature of this investment.

> The fact of the proposed Parkway Development was disclosed in the Fund Brochure. The complainant is an experienced investor and was a high-net-worth individual. He proceeded with this high risk investment. I am satisfied that there was no material non-disclosure of risk"

The appellant asserts that there is no explanation as to how these conclusions were reached. The appellant is of the opinion that there was material non-disclosure of risk and states that the respondent failed to consider the impact of the misrepresentation made by Anglo in the fund brochure, whereby Newbury was described as a vibrant market town. There was no discussion as to the discrepancies in the fund brochure when compared with the Savills' report or the Newbury 2025 document. In the face of such an important fact, the appellant seeks to rely on *Irish Life and Permanent plc v. Financial Services Ombudsman* [2011] IEHC 439 whereby White J states:

> "If there is a dispute of fact, which has a direct bearing on the outcome of the complaint, it should be addressed."

Reliance is also placed on *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 where it was held, by Hogan J, that the acceptance by the Ombudsman of an assertion made by the financial institution without any analysis of the actual clause relied upon was a serious error.

2.10 The appellant also seeks to rely on the requirement that fair procedures and the duty to give reasons apply, relying on *Murphy v. Financial Services Ombudsman* [2012] IEHC 92, and *Lyons and Murray v. Financial Services Ombudsman* [2011] IEHC 454 to illustrate this. Reliance is also put on the Supreme Court's decision in *Mallak v. Minister for Justice, Equality and Law Reform* (unreported [2012] IESC 59, whereby the Supreme Court reiterated that the right to reasons is a general right that applies irrespective of the nature of the decision

The Ombudsman made an error of law.

2.11 The final element to the appellant's application is that the Ombudsman made an error of law, in not giving due consideration to the principle of *uberrime fidei* which applies to contracts of life assurance such as this. Section 57CI of the Central Bank Act, (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act, 2004) provides for instances in which a complaint investigated by the Ombudsman can be substantiated and at paragraph (a) of that section, it is provided that:-

"The conduct complained of was contrary to law"

2.12 It is submitted by the appellant that the conduct of Anglo with regard to this incident was contrary to law in two instances:

(1) the contract was *uberrime fidei* and it had failed to make disclosure of the material facts; and

(2) it had made material misrepresentations.

The appellant submits that as the investment contract, which was tied up in a life assurance policy for tax purposes, was subject to full disclosure in utmost good faith, the material non-disclosure and misrepresentations of Anglo in the fund brochure violated this principle, thus voiding the contract and entitling him to a return of the premium paid by him into the fund. It is the appellant's assertion that had he known all the facts regarding Kennet, Parkway, the decline in Newbury and the correct figure of tenants with a break clause, he would never have invested in Kennet in the first place.

2.13 Regarding contracts *uberrime fidei*, the appellant relies on the decision in *Banque Keyser Ullmann SA v. Skandia (UK) Insurance Co. Ltd and Others* [1991] 2 AC 249, where the House of Lords held that the pre-contractual duty of disclosure on

an insurer arising from the obligation of utmost good faith would require him to disclose all material facts known to him with regard to the nature of the risk or the recoverability of a claim under the policy. It is the submission of the appellant that as there was a legal obligation on Anglo to disclosure the full nature of the risks associated with Kennet, and since the defence put forward by Anglo to this contention was to dispute the claim on the facts, the onus was on the respondent, under s. 57Cl , to determine whether the conduct complained of was contrary to law.

Submissions of the Respondent

3.1 The respondent argues that he exercised his function in accordance with his jurisdiction, that findings of the Ombudsman are not required to be as detailed or thorough as that of a Court judgment and that the appellant is seeking to add new evidence to the Court which was not adduced before the Ombudsman.

The Ombudsman acted within his jurisdiction

3.2 He refers to the role that the Financial Services Ombudsman has within the legislative framework of the Central Bank and Financial Services Authority Act, 2004.

3.3 The office itself is set up under s.57BB of the Act and provides for an Ombudsman as an independent officer:-

> "To investigate, mediate and adjudicate complaints made in accordance with this Part about the conduct of regulation financial services providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service.

