THE HIGH COURT

[2012 No. 233 M.C.A.]

IN THE MATTER OF AN APPEAL PURSUANT TO PART VII(B) OF THE CENTRAL BANK ACT, 1942, AND CHAPTER 6 AND SECTION 57CL THEREOF, (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004).

BETWEEN

MARY CARTY-DOYLE

APPELLANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

GOODBODY STOCKBROKERS

NOTICE PARTY

JUDGMENT of Mr. Justice Herbert delivered the 15th day of July 2014

1. Dissatisfied with the Final Response letter dated the 30th August, 2010, received by her solicitors from the notice party, the appellant, through her solicitors, submitted a complaint to the respondent dated the 2nd November, 2010. The respondent decided to investigate this complaint. By a letter dated the 5th August, 2011, the respondent submitted to the notice party a Summary of Complaint, a Schedule of Questions and, a Schedule of Documentary Evidence which he wished to

consider. For the purpose of this appeal only the first and second questions posed by the respondent are relevant. These are:

"1. Please explain why the Stockbroker believed it was appropriate for the Complainant to invest all her funds in Northern Irish Property.

2. Please address the issues raised by the Complainant in her Solicitor's letter dated the 2nd November, 2010, and in particular the contention that the investments were not consistent with the representations made to the Complainant."

2. At paras. 3 and 4 of this letter of complaint dated the 2nd November, 2010, it is stated as follows:-

"3. Our client met with T.J. Scully of Goodbody Stockbrokers on the 29th November, 2005. T.J. Scully introduced numerous investment products to our client. Our client was not interested in the investment products presented to her as they were mainly property orientated. On the 6th December, 2005, our client had a further meeting with M.K. of Allied Irish Bank at the (named) Branch. M.K. asked our client how she got on with Goodbody Stockbrokers and whether there was any particular investment she was interested in. A general discussion ensued and our client indicated to M.K. that there was nothing of interest to her and that she would not proceed with any investment. M.K. assured our client that Goodbody Stockbrokers were very professional, had a lot of experience in the marketplace and that they would endeavour to find a suitable investment product for her.

4. In or about the 8th December, 2005, our client received a call from Goodbody Stockbrokers asking her to make contact as they had an investment opportunity for her and time was of the essence. At this stage, our client was

introduced to Northern Ireland property fund by T.J. Scully. He advised her that the fund would invest in various commercial properties throughout Northern Ireland. Our client indicated her reluctance to invest in this fund as she believed that the market had peaked at this time. In particular, she pointed out to T.J. Scully that she did not want any exposure to the residential property market. T.J. Scully assured our client that the purpose of the fund was to invest in commercial properties only throughout Northern Ireland, such as shopping centres, office accommodation etc. He assured her that the fund would not be investing in residential property. This oral representation by T.J. Scully is supported by the following documentation which was sent to our client."

There were:-

(a) A letter for Goodbody Stockbrokers addressed to Mary Doyle-Carty [sic] dated the 6th December, 2005.

(b) The Goodbody Northern Ireland Property Fund Information Memorandum dated December 2005.

3. The letter of the 2nd November 2010, goes on to state that contrary to these oral representations by T.J. Scully and to the terms of the letter dated the 6th December, 2005, and the terms as incorporated in the Information Memorandum dated December 2005, approximately 70% of the Northern Ireland Property Fund (or even more if borrowed finance was taken into account), was invested "solely and exclusively in residential property investments".

4. The letter of complaint dated the 2nd November, 2010, goes on to complain that:-

". . . From the financial information provided by Goodbody Stockbrokers it would appear that the Goodbody Northern Ireland Property Fund borrowed in the region of Stg£222,550,000. This level of borrowing is 500% plus greater than that envisaged and/or as outlined in the letter dated the 6th December, 2005, by Goodbody Stockbrokers addressed to our client.

This level of borrowing was raised either via bank loan or via Mezzanine finance. It is well known that Mezzanine finance is a very expensive way to raise finance and it is generally only availed of when bank funding is not available due to the high risk nature of the investment. In the circumstances Mezzanine finance tends to attract a high rate of interest ranging anywhere between 12 and 20% or greater. Further it should be noted that the level of funding whether it be mezzanine finance or bank finance greatly exceeded the 1.5 leverage as indicated in the letter dated the 6th December, 2005. In fact, the level of funding is 8 plus times the level of equity which effectively means it exceeds nearly four times the level of maximum leverage as indicated in the letter of the 6th December, 2005. As aforementioned, it is obvious that this fund was highly leveraged and therefore the risk of loss of capital was greatly increased by the amount of leverage. This fact was never explained to our client and there is no reference to this particular risk either in the correspondence from Goodbody Stockbrokers to our client prior to her investment or in the Information Memorandum dated December 2005."

5. The letter of the 2nd November, 2010, complains that the management fee of 0.5% of gross assets paid quarterly in arrears created a conflict of interest between the notice party and investors, including the appellant, by encouraging the notice party to increase the gross assets through reckless borrowing to the detriment of investors

including the appellant and this conflict of interest was increased by members of the notice party being made directors of the various subsidiary companies operated by the Northern Ireland Property Fund. This letter further complains that contrary to the statement at subpara. 1.3 of the Northern Ireland Property Fund Information Memorandum December 2005, that:-

> "The joint ventures shall seek development opportunity with clear exit strategies in retail, office, industrial and leisure sectors. . . ."

there was no exit strategy in the case of the three largest developments, - Taggart (Belfast) Homes Limited, Evish Road, Strabane and Crescent Link, Derry, - which were, "highly speculative land investments", where there was either no planning permission granted or it was intended to seek a variation of the planning permission granted.

6. The appellant has abandoned her claim that she was, "pressurised into investing in this particular fund". Once the notice party produced a transcript of the recorded telephone conversation between the appellant and Mr. T.J. Scully on the 8th December, 2005, she was left with no real alternative, but to take such a course.

7. The letter of the 2nd November, 2010, further complained that:-

> "Contrary to the assertions of T.J. Scully where he states that Mary Doyle Carty described herself as a seasoned and professional investor, which is denied, our client has had very limited exposure to the financial investment markets. It is disingenuous to say the least, for Goodbody Stockbrokers to imply that our client was a seasoned and professional investor purely because she had a few transactions involving the purchase of shares. We are instructed by our client that she had approximately 6-7 orders in total. It is incredulous that Goodbody Stockbrokers would state that our client is an experienced and

successful investor based on the fact that she had 6 or 7 orders in her life-time."

8. There is also a complaint that for a total of only five investments, no less than sixteen different companies, each managed by Goodbody Northern Ireland and employing the same Audit Firm were used by Northern Ireland Property Fund and, in respect of which either no or only very non-specific financial information was provided to the appellant.

9. A very extensive response, (nineteen pages of close type), was furnished by the notice party to the respondent on the 12th October, 2011. In answer to the first question,(ante), posed by the respondent the notice party states that it believed that it was appropriate for the appellant to invest all her funds in Northern Irish Property because she had described herself to Mr. T.J. Scully as a "seasoned" and "successful" investor and, had made the decision herself, following discussions with a "trusted source" and, having rejected a suggestion by Mr. Scully that she might consider a diversified range of investments with a view to spreading the risk. Central to this response are references to oral discussions between the appellant and Mr. T.J. Scully on the 29th November, 2008, the 8th December, 2005, and the 14th December, 2005. Arising from the appellant's complaint and the response from the notice party, I find that the respondent was faced with a clear conflict of material fact as to what had been said during these discussions.