3.4 Section 57 BK (4) of the Act provides that the Ombudsman is

> "Entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

In *Murray v, The Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, Kelly J was of the opinion that ". . . the procedures of the Ombudsman are undoubtedly less formal than those of a court." What this means is that the Ombudsman, who is a person of great experience and expertise in the financial services sector, resolves disputes using criteria that normally would not apply in the courts, for example, whether the treatment or conduct complained of was unreasonable. He can also make orders directing a financial services provider to change their conduct in the manner in which they sell their products.

<u>The Ombudsman's findings are not required to be as detailed as that of a Court.</u>

3.5 The Ombudsman submits that his role is different to that of a court, as he is charged, by statute, not to have regard to rigidity of legal form or to technicality. He can resolves disputes using criteria not usually employed by the courts, a key example being his discretion, under s. 57 CI(2) of the Act of 1942, as amended, to decide whether conduct, that may have been in line with law, was still unreasonable with regards to that specific scenario.

3.6 As the Ombudsman is not held to the same legal formality as the courts are, it is submitted by the respondent that the Court, in reviewing his decision, should not do so as if it were reviewing the procedures adopted by an inferior court. The same

standards of procedure do not apply. In supporting this, reliance is placed on *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107 where O'Flaherty J stated that the decisions of such administrative tribunals (such as the respondent) are only required to give the "broad gist" of the basis of their decisions. This broad gist approach is quoted with approval in *Ryan v. Final Services Ombudsman and Irish Life and Permanent PLC* (MacMenamin J, 23rd September 2011) and, more recently, by O'Malley J in *Carr v. Financial Services Ombudsman* [2013] IEHC 182. The respondent contends that as the requirement placed upon the Ombudsman is considerably less that that of the courts, the finding made by the respondent was validly made within jurisdiction.

The attempt to raise new grounds of appeal

3.7 The respondent submits that the appellant is attempting to raise a number of new complaints over the course of his written submissions. The respondent asserts that at no time during the investigation did the appellant suggest that the Ombudsman could not proceed to a finding without obtaining what is described as an internal credit paper from Anglo. There is no reference in the grounding affidavit in this case that the non-obtaining of the credit paper report amounted to a ground of appeal in the current proceedings. It is submitted by the respondent that an invitation to view the documentation detailing the financing, investment structure and property management of the venture could have been arranged at any time during office hours. The appellant never sought to avail of this opportunity to view the documentation, and a list of documentation that was included in the document cache was listed within the brochure. Anglo confirmed the types of documentation available for inspection by prospective investors to the Ombudsman in a letter dated 10th January 2012.

3.8 The respondent submits that it is not permissible in the context of this appeal to now raise grounds of appeal that were not put forward in the original complaint, relying on *Hayes v. Financial Services Ombudsman* (MacMenamin J, 3rd November 2008), whereby MacMenamin J was of the following opinion:

> "I find it difficult to see how the decision of the respondent can now be attacked on the basis of issues that were not properly raised or ventilated before him."

3.9 Counsel for the respondent also disputes claims that the appellant did not understand what he was getting himself into. On replying to the contention that the appellant was not an experienced investor, it was submitted by him that considering the range of other investments entered into by him, in the stock market, he could not be described as a naïve or inexperienced investor, especially as a number of these investments could be classed as risk one . He knew the investment was high risk, it was marketed and described as a high risk one. The very nature of gearing investments is high risk. This investment was emphatically not a blue-chip investment. Counsel argued that the applicant could have made any number of inquires to ascertain the viability of the area, even a cursory web search would have uncovered the situation in Newbury or even the Newbury 2025 document. The brochure also has pictures of the Kennet centre, which indicate that it is a value shopping centre. All these are factors to consider when making such a significant investment.

3.10 As to the question of *uberrime fidei* with regards to the investment put forward by Anglo in relation to material non-disclosures, the respondent argues that he dealt with this in his finding where he stated that "He had considered all of the grounds of complaint advanced herein, and I do not find any of them to be compelling". It is

argued that he made a full investigation and not the opposite as is contended by the appellant. It was also submitted that no authority existed to suggest that *uberrime fides* could extend to a brochure for an investment. The brochure is an advertising mechanism. The respondent argues that utmost good faith does not apply to collateral matters. The wrapping of a property venture as a life assurance policy was done here as a tax-efficiency measure, and it would not be correct to expect the same level of disclosure when the risk posed was not in the vein of insurance or accident but that of an investment. It was not a contract of insurance in the classic sense.