10. However, in his Finding the respondent held that:-

"Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict. I am also satisfied that the submissions and

evidence submitted are sufficient to enable a Finding to be made in this complaint without the necessity for holding an oral hearing."

11. The primary reason offered by the notice party to the respondent in reply to his query as to why they considered it appropriate for the appellant to invest all her funds in Northern Irish Property was that she had described herself to Mr. T.J. Scully as a "seasoned" and "successful" investor. This they alleged was, "borne out by a perusal of some significantly sized transactions conducted by [her] on an Execution Only basis", through the notice party in 2005. In his Finding the respondent concluded that the appellant's prior investment experience did not accord with the description of her as a "seasoned investor". The decision of the notice party to treat the appellant as a "seasoned investor", insofar as it was based on her prior investment transactions (and not on what she might have said to Mr. T.J. Scully at one of the three meetings between them) was therefore found to be incorrect by the respondent.

12. However, the respondent made no finding at all as to whether or not the appellant had in fact, described herself to Mr. T.J. Scully as a "seasoned" and "successful" investor, or, whether she made the other statements regarding her investment experience set out in the first paragraph of the answer dated the 12th October, 2011, made by the notice party to the first question (ante) posed by the respondent in his letter of the 5th August, 2011. The first para. of the answer of the 12th October, 2011, states as follows:-

> "As stated in our Final Response the Complainant described herself to Mr. T.J. Scully, her private client executive in our firm, as a "seasoned" and "successful" investor. The Complainant advised Mr. Scully that she had made a very substantial portion of the available funds for investment by selectively investing in resource stocks in the years prior to her investment in the

Northern Ireland Property Fund. She also informed Mr. Scully that she had experience of trading in other shares. This is borne out by a perusal of some significantly sized transactions conducted by Complainant on an Execution Only basis through our firm in 2005 via the AIB Branch in (named), see copy Contract Notes attached in Appendix D. In addition, in the Agreement which the Complainant signed with our firm on the 14th December, 2005, she confirmed that the source of funds for investment, ie. £260,000 sterling was share-dealing."

13. These matters are denied, expressly and impliedly, by the appellant's letter of complaint to the respondent dated the 2nd November, 2010, from her solicitors.

14. This serious and very material factual dispute could not be determined by reference to the documents provided to the respondent. There is no record of her having made any of these statements in the holograph memorandum of the meeting of the 29th November, 2005, made by Mr. T.J. Scully. The transcript of the telephone conversation between the appellant and Mr. T.J. Scully on the 8th December, 2005, and the Irish Stock Exchange Mandatory Meeting Note Form, completed by Mr. Scully following his meeting with the appellant on the 14th December, 2005, contain no reference to any such statements or information.

15. There was therefore no manner in which the respondent could reasonably or properly resolve this serious and material factual dispute and, also the issue of whether Mr. T.J. Scully made the alleged oral representation to the appellant that the Northern Ireland Property Fund would invest in commercial property only and would not invest in residential property, other than by way of hearing oral testimony from the appellant and from Mr. T.J. Scully. I find that it was not rationally or reasonably open to the respondent in the circumstances to conclude that, "the submissions and

evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve such a conflict". I am satisfied that the respondent erred in principle in failing to exercise his discretion to hear oral testimony from the appellant and from Mr. T.J. Scully on these material disputes of fact and this failure amounted to a serious procedural irregularity which vitiates the Finding of the respondent in this respect.

16. The other explanation offered by the notice party to the respondent as to why it believed that it was appropriate for the appellant to invest all her funds in Northern Irish Property was that she made the decision herself having been sent extensive and detailed information regarding the investment, which included warnings as to the risks involved and, having been advised by Mr. T.J. Scully at his meeting with her on the 14th December, 2005, of the risks associated with a lack of diversification in her investment. In this respect the content of the Irish Stock Exchange Mandatory Meeting Note Form, completed by Mr. T.J. Scully following this meeting on the 14th December, 2005, is of importance. This note is as follows:-

> "DATE OF MEETING: 14/12/05
>
> Goodbody representative: T.J. Scully
>
> Names of parties present; Mary Doyle-Carty
>
> PURPOSE OF MEETING: discuss Northern Ireland Property
>
> KEY POINTS OF MEETING:
>
> Strength of NI economy
>
> Mary discussed the investment with a close friend/relative who lives in the North and she feels it is now a good opportunity.
>
> Discussed the downside risk (and upside) of not having any diversification.

Mary felt strongly that she did not want a share portfolio in combination with a smaller investment in NI Property Fund.

SIGNED BY GOODBODY REPRESENTATIVE: T.J.Scully."

17. This Irish Stock Exchange Mandatory Meeting Note Form was, I understand, made available by the respondent to the appellant through her solicitors. There is no record that she challenged the accuracy of its contents. It was clearly open to the respondent in these circumstances to accept and to find that the appellant had been warned by Mr. T.J. Scully of the risk involved in investing all her funds in a single investment in the Northern Ireland Property Fund but was nonetheless determined to pursue that course.

18. In her letter of complaint to the respondent dated the 2nd November, 2010, the appellant, through her solicitors, states:-

"At no time was our client advised of the significant risks attached to highly leveraged funds. This risk was not brought to her attention and there is no reference to the same either in the correspondence and/or in the Information Memorandum."

19. The initial letter from the notice party to the appellant, dated the 6th December, 2005, having referred to the opportunity of investing in Northern Ireland, "the fastest growing regional economy in U.K. over the past decade", describes "The Fund" as a, "£20m sterling Fund to invest in commercial development property in Northern Ireland". It went on to state that the first £7m sterling would be invested in retail space and retail warehousing at Bridgewater Park, Banbridge, Co.Down. This initial letter stated that the Fund would be leveraged up to £50m sterling and would be managed by an experienced team, including a former chairman of the leading developer of retail and commercial schemes in the United Kingdom. There is no

reference to risk in this letter. The letter refers to an enclosed Executive Summary [which], "outlines this fund in more detail and interested parties will be issued with an Information Memorandum and Application Form next week".

20. This Northern Ireland Property Fund Executive Summary December 2005, (which senior counsel for the appellant accepted was enclosed with the letter of the 6th December, 2005), commences with an "IMPORTANT NOTICE" which is a comprehensive disclaimer notice in the following terms:-

> "This Executive Summary (the "Document") is intended for general guidance only. This Document constitutes an executive summary only. An Information Memorandum containing more detailed information concerning the investment will be available in due course. No representation or warranty, express or implied, is made or liability accepted by Goodbody Stockbrokers, Goodbody Corporate Finance or by any of their directors, employees, advisers or agents in relation to the accuracy or completeness of the information in this Document. No potential investors should treat any of the contents of this Document as constituting advice relating to this investment and each investor is advised to consult his/her own independent professional advisers concerning participation in the investment and to make his/her own commercial assessment of the information contained herein. This Document does not constitute an offer or an invitation to invest or an offer of any securities. This Document is confidential and is intended solely for use by the person to whom it is addressed. Copying of this Document and further circulation without the prior written consent of Goodbody Corporate Finance is expressly prohibited. Goodbody Stockbrokers is regulated by the Financial Regulator under the Stock Exchange Act, 1995. Goodbody Corporate Finance is regulated by the

Financial Regulator under the Investment Intermediaries Act 1995. Goodbody Stockbrokers and Goodbody Corporate Finance are both members of Allied Irish Bank plc which is regulated by the Financial Regulator."