3.11 The respondent also contends that the appellant is relying incorrectly on the decision of the House of Lords in the *Banque Keyser* case. In *Banque Keyser* it was held that the insurer was required to disclose to the insured that his broker had been dishonest. However, it was opined in Buckley on *Insurance Law* (Third edition) at page 163, that "where . . . an insurance agreement form s a distinctive part of a wider agreement and operates as security for various obligations under that transaction, the insurer's duty of disclosure does not extend to the wider transaction". However the issue is not relevant to this case because the Ombudsman found that there was in fact no material non-disclosure.

3.12 It was also denied that the Ombudsman failed to understand or "ignored" all of the issues raised. It is submitted clearly at page three of the finding that "in arriving at my finding I have carefully considered the evidence and submissions put forward by the parties to the complaint".

Submissions of the notice party

4.1 The submissions of the notice party followed a similar line to that of the respondent with counsel for the notice party adopting the submissions of the respondent with regard to the scope of the statutory appeal. The notice party then

made submissions along two main grounds; firstly that sufficient disclosure of the risk involved in the Kennet investment was made and secondly that the appellant was incorrect in his assertion that utmost good faith applies in this situation.

Sufficient disclosure of risk

4.2 The appellant had ample time to challenge the merit of the notice party's case in the run up to the respondent's finding, instead opting to base his complaint on the assertion that the notice party failed to disclose material risks involved in the Kennet Investment. This is strongly refuted by the notice party, and a list of instances where risk was mentioned consistently was raised in written submissions. These include:

(a) The fund brochure outlining the nature of the geared investment, that Anglo were to borrow the funds needed to purchase Kennet and that this sort of arrangement constituted risk to the premiums paid by investors.

(b) That figures utilised by Anglo in the preparation of the brochure were reproduced from outside sources (The Savills' Report being one), and that Anglo Irish Assurance Company would not accept any liability for errors contained within.

(c) That frequent warnings appear in the fund brochure advising prospective investors to seek the advice of a financial, legal or tax adviser in relation to this investment.

(d) That the risk of investing in the UK property market cannot be accurately predicted and as such, the value of the investment could be volatile. Rental incomes could fall as well as rise.

(e) That the conclusion of the brochure reiterated the high-risk nature of the investment, and, under heading of "Important Notice" that the brochure itself was for "information purposes only".

Thus the notice party submits that ample disclosure of the high risk nature of the Kennet venture was apparent from the brochure alone.

4.3 Further instances of risk were identified by the notice party and communicated to the appellant e.g. by way of a "Reasons Why" letter, dated the 10th January 2006, whereby the appellant was informed of the proposed investment in the fund as providing long term capital appreciation on a lump sum investment. In this "Reasons Why" letter he was warned again to seek independent advice regarding such investments and that Anglo did not sell or offer any advice on protection products, such as life cover and critical illness. There was a stark warning also where the term high risk was defined as being a situation "where capital is not guaranteed and could be subject to a high degree of volatility". A file Memo was prepared in respect of the appellant's proposed entry into the fund, where it was stated that the appellant read the brochure and understood the risks associated with the investment.

4.4 The notice party contends also that the contract schedule to the investment illustrated further reiterations of the risk involved in this highly geared investment venture. Supplementary provisions to the contract bound the appellant to expressly declare that he had taken independent advice as to the suitability of the investment and also that Anglo was not in a position to advise him in respect of his suitability for this fund. The Disclosure Information document also contained a further warning to the appellant to "Make sure the policy meets your needs", informing him that if he is not fully satisfied as to the commitment involved in the investment, he should not enter into it. The appellant was also afforded a standard "Cooling Off Notice"

whereby he could cancel his investment within 30 days of receipt of the letter of May 4th 2006.

4.5 As a result of the above, the notice party contends that there is no material non-disclosure of risk. The nature of the investment and the risks contained therein were explained sufficiently to the appellant.

Utmost Good Faith.