21. At p. 1 (of 4) under the heading, "THE FUND" this document contains the following statement:-

> "Newco shall seek development opportunities with clear exit strategies in the retail, office and industrial areas, primarily in Northern Ireland and the border counties. Newco may undertake residential development as part of larger schemes and may acquire investment properties where there is an expectation of capital appreciation over a 3-5 year horizon. The objective of Newco is to achieve capital appreciation over the medium term. The fund will be jointly managed by Orana Group and Goodbody Stockbrokers.
>
> The Fund expects to utilise bank leverage in its developments to maximise returns for investors."

22. Newco is elsewhere described as Goodbody Stockbrokers in a joint venture with Orana Group Guernsey, operating in Northern Ireland through its wholly-owned subsidiary GML Estates Limited, and owned by John Farmer, a retail and commercial property developer with 25 years experience in the sector. On p. 4 of this Executive Summary under the heading "RISKS" the following is stated:-

> "Risks associated with this investment would include loss of capital, delay or failure to secure appropriate planning permission, no established exit mechanism, no guaranteed return, no liquidity, the risk of the need for additional funding, failure to deliver the development on profit, interest rate movements, poor retail trading and adverse conditions in the property market.

A fuller description of risk factors will be set out in the Information Memorandum."

23. The next document in time admitted to have been received by the appellant is an Offer Letter dated the 8th December, 2005, from Goodbody Northern Ireland plc. It makes no reference whatever to risks. It refers to the "Joint Ventures" as being Goodbody Northern Ireland plc, (the "Company") (to be incorporated) and Orana Group. It states that the amount sought to be raised from private investors to invest in property, primarily in Northern Ireland and the border counties is £30m sterling. It identifies Bridgewater Park, Banbridge, as the first investment to be considered and, "the Company will look to invest £7.2m sterling in this project". This Offer Letter then continues as follows:-

"Further information in relation to the Company, the Joint Venture, Bridgewater Park and the Offer is set out in the enclosed Information Memorandum dated the 7th December, 2005, ("the Document"). This letter should not be read in isolation but should be read in conjunction with the Document.

Please note capitalised words and phrases used in this letter shall have the meaning given to them in the Definitions section contained in Appendix I of the Document. This letter is subject to the provisions of the Document. In the event of any conflict between the terms of this letter and the terms of the Document, the terms of the Document shall prevail.

DETAILS OF THE OFFER

Goodbody Stockbrokers Nominees Limited ("Goodbody Nominees") has been offered the right to subscribe for Units at a price of £1,000 sterling per Unit ("Offer price") payable in full on acceptance of the terms and subject to the

qualifications set out in the Document. In addition, commission of 4.0% is payable to Goodbody Stockbrokers giving a total price per unit of £1,040 sterling. Goodbody Stockbrokers will also be entitled to an incentive fee of 15% of investor profits once the internal rate of return surpasses 15%. . . . ."

24. There is no discussion whatsoever in the course of the recorded telephone conversation, (as per the transcript), between Mr. T.J. Scully and the appellant on the 8th December, 2005, about risks associated with the Northern Ireland Property Fund.

25. The appellant now claims that she did not receive the Northern Ireland Property Fund Information Memorandum December 2005, until after she had made her investment in the Northern Ireland Property Fund on the 14th December, 2005. I make no finding as to this. It was open to the respondent to proceed on the basis that she had received this document between the 9th and the 14th December, 2005, inclusive.

26. This Northern Ireland Property Fund Information Memorandum December 2005, (38 or more pages long) commences with an "IMPORTANT NOTICE" which covers four closely typed pages. In addition to various disclaimers, such as, "prospective investors must rely upon their own examination of the Company and consider the risks involved before subscribing for the Units", and "no information set out in this Information Memorandum or the fact of its distribution will form the basis of any contract", this "Important Notice" also refers to risk factors. In the first page of this Important Notice under the heading "Risk factors" the following appears:-

> "An investment in the Units involves a high degree of risk. Set out in Part 8 of this Document are certain risk factors which should be considered by prospective investors in connection with an investment in the Units. However, prospective investors must rely upon their own examination of the Company

and consider the risks involved before subscribing for Units. Prospective investors are advised to consult an independent professional adviser before making any investment decision. The ordinary share capital of the Company is neither listed nor afforded a trading facility. No application has been made (or intended to be made at present) to list or to afford a trading facility for the Units, on any stock exchange."

27. Part 8 of this Information Memorandum (pp 33 and 34) is headed "RISK FACTORS". It addresses in a series of subparagraphs, fourteen different types of risk which "could have a material adverse impact on the Company's business, financial condition, development land values and the value of the Units". Ranging from "Property Risk" [values] to "Currency Risk". At subpara. 8.8 under the heading "Investment Risk", the following is stated:-

> "Prospective investors should be able to bear the financial risk of an investment in the Company for an indefinite period and should be able to withstand a total loss of their investment".

28. A Private Placement Agreement was executed on behalf of Goodbody Stockbrokers and the Nominee Company on the 8th December, 2005, and by the appellant on the 14th December, 2005. This agreement provided for registration in the name of and thereafter for total management of unlisted and unquoted shares and investments by Goodbody Stockbrokers Nominees Limited or Allied Irish Bank plc or any of its subsidiaries or associated companies (Allied Irish Bank Group) their successors and assigns. Though it does not specify by name the Units in the Northern Ireland Property Fund it is clearly referring to these Units in making the following statement in the first paragraph of the agreement:-

"THIS IS A HIGH-RISK INVESTMENT. Investments in securities which at the time of investment are not listed on any recognised stock exchange or for which there is no quotation ("Private Placement(s)") will not be eligible for trading. There is no market in such investments. It may be difficult for you, as an investor to sell or realise your investment in a Private Placement or to obtain reliable information about its value or the extent of the risks to which you are exposed. An investment in a Private Placement is a highly volatile investment, which may be subject to sudden and large falls in value. The value of your investment may fall as well as rise and you may get back less than or none of the sum which you invested. An investment in Private Placements is only suitable for those persons who are able to bear the financial risk of holding the investment for an indefinite period of time and able to withstand the total loss of their investment. You must rely on your own examination and assessment of an investment in a Private Placement and the risks to you involved in making such an investment. The contractual rights granted to you at the time of making a subscription in a Private Placement may not be significant and may be less than granted to other investors, for example, venture capital funds. If you are in doubt about the suitability for you of an investment in a Private Placement or your eligibility to invest, you should consult an independent professional adviser before making any such investment."

29. These express statements in these three documents, - the Executive Summary, the Information Memorandum and the Private Placement Agreement, - would have entitled the respondent to make the Finding which he did, that:-

"The risk factors are set out in unambiguous language and are clearly explained. The documentation ensures that the investor is given notice of the fact that the risks give rise to the potential loss of the total amount of the investment. Both these documents [the Executive Summary and the Information Memorandum] contain a clear reference to the level of risk that applied to the investment and to the fact that the total amount of the investment could be lost. Investors were warned that they should ensure that they are able to withstand the total loss of the investment".