4.6 It is the notice party's submission that the appellant is incorrect in law as to his assertion that the investment attracted the effects of utmost good faith. Reference was made to Buckley on *Insurance Law* (Third Edition, at page163) whereby doubt was cast on whether utmost good faith applies in cases where an insurance contract forms a distinct part of a wider agreement. The notice party relies on the judgment in the case of *Aldrich v. Norwich Union Life Insurance Society* [2002] Lloyds Rep I.R. 1, where the English Court of Appeal rejected a claim that Norwich Union had a duty of utmost good faith to the appellants, Lloyd Names, in respect of risks involved in a property bank guarantee plan for Lloyd's Names in which each of the appellants had participated. Particular reliance is placed on the judgment of Mummery LJ, where it was stated: -

> "Norwich Union disputes this analysis of the Endowment Policy as an insurance against the risk of draw downs against the guarantee. It contends that, even if the policy in each case is regarded as an element in the overall plan, neither the Policy nor the Plan as a whole was an insurance against the risk of losses at Lloyd's and there was therefore no duty of disclosure of the Information Regarding Impending Losses. The Endowment Policy was in common form: it was paid out only on maturity or earlier death, nor upon earlier draw down against the guarantee. Those were the relevant risks. The

> Information Regarding Impending losses was not material to the risks covered by the insurance transaction undertaken by Norwich Union. The duty of disclosure does not operate to require disclosure of any fact which would or might induce a person to enter into an insurance contract or into a composite transaction of which an insurance contract forms part as security."

The notice party contends that the life assurance policy model used by the notice party was a useful tax treatment for the investment; however, this investment bore none of the risk features associated with a contract of insurance that would attract the doctrine of utmost good faith. It was thus, as in *Aldrich* a composite transaction of which an insurance contract formed a part.

Decision of the Court

5.1. The role of the FSO – is quite different to that of a court. It is, as this Court has previously found, an informal, cost-free system of resolving disputes. See *Walsh v. Financial Services Ombudsman*, judgment of the 27th June, 2012. The FSO is required by s. 57BK(4) of the Central Bank & Financial Services Authority of Ireland Act 2004 to ". . . act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form". Thus, it is not a forum for resolving contract law disputes in the manner that a court would. The FSO resolves disputes using criteria not normally used by a court in contract cases such as the reasonableness of conduct simpliciter or failure to explain conduct or where conduct, although in accordance with law or practice, was unreasonable, unjust, oppressive or discriminatory. See s. 57CI(2). The FSO also makes orders of a type a court cannot make, such as directing a provider to change its practices. The office of the FSO is not a court of law and should not be required to

exercise all the procedures and requirements of a court of law. See *Ryan v. Financial Services Ombudsman*, 23rd September, 2011, MacMenamin J.

5.2 The role of the Court in this type of appeal is well established. In *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] IEHC 323, Finnegan P. laid down the test 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 test, thus, is as follows;

(i) the burden of proof is on the appellant;

(ii) the onus of proof is the civil standard;

(iii) the Court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;

(iv) in light of the above principles, the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors;

(v) in applying this test, the Court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman.

The appeal is thus not a *de novo* one. Whilst it is not a judicial review, it does bear many of its characteristics and on a scale between *de novo* and judicial review is far closer to judicial review. A notable characteristic that this type of appeal has in

common with judicial review is the deference that this Court must accord to the FSO as a specialist expert Tribunal working within its own area of professional expertise. Thus, there may be a permissible error if it is within jurisdiction insofar as it falls short of being one which is serious and significant. In determining factual matters, I can only quash the FSO's decision if I am persuaded that he could not have reasonably come to his decision based on the facts he had before him.

5.3 In his written and oral submissions, the appellant criticises the structure of the FSO's decision, *i.e.* the inadequacy of its reasons. It is objected by the FSO that this was not raised in the papers grounding this appeal. In those, the appellant challenged the findings solely on the merits. At what the respondent refers to as the eleventh hour, the appellant seeks to expand his grounds to include this and also one of fair procedures, in that the FSO failed to obtain a credit committee paper.

I think it is very undesirable to have issues raised late in these types of appeals. The appellant should set out clearly in the grounding affidavit the basis of the complaint made by him against the FSO. In this case at paragraph 39 of his affidavit, the appellant set out his grounds for this appeal. No mention was made of any complaint of unfair procedures or inadequate reasoning. In his replying affidavit at paragraph 52, the respondent characterises the appeal as a challenge on the merits. The battle lines were drawn by both at this stage. If they wanted to expand the grounds, it seems to me that fair procedures, which are for the benefit of both sides, provide that the appellant should clearly put the respondent and the notice party on notice. However, the respondent has dealt with these new complaints in written and oral submissions and so I propose to deal with them.

5.4 The adequacy of the reasons. The obligation on the FSO to give reasons is provided by s. 57CI(3)(a). He is simply enjoined to include in his finding "reasons

for the finding". In *Faukner v. Minister for Industry & Commerce* [1997] ELR 107, O'Flaherty J. (at p. 111) stated;

> "When reasons are required from administrative tribunals they should be required to give only the broad gist of the basis of their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."

It is clear that the central complaint of the appellant was that the notice party did not fully appraise him of the risks involved in this investment. He complained that the contract was structured as a life assurance policy and, as such, was a contract *uberrimae fidei*. There was, therefore, upon the provider a duty to disclose to him all material risks. In his finding, in the third paragraph, the FSO directly addressed that exact matter. He goes on to set out the facts – the reference to Parkway and its negative impact on Kennet – the case for *uberrimae fidei* – that he was aware the policy carried a level of risk but not of the total loss of the investment. He sums up the complaint as that the Bank did not disclose material adverse information in relation to the Kennet Centre which would have led him to decline the investment. The FSO proceeds to briefly outline the case for the provider. He then proceeds to his finding. He finds no conflict of fact requiring the holding of an oral hearing. He notes the delivery to the appellant of the brochure. He notes the letter of the 10th January, 2006 to the appellant in which the provider describes the investment as "high risk". He notes the appellant is described in a file note of the 11th January, 2006 as a man of very substantial means including various investments including leveraged investments. He notes that the appellant described himself to the Bank at the time as being prepared to take some risk with capital. In the result, the FSO considered the appellant to be an experienced investor. The finding goes on to note that the brochure

at page 15 dealing with gearing risk warns that investors may lose all of their investment. Further, under the heading "Risk Factors", the brochure states that "A geared property investment is considered to be high risk". The FSO then directly addressed the central complaint of the appellant that the fact that Parkway represented a risk to Kennet was not disclosed and that advice from Savills to the provider to this end was not disclosed to him. Further, the fact that Newbury was a market town in decline was not disclosed. He then deals with the break clause issue. The FSO notes that Savills' report assumed that the effect of Parkway on Kennet would be positive. The FSO notes the strategy document of the Kennet Centre sent to the appellant in 2009. The challenge of Parkway is noted but is considered in terms more positive than negative. The FSO then considers the Savills' report and its content which he believes to be positive rather than negative in its assessment of the impact of Parkway. As a result of his consideration, the FSO expressed the view that the provider cannot fairly be said to have misrepresented the nature of the investment. He finds Parkway was disclosed in the fund brochure. He notes the appellant as an experienced investor proceeded with this high risk investment. He states that he is satisfied there was no material non-disclosure and thus deals with the *uberrimae fidei* issue as though this principle was applicable. He finds the appellant was fully informed of the risk level and the possibility of total loss of investment. The FSO does not consider there is sufficient evidence that Parkway was the principal reason for the failure of Kennet.

5.5 It seems to me that on any assessment of this written finding, it complies with the statutory requirement as judicially interpreted to give reasons because it considers the central complaints made and deals with them. It goes considerably further than just the "broad gist" referred to in *Faulkner* and *Carr*. He does not deal with the

break clause issue but this, I think, is something that falls within what O'Malley J. meant when she referred to there being no obligation to deal with every single point raised. The ultimate impact on the Kennet centre of this percentage miscalculation is at this stage very difficult, if not impossible, to judge. It could have been positive or negative but the extent of its negative impact in the light of the far greater impact on Kennett of Parkway and the general decline in the United Kingdom property market must be all but unknowable.