30. The appellant now avers that Mr. T.J. Scully told her that what these documents said about high risk was "more or less precautionary". She therefore decided to go ahead with the investment despite these statements. As this case was not made to the respondent despite the clear emphasis laid by the notice party on these high risk warnings in their response dated the 12th October, 2011, to the Schedule of Questions raised by the respondent in his letter to the notice party dated the 5th August, 2011. I shall disregard it for the purpose of this appeal. As was pointed out by MacMenamin J. in *Ryan v. the Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011), the courts have consistently deprecated any tendency to seek to make a case that was not made before the Ombudsman. However, in the overall context of what took place between the appellant and the notice party the matter does not admit of such a ready and clear cut answer ie. that the appellant was clearly notified of the high risk nature of the investment but decided nonetheless to invest in the Northern Ireland Property Fund.

31. In his holograph memorandum of his first meeting with the appellant on the 29th November, 2005, Mr. T.J. Scully records (*inter alia*), "Focus on high quality stocks. . . . Also would consider Northern Ireland Property as an alternative". No

record is made or any account given as to how this alternative investment came to be discussed. Mr. Scully's list of the stocks discussed shows that they were all gilts and certainly (at least in the financial circumstances of 2005), very far removed from high risk investments. Similarly, there is nothing in the transcript of the telephone conversation of the 8th December, 2005, to even suggest that the appellant and Mr. Scully were discussing a high risk investment or an investment in residential property in Northern Ireland or in the border counties.

32. Goodbody Stockbrokers, Private Client Department submitted an Investment Proposal prepared by T.J. Scully on the 12th December, 2005, to the appellant. The notice party claims that this occurred on the 14th December, 2005, before she made her investment on that same day in the Northern Ireland Property Fund. At p. 6 of 12 under the heading "YOUR PORTFOLIO" this document states as follows:-

> "I understand that your needs at present are for a moderate risk portfolio of direct equities and to the exclusion of the other asset classes described above. The schedule in Appendix I, sets out our current view of what holdings your portfolio should have at the present. Holdings are amended regularly to reflect changing market conditions. The schedule assumes a lump sum investment of €500,000."

33. In this Appendix, entitled "Investment Proposals" there is suggested a percentage weighted investment of a total sum of €500,000 in the following:

> "5. Financials,
>
> 2. Energy,
>
> 6. Consumer Stables,
>
> 3. Consumer Discretionary,
>
> 2. Healthcare,

1. Industrials and

3. Basic Industries,

retaining a cash holding of €29,000. Alternative investments suggested are substituting €50,000 (weight 10%). Dexion Absolute Limited for one of the foregoing investments or a 100% investment in Property."

34. On the 14th December, 2005, also the appellant also entered into an Advisory Portfolio Agreement with the notice party to provide her with investment advice for use by her in the management of her account. Subsection 1.C of this Agreement under the heading "Setting your Investment Objectives", provides as follows:

"It is important that investment objectives are set for your account against which performance can be monitored. Under the rules of the Stock Exchange we are required to ask you to complete the attached questionnaire. If this is not completed we will proceed on the basis that:

(a) your investment objectives are for capital growth

(b) you are prepared to accept a moderate level of risk, and

(c) your investment time horizon is three to five years."

The appellant did not complete the relevant questionnaire so that the notice party was obliged to proceed on the above basis.

35. The respondent in his Finding concluded that, - "A 'moderate' level of risk", - was the appellant's "original intention". However, no reason is given for introducing the adjective "original". It will be recalled that she made the investment in Northern Ireland Property Fund on the 14th December, 2005. The Investment Proposal, to which I have referred prepared for the appellant by Mr. T.J. Scully on the 12th December, 2005, and, claimed by the notice party to have been given to her by him on the 14th December, 2005, expressly records the understanding of the notice party

through Mr. Scully on the date of preparation and by clear inference on the date of presentation of the document to her that her need was then for a moderate risk portfolio. The Advisory Portfolio Agreement which she executed on the 14th December, 2005, states that the notice party will proceed on the basis that her investment objectives are for capital growth over 3 to 5 years with a moderate level of risk. Both these documents are later in date to the Northern Ireland Property Fund Executive Summary December 2005, (enclosed with the letter of the 6th December, 2005), and the Northern Ireland Property Fund Information Memorandum December 2005, which latter document the notice party now claims was not received by her prior to the 14th December, 2005, and which on the evidence of the transcript of the recorded telephone conversation of the 8th December, 2005, could not have reached her prior to Friday 9th December, 2005, and by inference not before Monday 12th December, 2005, if as stated in the transcript it "could be available as soon as tomorrow" and if so available was, as promised, popped in the post.

36. The respondent found that the "complainant received adequate notice . . . of the high level of risk that attached to the investment . . .". I can only infer that he concluded from this that the appellant must have abandoned her "original" intention of seeking a "moderate" level of risk. I am satisfied that it was open to the respondent to find, on the basis of the uncontradicted Irish Stock Exchange Mandatory Meeting Note Form, completed by Mr. T.J. Scully after his meeting with the appellant on the 14th December, 2005, that having considered the evidence of the strength of the Northern Ireland economy, having discussed the investment with a close friend or relative who lived in Northern Ireland and, having discussed the downside risk and upside advantage of an undiversified investment with Mr. Scully, the appellant

decided that she did not wish to have a share portfolio in combination with a smaller investment in the Northern Ireland Property Fund.

37. However, the documents alone do not provide an answer to the question, implicit in the first question posed by the respondent himself, as to why the notice party believed it was appropriate for the appellant to invest all her funds in the Northern Ireland Property Fund, which they identified to be a high risk investment, when they themselves, expressly stated and recorded in documents of even and almost even date, emanating entirely from them, that the appellant's need was for a moderate risk portfolio. In my judgement, in these circumstances, it was an error of principle on the part of the respondent to have assumed, as he appears to have done, that the appellant must simply have changed her mind about the degree of risk she was prepared to accept. There was here a very serious and material conflict evident on the face of the documents before the respondent and consequently fair procedures clearly required that the respondent should have heard oral testimony from the appellant and from Mr. T.J. Scully before reaching a conclusion, if such was open to him, that the notice party must have an "original" intention which she at some stage abandoned and had conveyed this to the notice party in some manner, so that the notice party was reasonably and properly entitled to believe that it was appropriate for the appellant to invest all her funds in the Northern Ireland Property Fund.

38. In the course of his Finding made on the 24th May, 2012, the respondent held as follows:-

> "The Complainant asserts that she had concerns about the property market in general and the residential market in particular. I have considered the submissions and evidence of both parties in detail. The Complainant asserts that she sought and received assurances that the investment would be in

commercial property only. The Company concedes that the investment documentation in the main refers to commercial development, but denies that it made any such representation or provided the assurance as claimed by the Complainant. Whilst the complainant makes the case that she was provided with oral representations in this regard, there is no independent evidence to support this assertion. The investment documentation is mainly concerned with considerations in relation to commercial property developments and it creates the clear impression that commercial property is to be the driving force of the investment. The Information Memorandum advises the prospective investor that 'other opportunities in the property market' will be pursued. This was given in the context of an overall emphasis on commercial property investments. However, there are no guarantees provided that this is the only type of property that may be considered. There is also a brief reference on p. 2 that residential development may be undertaken as part of larger schemes. I do not find on the evidence before me that the Company breached its contractual obligation to the Complainant by investing in residential property as part of the Fund."

39. Having identified a conflict of fact between the parties as to whether or not the appellant had sought and had been given oral assurances that the Northern Ireland Property Fund would invest in commercial property only, the respondent simply dismisses this claim by the appellant on the basis that there was no independent evidence to support it. The presence of such evidence would add weight to her claim, but there is no legal requirement whatsoever for it. Perhaps the respondent meant to convey that he found nothing in the circumstances surrounding the formation of the

agreement or in the terms of the written contract which would tend to support the making of the representation of fact claimed by the appellant.