5.6 The belated reference to the "internal credit paper" from the provider in this appeal is not referred to in the appellant's grounding affidavit. As also outlined above the nature of this appeal is not *de novo*. Were it so, it might be possible to introduce new evidence. However, this Court is limited to a consideration of the case on the basis of the documents that were before the FSO at the time of his decision. It cannot question the FSO finding on the basis of issues not raised or ventilated before him. See *Hayes v. Financial Services Ombudsman*, (MacMenamin J., 3rd November, 2008). Although the appellant did refer in his replying submission to the FSO at A.1 under the heading of "Preliminary Objection to the Absence of the Credit Committee Document", he appears to have left the matter there. On the 8th March, 2012, his solicitors wrote to the FSO stating that;

> "It appears that the matter can now be sent forward for adjudication."

Thus, the FSO was told that everything which he needed was before him. I do not think the appellant can now raise the absence of this particular document.

<u>The main issue in this appeal</u>

5.7 As noted above, the Court must bear in mind that the burden of proof lies on the appellant. The onus of proof is the civil standard, *i.e.* the balance of probabilities.

The Court must not consider complaints about process or merits in isolation but must consider the adjudicative process as a whole. The Court must decide whether there has been a serious and significant error or series of such errors which vitiate the decision. The Court must adopt a deferential stance to the office of the FSO bearing in mind that it is exercising its expert and specialist knowledge in the financial services industry. It is the assessor of evidence and the determiner of facts. This Court can only intervene if it comes to the conclusion that on findings of fact he had no relevant evidence before him upon which he could reasonably conclude as he did. This Court does not sit as a court of appeal on the facts. It may not assess the evidence and interpose its own judgment for that of the expert body charged by the Oireachtas with doing so. This Court has neither the jurisdiction nor the competence to do so.

5.8 The use of the word "compelling" has been raised as suggesting the respondent adopted a higher standard in his consideration of the complaint than the civil standard. The courts have frequently held that it is not appropriate to parse the decisions of administrative tribunals. The FSO is a frequent litigant before these courts and in all cases relies upon the jurisprudence of the courts in relation to his office. All these cases expressly find that the onus of proof is the civil standard. I do not accept that the FSO applies any other standard notwithstanding the use of the word "compelling".

5.9 The essential complaint made by the appellant to the FSO was that this was a contract of assurance and was thus a contract *uberrimae fidei* which required disclosure of all material facts. It is argued that the Bank failed to reveal the fact that the new shopping centre posed a risk to Kennet and failed to reveal that in a 2003 survey called "A Vision for Newbury 2025", Newbury was described as a town in

decline. The FSO decided there was no material disclosure and the question for this Court is whether there existed any relevant evidence upon which that decision could reasonably be based.

5.10 I have heard substantial and powerful submissions from both sides on this matter. I have been furnished with the written submissions of the parties including the appellant's submissions in reply furnished at my direction after the hearing. I have also spent some considerable time reading and considering the voluminous material with which I have been furnished. I have come to the following conclusions based upon these considerations.

The FSO in the third page of his finding states that the appellant considered the contract he entered into to make this investment was structured as a life assurance policy to which the principle of utmost good faith attached. He was thus satisfied when he entered into this contract that he had been fully appraised by the provider with all risks and material facts. His ultimate complaint was that he had not, in fact, been appraised of all material facts. Was this such a contract of assurance or was it a contract of investment? It seems to me that it is very questionable as to whether the contract really was one of assurance. Everything I have read and heard concerning it strongly suggests it was a contract of investment dressed up as a contract of assurance for tax purposes. It dealt with an investment risk not an insurance risk. There is no life risk covered. It is described as an investment bond. The amount of €500,000 is described as the amount to be invested. The investment bond was intended to mature after at least five years and, following payment of certain costs and expenses, the balance of the value of it was to be distributed. In the event of the investor's death prior to maturity, the market value of the investment would be paid into the estate of the investor subject, however, to the right reserved to defer such payment until the

investment property was sold. Thus, the death benefit could be deferred and where the proceeds of sale of the bond were less than the outstanding loans, the death benefit could be zero. In the letter to the appellant of the 10th January, 2006 in relation to this investment, the appellant's "investment choice" is described as high risk. This contract seems to be one not of assurance but of investment.