40. The transcript of the telephone conversation between the appellant and Mr. T.J. Scully on the 8th December, 2005, contains the following exchange:-

"MCD: [the appellant referring to the letter of the 6th December, 2005, and the Executive Summary December 2005, enclosed with it] - Can I just talk you through a bit of it – I'm looking at charges, I am very . . . there is nothing here that has turned me off anything I have thought of it already, I think its reasonably good, I think I like it.

TJ: Yeah I must say now I like it, I think the Northern Ireland property is not a bad place to be anyway in the first place and secondly I think that . . .

MCD: They have a nice powered team.

TJ: They have yeah, they are very strongly experienced in all that, these guys are at the top of the league tables when it comes to experience and know-how and all of that so I mean that's important in all of these things as well, the team that's behind it, because any of these projects are only as good as the people that are behind them

MCD: Sure, yeah.

TJ: You know they are very experienced and they do like, they wouldn't go into business with people that you know that you know weren't up to doing it on that front, so I'd be very happy on that front. I am also happy on the front of Northern Ireland generally as an area. I think its an economic area which has a lot of potential for growth and it has been doing well over the last decade and I'm also happy with that first thing that's been done there, that high end fashion factory retail outlet thing, I mean I think that's a proven . . .

MCD: It's well . . . it's cleverly thought of where it was put.

TJ: Yeah, so I think it has an awful lot going for it and the fact that its going to be 50% pre-let before they do anything construction, I mean I think that's a formality at this stage, because I, they've already signed up 12% or 13% of the units are gone already, and once you have in the Armanis and the Joseph and Coast and these guys, others will follow suit I would imagine you know."

41. The "very nice powered team" being discussed here were the directors of Newco who are identified in the Northern Ireland Property Fund Executive Summary December 2005, (which was enclosed with the letter of the 6th December, 2005), as follows:-

"DIRECTORS OF NEWCO

The board of Newco will comprise directors from Goodbody, Orana Group and independent director(s). The initial directors will be Eamonn Glancy and Paul Higgins from Goodbody, John Farmer from Orana Group and Chris Harris, Executive Chairman of London and Metropolitan International. London and Metropolitan International has successfully developed over 6m square feet of commercial property in the UK and Europe since 1980. Mr. Harris is also a director of Value Retail PLC, which develops and operates Europe's leading discount outlet centres including Bicester, England. Newco will also seek to appoint an independent director from Northern Ireland."

42. In my judgement, it is perfectly plain from this that the appellant and Mr. T.J. Scully were discussing retail and commercial property in Northern Ireland only. This is therefore evidence to which the respondent could have had regard in deciding

whether the appellant had sought and had been given oral assurances that the Northern Ireland Property Fund would invest in commercial property only.

43. The letter dated the 6th December, 2005, expressly defines, "THE FUND" as a £20m sterling Fund to invest in commercial development property in Northern Ireland. The Northern Ireland Property Fund Executive Summary December 2005, which accompanied this letter, refers to, "THE FUND" in the following terms:-

> "Newco will seek development opportunities with clear exit strategies in the retail, office and industrial areas, primarily in Northern Ireland and the border counties. Newco will undertake residential development as part of larger schemes and may acquire investment properties where there is an expectation of capital appreciation over a large 3-5 year horizon. The objective of Newco is to achieve capital appreciation over the medium term. The fund will be jointly managed by Orana Group and Goodbody Stockbrokers.
>
> The fund expects to utilise bank leverage in its developments to maximise returns for investors."

44. In the letter of the 6th December, 2005, under the heading, "THE FUND" it is stated "Fund leveraged up to £50m sterling".

45. The OFFER LETTER dated the 8th December, 2005, under the general heading "PLEASE NOTE THIS DOCUMENT IS IMPORTANT AND REQUIRES YOUR IMMEDIATE ATTENTION", commences by stating:-

> "Goodbody Stockbrokers through an Irish company to be incorporated, Goodbody Northern Ireland plc (the "Company") is seeking to raise up to Stg£30m from private investors to invest in property, primarily in Northern Ireland and the border counties in a joint venture with Orana Group. All monies raised by the Company will be invested through joint venture entities

controlled jointly by Goodbody and Orana Group and references to 'Joint Ventures' refers to the joint activities of the Company and Orana Group in this context. The Joint Ventures will acquire property with the objective of adding value through development and active asset-management.

The first investment opportunity to be considered by the Joint Venture is Bridgewater Park at Banbridge, Co. Down. The Company will look to invest £7.25m in this project.

Further information in relation to the Company, the Joint Venture, Bridgewater Park and the Offer is set out in the enclosed Information Memorandum dated the 7th December, 2005, ("the Document"). This letter should not be read in isolation, but should be read in conjunction with the Document.

Please note capitalised words and phrases used in this letter shall have the meanings given to them in the Definitions section contained in Appendix I of the Document. This letter is subject to the provisions of the Document. In the event of any conflict between the terms of this letter and the terms of the Document, the term of the Document shall prevail."

46. Under the heading "DETAILS OF THE OFFER", it is stated that - "Goodbody Stockbrokers Nominees Limited ("Goodbody Nominees") has been offered the right to subscribe for Units at a price of £1,000 per unit ("Offer Price") payable in full on acceptance of the terms and subject to the qualifications set out in the Document. . . ."

47. The Northern Ireland Property Fund Information Memorandum December 2005, at subpara. 1.3 states as follows:-

"1.3 THE INVESTMENT STRATEGY OF THE JOINT VENTURES

The Joint Ventures shall seek development opportunities with clear exit strategies in the retail, office, industrial and leisure sectors, primarily in Northern Ireland and the border counties. It may undertake residential development as part of larger schemes and may acquire investment properties where there is an expectation of capital appreciation over a 3-5 year horizon. The objective of the Joint Ventures is to achieve capital appreciation from its property investments over the medium term. The Joint Ventures will be jointly managed by Orana Group and Goodbody Stockbrokers.

The Joint Ventures expect to utilise bank leverage in their developments to maximise returns for investors."

48. The appellant claims that the statement in the letter of the 6th December, 2005, under the heading "THE FUND", - "Fund leveraged up to £50m", - was an assurance and a representation of fact as to the upper limit of this bank leverage which, with the representation that the investment would not be in residential property in Northern Ireland induced her to invest in the Northern Ireland Property Fund.

49. Part 3 of the Northern Ireland Property Fund Information Memorandum December 2005, contains six subparagraphs entitled respectively:

3.1 BACKGROUND,

3.2 OPPORTUNITIES TO BE TARGETED

3.3 RETURNS TO INVESTORS

3.4 FUNDING TIMETABLE

3.5 INVESTMENT CONSIDERATIONS and

3.6 COMMERCIAL TERMS OF INVESTMENT.

50. Subparagraph 3.2 entitled OPPORTUNITIES TO BE TARGETED, having referred to the first investment opportunity to be considered, namely Bridgewater Park, continues as follows:-

> "In addition to the initial investment in Bridgewater, the Joint Ventures will also look to identify other opportunities in the property market. The segment of the market in which the Joint Ventures will operate will be the acquisition of potential development opportunities in the retail, office, industrial and leisure sectors, primarily in Northern Ireland and the border counties. It may also look to undertake residential development as part of larger schemes and may acquire investment properties where there is an expectation of capital appreciation over a 3 – 5 year horizon."

51. Subparagraph 3.3 entitled RETURNS TO INVESTORS, states as follows:-

> "The Joint Ventures are focused on generating capital growth for investors over a seven year time horizon. The Joint Ventures are aiming to return all or part of Investors' capital as quickly as possible to maximize Investors' rate of return. It will raise non-recourse borrowings (secured on its property assets) to provide a geared return to Investors".

52. Subparagraph 3.5 entitled INVESTMENT CONSIDERATIONS" states as follows:

> "The following are important considerations for investment in property in Northern Ireland:
>
> Northern Ireland is the fastest growing region within the UK economy. The Northern Ireland property market is among the strongest performers in the UK regions.

> The office and hotel sectors have benefited from the strong economic conditions and growing confidence in investing in the market.
>
> The retail sector has been a strong performer, with several significant transactions occurring recently.
>
> Northern Ireland is expected to remain a buoyant and attractive marketplace for investment properties."

53. Part 4 of the Northern Ireland Property Fund Information Memorandum December 2005 is concerned with the proposed first investment by the Fund in phase 1 of Bridgewater Park, - "The Outlet" – a 212,000 square foot gross factory outlet centre comprising around 80 units and over 1,500 parking spaces. Subparagraph 4.6 entitled TERMS OF INVESTMENT provides, *inter alia*, that:-

> "The Company will initially invest in Phase one by way of a mezzanine loan with a rolled up coupon of approximately LIBOR (currently 4.6%) plus 4%. Land Securities Plc has an obligation to acquire Phase one at a pre-determined multiple of the rent at the end of year two. . . ."

54. The term "investment properties" in 1.3 and 3.2 of the Northern Ireland Property Fund Information Memorandum December 2005, (above cited) and in the definition of "THE FUND" in the Northern Ireland Property Fund Executive Summary December 2005, enclosed with the letter of the 6th December 2005, is not defined in the contract and in particular in Appendix 1 – "Definitions" - of the Information Memorandum. In the absence of agreement between the parties as to its meaning, this would fall to be determined by the respondent principally by reference to its context. The *Oxford Dictionary of Finance and Banking*, 4th Ed. (Oxford University Press 2008) defines "investment property" by reference to the definition in the United Kingdom "Statement of Standard Accounting Practice", 19 – accounting

for investment properties, which defines "investment properties" as being "an interest in land and/or buildings: (1) in respect of which construction work and development has been completed: and (2) that it is held for its investment potential, any rental income being negotiated at arm's length". In the instant case, the type of investment properties which the Northern Ireland Property Fund "may acquire" is not stated in the contract or pre-contract documents and the respondent would have to consider whether the choice was cut down by reference to the "segment of the market in which the Joint Ventures will operate" (subpara. 3.2), - retail, office, industrial and leisure sectors.

55. The appellant's claim was that more than 70% of the Northern Ireland Property Fund, in breach of contract, had been invested "solely and exclusively in residential property investments", which were highly speculative and had no clear exit strategies.

56. The respondent in his Finding held as follows:-

> "The investment documentation is mainly concerned with considerations in relation to commercial property developments and it creates the clear impression that commercial property is to be the driving force of the investment. The Information Memorandum advises the prospective investor that 'other opportunities in the property market' will be pursued. This was given in the context of an overall emphasis on commercial property investments. However, there are no guarantees provided that this is the only type of property that may be considered. There is also a brief reference on p. 2 that residential development may be undertaken as part of larger schemes. I do not find on the evidence before me that the Company breached its

contractual obligations to the Complainant that by investing in residential property as part of the Fund".

57. This reference to "other opportunities in the property market" by the respondent is seriously misleading. To refer again to subpara. 3.2 of the Northern Ireland Property Fund Information Memorandum December 2005, it explicitly states as follows:

> "In addition to the initial investment in Bridgewater, the Joint Ventures will also look to identify other opportunities in the property market. The segment of the market in which the Joint Ventures will operate will be the acquisition of potential development opportunities in the retail, office, industrial and leisure sectors, primarily in Northern Ireland and the border counties. It may also look to undertake residential development as part of larger schemes and may acquire investment properties where there is an expectation of capital appreciation over a 3 – 5 year horizon."

58. I am satisfied that the respondent misdirected himself in fact in this regard and did not consider properly or at all the appellant's complaint that the impugned investments did not come within the category of potential development opportunities in retail, office, industrial and leisure sectors or within the category of "residential development as part of larger schemes or within the category of investment properties where there is an expectation of capital appreciation over a 3 -5 year horizon. In this respect in its answer of the 12th October, 2011, to the respondent's queries of the 5th August, 2011, the notice party stated as follows:-

> "In addition to the Bridgewater Park investment, the Northern Ireland Property Fund acquired a strategic site at Cascum Road adjacent to Bridgewater Park for later commercial development in conjunction with

adjacent land owners Land Securities and Stoney Properties. This site is still held by the Northern Ireland Property Fund through GSB Guernsey Trading Limited.

As stated above, the Northern Ireland Property Fund invested in a housing development company with a portfolio of prime residential land in Belfast operated by a leading housing developer. The investment was made in Taggart Homes Belfast 1 Ltd in order that the Northern Ireland Property Fund benefit from 'the strongly performing Northern Ireland residential housing market'. In this instance the Northern Ireland Property Fund was prepared to retain its investment for an initially envisaged 5 year period. It remained open to the Northern Ireland Property Fund to dispose of all or part of its shareholding assuming continued positive performance in the Northern Ireland Residential Market. This was the expectation of the board at that time.

Furthermore, the Northern Ireland Property Fund acquired a strategically located development site in Strabane, Co. Tyrone that offered potential to optimise planning with a view to sub-division for sale and licensed development to local house builders. Furthermore, the site provided potential valuable access to an adjacent landbank. On securing a favourable planning decision, GSB Evish intended to complete the infrastructure with a view to licensing and/or selling sites in phased parcels to local house builders.

The Northern Ireland Property Fund acquired a high profile development site at Crescent Link, Co. Derry with a view to developing a regionally significant large scale mixed use development on the site. A scheme of development has been prepared for the site and planning applications have been submitted in

2008 and 2010. Planning permission was recently granted for a hotel on the site with further planning decision expected in the coming months."

59. The respondent concluded that there had been no breach by the notice party of the terms of its contract with the appellant, because, "there are no guarantees provided that this [commercial property investment] is the only type of property that may be considered". If this means that the Joint Ventures were not bound by the express provisions of subparas. 1.3 and 3.2 of the Northern Ireland Property Fund Information Memorandum December 2005, In my judgement, there is a strong *prima facie* case that the Finding of the respondent is to this extent vitiated by serious and significant error. The Application Form executed by the appellant on the 14th December, 2005, states, *inter alia* that:-

"In response to your letter dated the 8th December, 2005, I/we, the undersigned hereby irrevocably and unconditionally instruct and authorise Goodbody Nominees to subscribe for up to a maximum of 250 Units which are available on the terms and conditions and subject to the limitations set out in the Document and the Offer Letter."