5.11 I do not think, however, that it is necessary for the Court to resolve this issue because it is clear from the finding that the FSO proceeded on the basis that it was a contract of insurance to which the requirement of full disclosure applied. He was aware that this was the complaint the appellant was making. He considered there was no conflict of fact such as required an oral hearing. In short, on all material matters, the facts were not in dispute. This does indeed seem to be the case. He outlined the history of the investment involved. He considered it significant that a letter was sent on the 10th January, 2006 which warned that the investment was "high risk". He noted the appellant's attitude to risk was a moderate. He was, he said, prepared to take some risk with capital. The FSO also expressed the view that the appellant was an experienced investor. The appellant takes issue with this but I cannot accept that this description of him is anything other than correct. The finding does not describe him as a specialist or expert investor but as an experienced one. On a purely factual level this is clearly correct. An outline of his career, of his assets and investments show that he is a person well versed in business, capable of understanding any of the documents furnished in relation to this investment and of weighing risks. He bears no resemblance to the inexperienced investor with which the FSO frequently deals and who frequently come to these courts on appeal therefrom. The finding notes that the appellant was informed by the brochure that he could lose all of the investment. The brochure notes further that a geared property investment is considered high risk.

5.12 The finding goes on to outline the background events culminating in the complaint. It considers the role of Parkway as a possible risk to Kennet, the fact that Newbury was described in 2003 in the Vision of Newbury 2025 paper as "declining". This 2025 document was described in the Savills' report in positive terms with Parkway being the main driver for possible positive progress. It considers its reference in the brochure to Parkway and the expectation it will drive rents in the vicinity of Kennet upward. The finding notes the complaint about the miscalculation of the percentage of income subject to break clauses. It notes the Savills' valuation report of the 11th October, 2005 and its assumption that the impact of Parkway on Kennet would be positive rather than negative. The finding concludes that the fact of the proposed Parkway development was disclosed in the brochure. This impact was described as positive rather than negative. The FSO concluded in this finding that there was no sufficient evidence to support the appellant's claim that the principal reason for the decline in value of the Kennet Centre, and thus the failure of the investment, was the development of the Parkway Centre. The appellant, an experienced investor, was made aware that this was an illiquid, high risk investment subject to the possibility of total investment loss. On these findings the FSO based a decision that there was no misrepresentation of the investment and there was no material non-disclosure of risk.

5.13 Was there relevant evidence before the FSO upon which it could reasonably come to this conclusion? In my judgment there was. The appellant was told it was a high risk investment with the possibility of losing all the investment. The existence of the Parkway development was made clear to him. The providers' information at the time was that the effect of Parkway was positive rather than negative. The report "Vision for Newbury 2025" also, whilst describing a town in decline, saw a positive

future due to, *inter alia*, the development of Parkway. The higher level of break clauses than that identified by Savills was an error but one firstly for which the provider expressly renounced liability and secondly was a feature that would have benefited the investment had the rent levels gone up as predicted. Lastly, it is a matter for the FSO's expertise to determine if the appellant had satisfied him to the balance of probabilities that the failure of the investment was due principally to the development of Parkway. According to the FSO, as I must, the appropriate level of deference to his expertise in the area, I do not believe that I can go behind that finding. I also consider that the FSO had before him, notably in the response dated the 30th September, 2011 by the provider to the appellant preliminary submissions, evidence to come to the conclusion that the impact of the Parkway development on Kennet was not even capable of being assessed at the time the submissions were exchanged in August and September 2011. On the evidence before him it was reasonably open to the FSO to conclude that no material non-disclosure of risk was made in this case. The evidence showed an investment high risk in nature, in the United Kingdom property market by an experienced investor prepared to take a risk. The Parkway development was revealed, it was described, as the provider was then advised, as likely to have an impact more positive than negative. The town of Newbury seems to have been considered as one in decline but, with the advent of the Parkway development, one which was likely to recover. It seems to have borne the image of an investment opportunity in an area considered likely to improve in value and thus reward an investment. Consideration of the balance of all these matters evidenced before him was an exercise by the FSO of his expertise and his decision thereon was, in my view, a judgment reasonably made and clearly based upon the evidence before him.

Thus, I must dismiss the appeal herein.