60. Subparagraph 1.3 of the Northern Ireland Property Fund Information Memorandum December 2005, states that the Joint Ventures expect to utilise bank leverage in their developments to maximise returns for investors, but it does not place a lower or upper limit on the amount of the bank leverage expected to be utilised. The appellant claims that the statement in the letter of the 6th December, 2005, "Fund leveraged up to £50m sterling", was a binding assurance and representation that this bank leveraging would not exceed £30m sterling and, this had in breach of contract been greatly exceeded. This was not accepted by the notice party. The respondent in his Finding held that:-

"In addition to the warning in relation to bank's expected utilisation of leverage referred to in the Executive Summary the complainant was advised at clause 3.3 of the Information Memorandum of the potential that there will be 'non-recourse borrowings' (secured on its property assets) to provide a geared return to Investors.

There is no express reference to mezzanine borrowing however this method of financing is not precluded."

61. This latter statement is not correct. There is a reference to mezzanine borrowing at subpara. 4.6 of the Information Memorandum to which I have already referred and which states that:-

"The Company will initially invest in phase 1 [of Bridgewater Park] by way of a mezzanine loan with a rolled up coupon of approximately LIBOR (currently 4.6%) plus 4%. . . . ."

62. At pp. 14 and 15 of its answer, dated the 12th October, 2011, to the queries raised by the respondent, the notice party states that the total amount, (equity) raised from investors by the Northern Ireland Property Fund was £27,407,000 (sterling). The letter of the 6th December, 2005, referred to a "£20m Fund . . .". However, the Northern Ireland Property Fund Executive Summary December 2005, refers to £25m sterling. The Offer Letter of the 8th December, 2005, refers to Stg£30m and the Northern Ireland Property Fund Information Memorandum December 2005, at subpara. 3.1 refers to Goodbody Northern Ireland plc "seeking to raise up to Stg£30m from private investors . . .". The notice party in its answer to the respondent goes on to state that, "in total initial non-recourse borrowings within the Fund amounted to £55.4m. This represented a debt to initial equity ratio of 2 to 1 opposed to 1½ to 1 as indicated in the letter issued on the 6th December 2005, to the complainant".

63. In her letter of complaint to the respondent dated the 2nd November, 2010, the appellant, through her solicitors, states:-

> ". . . From the financial information provided by Goodbody Stockbrokers it would appear that the Goodbody Northern Ireland Property Fund borrowed in the region of £222,500,000. This level of borrowing is 500% plus greater than that envisaged and/or as outlined in the letter dated the 6th December, 2005, by Goodbody Stockbrokers addressed to our client.
>
> This level of borrowing was raised either via bank loan or via Mezzanine finance. . . . In fact, the level of funding is 8 plus times the level of equity which effectively means it exceeds nearly four times the level of maximum leverage as indicated in the letter of the 6th December, 2005. . . ."

64. The Finding of the respondent on this issue is as follows:-

> "In addition to warning in relation to bank's [sic] expected utilisation of leverage referred to in the Executive Summary the Complainant was advised at clause 3.3 of the Information Memorandum of the potential that there will be 'non-recourse borrowings (secured on its property assets) to provide a geared return to investors'.
>
> There is no express reference to mezzanine borrowing, however, this method of financing is not precluded."

65. The *Oxford Dictionary of Finance and Banking* 4th Ed. (Oxford University Press 2008) defines "mezzanine finance" as follows:-

> "1. Finance, usually provided by specialist financial institutions, that is neither pure equity nor pure debt. It can take many different forms and can be secured or unsecured; it usually earns a higher rate of return than pure debt, but less than equity. Conversely, it carries a higher risk than pure debt,

although less than equity. It is often used in management buy-outs. 2. A form of finance used by venture capitalist after seed capital has been provided."

66. Insofar as the form of mezzanine finance employed fell within the definition of "non-recourse borrowings (secured on its property assets) to provide a geared return to investors", it was reasonably open to the respondent to make this latter finding. This, however, does not answer the appellant's complaint to the respondent.

67. The Northern Ireland Property Fund Executive Summary December 2005, which accompanied the letter of the 6th December, 2005, expressly states that "the Fund" expects to utilise bank leverage in its developments to maximise returns for investors. The letter of the 6th December, 2005, itself expressly refers to, "Fund leveraged up to £50m". However, subpara. 1.3 and subpara. 3.3 of the Northern Ireland Property Fund Information Memorandum December 2005 refer to borrowings by the "joint ventures". The first paragraph of the Offer Letter of the 8th December, 2005, states that all monies raised by Goodbody Northern Ireland plc from private investors will be invested through joint venture entities controlled jointly by Goodbody and Orana Group and references to "Joint Ventures" refers to the joint activities of the Goodbody Northern Ireland plc and Orana Group. It further states that the Joint Ventures will acquire property with the objective of adding value through development and active asset management.

68. Subparagraph 1.3 of the Northern Ireland Property Fund Information Memorandum December 2005, states that the Joint Ventures expect to utilise bank leverage in their developments to maximise returns for investors. Subparagraph 3.3 of the same Information Memorandum states that "it [joint ventures] will raise non-recourse borrowings (secured on its property assets) to provide a geared return to

investors". Part 1, "Executive Summary" of the same Information Memorandum contains subpara. 1.3 and commences with the following statement:-

> "The following information is derived from, and should be read in conjunction with, the full text of this Document. You should read the whole of this Document, and not rely solely on the information set out below."

From this and, from the ordinary principles applying to the construction of documents, the statement at subpara. 3.3 of the same Information Memorandum, which is not part of the "Executive Summary" of that Information Memorandum that the Joint Ventures will raise non-recourse borrowings (secured on its property assets) to provide a geared return to investors, ought *prima facie* to be seen as a more definitive statement of what is intended by subpara. 1.3 where it refers to the use of bank leverage. The Oxford Dictionary of Finance and Banking, to which I have already referred, defines "leverage" as:-

> "(1) U.S. word for gearing.
>
> (2) Use by a company of its limited assets to guarantee substantial loans to finance its business.
>
> (3) A position (usually a derivative position) in which the principal is small relative to the marker risk."

69. I can only infer that the respondent in his Finding, where he refers to, "the Executive Summary", is referring to the terms of subpara. 1.3 of Part 1- Executive Summary, - of the Northern Ireland Property Fund Information Memorandum December 2005, and not to the terms of the Northern Ireland Property Fund Executive Summary December 2005, enclosed with the letter of the 6th December, 2005.

70. The appellant complained that the statement in the letter of the 6th December, 2005, that the Fund would be leveraged up to £50m sterling was a representation of

fact and a binding assurance intended to have contractual force that the total borrowing secured on all property assets in which the Fund invested would not exceed £30m sterling. The notice party claimed that this statement in the letter of the 6th December, 2005, was "indicative only". Senior counsel for the appellant pointed to the introduction into the answer of the notice party to the respondent's queries of the word "initial". This he submitted was entirely without justification, was grossly misleading, and had either been wrongly accepted by or had not been addressed by the respondent in his Finding. I am satisfied that this criticism is valid and represents a serious and significant error on the part of t he respondent.

71. The answer of the notice party to the appellant's complaint is that the Offer Letter of the 8th December, 2005, and subparas. 1.3 and 3.3 of the Northern Ireland Property Fund Information Memorandum December 2005, confer and express power to invest all money raised by the Northern Ireland Property Fund in joint venture entities controlled jointly by Goodbody and Orana Group whose power to raise non-recourse borrowings secured on their property assets was not limited to the £30m sterling total referred to in the letter of 6th December, 2005.

72. In my judgement the Finding of the respondent on this issue is, unfortunately, vitiated by an insuperable procedural unfairness. I accept the submission by counsel for the notice party and counsel for the respondent that the Finding of the respondent should not be set aside because of a failure "to spell it out in more detail" or "because his reasons may be less than perfect". However, the problem here is not simply a failure on the part of the respondent to give a more comprehensive statement of his reasons for rejecting this very significant aspect of the appellant's overall complaint. I accept the argument of senior counsel for the appellant that the respondent's Finding is so terse and so undirected to the gravamen of the claim that the appellant is left

entirely uncertain as to whether this significant aspect of her complaint was investigated, either properly or at all, by the respondent or what – without seeking to impose an undue burden on the respondent – where his reasons for rejecting this aspect of her complaint. The appellant has a statutory right of appeal from the Finding of the respondent to this Court and unfortunately the court finds itself with the same uncertainty.

73. In her complaint to the respondent, the appellant claimed that there were significant conflicts of interest and a failure to carry out proper "due diligence" requirements in making the investments entered into by the Northern Ireland Property Fund. The appellant now submits that this "significant part of her complaint" received only a mere cursory mention at the end of the respondent's Finding, without any analysis carried out despite the huge volume of paperwork involved.

74. The respondent held that he had considered in detail the appellant's complaint and the response made by the notice party regarding the "composition of the proposed investments" and the "considerations taken into account when assessing the potential for each investment". The respondent found that the notice party did not pursue the investment based solely on its own findings. He found that the notice party exercised due diligence and the evidence indicated that advice had been obtained from parties with specialist expertise such as, DTZ Corporate Finance, DeLoitte Touche and various independent legal, planning and property advisers.

75. The respondent states in his Finding that there were no conflicts of interest or any failure to carry out a proper "due diligence process". He gives his reasons for that finding. The appellant has not demonstrated that this finding was *ultra vires* the respondent or arbitrary or unreasonable. In approaching this matter, the respondent must be regarded as having a degree of professional expertise and specialist

knowledge in such matters. The respondent is not required to provide a detailed and analytical finding: it is sufficient if the broad substance of the basis for his Finding is given. The respondent should not be "placed in the situation of being called upon to exercise all the procedures and requirements of a court of law", (See *Ryan v. Financial Services Ombudsman and Another* (Unreported, High Court, MacMenamin J., 23rd September, 2011) *Carr v. Financial Services Ombudsman* (Unreported, High Court, O'Malley J., 26th April, 2013). The respondent found that this aspect of the appellant's complaint was not substantiated. I am satisfied that the appellant has not shown any serious and significant error in this finding of the respondent.

76. The appellant made other complaints to the respondent which she now submits were not dealt with properly or at all by him in his Finding. These were:-

1. That the structures of the Northern Ireland Property Fund were grossly over complicated, involving sixteen different companies with directors common to most appointed by the notice party.
2. That the Northern Ireland Property Fund lacked transparency in that no proper or specific financial information was provided. This was so even though a senior compliance manager of the notice party had stated, on the 23rd March, 2012, that draft accounts were prepared and audits were underway and audited accounts would be made available despite the fact that under the law of Guernsey there was no statutory requirement to file such accounts.
3. That after discharging the sum of £175,000 sterling per annum in management fees to GML Estates Limited and the sum of 0.5% of gross assets per quarter in management fees to the notice party, in addition to bank finance, mezzanine finance and all other costs, it was

difficult to see how the projects in which the Northern Ireland Property Fund invested could be profitable.

77. The respondent in his Finding, in setting out the background of the submission to him adverts briefly to some of these matters:-

> "The Complainant also states that there was a significant conflict of interest between the Stockbroker and the interests of the Complainant. The fee structure encouraged the Stockbroker to increase the gross assets of the fund so as to increase the management fee to the detriment of the investors. This potential and real conflict of interest was not brought to the attention of the Complainant and the Complainant believes that the Stockbrokers were in breach of their fiduciary duty which they owed to her."

78. There is no further mention of these complaints in the Finding of the respondent, or any express determination of them.

79. All parties in this appeal were agreed that the principles of law applicable to this appeal are those stated by Keane C.J. in *Orange Communications Limited v. the Director of Telecommunications Regulation and Another* [2000] 4 I.R. 159 at 184, (followed and applied in *Ulster Bank Investment Funds Limited v. The Financial Services Ombudsman* [2006] IEHC 323, (Unreported, High Court, Finnegan P. 1st November, 2006), *Molloy v. The Financial Services Ombudsman* (Unreported, High Court, MacMenamin J., 15th April, 2011,) and in many other cases, where he held:-

> "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, the 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."

80. In my judgement the failure of the respondent to address these complaints in his Finding is not "taking the adjudicative process as a whole", a serious and significant error. These complaints are extensively dealt with in the answer from the notice party to the respondent dated the 12th October, 2011. I am unable to determine why the respondent failed to deal with them in his Finding. However, I believe that a comparison with the other matters addressed by the respondent in his Finding is sufficient to demonstrate that these complaints are of minor importance in the overall context of the appellant's complaint.

81. It is now well established that it is an unfair procedure for the respondent not to exercise his statutory discretion to hold an oral hearing where there is a conflict of material fact which would be extremely difficult or impossible to resolve without such a hearing. (*Davy v. The Financial Services Ombudsman* [2010] 3 I.R. 324 at 364, Supreme Court: *Hyde v. the Financial Services Ombudsman* [2011] IEHC 422: (Unreported, High Court, Cross J., 16th November, 2011), *Murphy v. The Financial Services Ombudsman* [2012] IEHC 92, (Unreported, High Court, Peart J., 21st February, 2012) and *O'Brien v. The Financial Services Ombudsman* [2014] IEHC 111, (Unreported, High Court, O'Malley J., 28th February, 2014)).

82. In the instant case, neither the appellant nor the solicitors, by whom she was represented throughout the making and conduct of the complaint, at any time or in respect of any issue requested an oral hearing from the respondent. However, I adopt what was held by Peart J. in *Murphy v. The Financial Services Ombudsman* (above cited) at para. 50, that "the power vested in the Ombudsman to direct such an oral hearing is not dependent upon him being requested to do so by either party". Should circumstances arise sufficient to render the holding of an oral hearing necessary, the onus is on the respondent to direct such an oral hearing even if it is not sought by any party to the reference.

83. The fact that an oral hearing was not requested by the party which on an appeal to this Court from a Finding by the respondent urges upon the court the necessity for such an oral hearing is something to which this Court may and should have regard in determining whether such an oral hearing was necessary, (see *Caffrey v. The Financial Services Ombudsman* [2011] IEHC 285, (Unreported, High Court, Hedigan J. 2011)). I adopt what was held by MacMenamin J. in *Ryan v. The Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011) and *Molloy v. The Financial Services Ombudsman* (Unreported, MacMenamin J., High Court, 15th April, 2011), that the courts have consistently deprecated any tendency to seek to make a case that was not advanced before the respondent and, save for some very fundamental issue emerging, will be slow to grant relief when the respondent was not given the opportunity to consider the point at first instance. However, for the reasons set out in this judgment, I am satisfied that such a very fundamental issue arises in respect of each of the matters which I have identified as requiring the holding of an oral hearing by the respondent.

84. It is of the utmost importance to stress that I do not make and have not made in the course of this judgment any finding whatsoever on the merits or otherwise of the appellant's complaints or any of them.

85. In exercise of the power vested in this Court by the provisions of s. 57CM(1) of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, the court will make an order setting aside the Finding of the respondent dated the 24th May, 2012, and will remit the matter to the respondent to review same in accordance with the terms of this judgment.

Approved.

David Nolan.