THE HIGH COURT

[2010 No.320 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57 CL (1), PART V11B OF THE CENTRAL BANK ACT, 1942, (AS INSERTED BY SECTION 16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004) AND ORDER 84 C OF THE RULESOF THE SUPERIOR COURTS

BETWEEN

JOHN CAFFREY

APPELLANT

V.

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ANGUS MCDONNELL, JOHN MAGUIRE, ARTHUR QUINLAN, DAVID HARLOW, RAYMOND DEASY, PETER COSTIGAN, AIDAN SHEERIN, ANNE BARRETT, MARTIN HARTE, FBD SECURITIES LIMITED, PRACTISING UNDER THE STYLE AND TITLE OF BLOXHAM

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered the 12th day of July 2011

1. The appellant resides at 1 La Touche Park, Greystones, County Wicklow.

The respondent is a statutory officer who deals independently with complaints from consumers about their individual dealings with all financial services providers.

2. The appellant seeks the following relief:-

(1) An Order pursuant to section 57CM (2)(B) of the Central Bank Act, 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004, setting aside the decision of the Financial Services Ombudsman of 22, November 2010.

(2) Further or in the alternative, and without prejudice to the foregoing, an Order pursuant to section 57 CM (2) (C) of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act, 2004, remitting to the Ombudsman for review in accordance with the directions of this Honourable Court the decision of 22 November, 2010 for the reasons set out in the notice of motion and any other reasons which may be adduced at the hearing of this action;

(3) Such further or other order as the Honourable Court should deem fit;

(4) An order providing for the costs of and incidental to this application.

3.1 In or about March 2005, the appellant became aware from Bloxham's Equity Research Quarterly Newsletter the "Quarterly Newsletter", of what was described as the Dresdner Bond. In the Quarterly Newsletter, under a section entitled "Corporate Bonds" the Dresdner Bond was listed as having a 6.25% yield with a maturity date of 2031. The credit rating was described as "A". Further, the Quarterly Newsletter stated: "The Dresdner Bond pays 6.25% per annum for the first five years followed by 4 x (10 yr Euribor –2yr Euribor). All of the Bonds should benefit from rising yields." After reading the Quarterly Newsletter, the appellant contacted Daniel Kiely of Bloxham Stockbrokers.

The contents of this conversation are in dispute between the appellant and the notice party. The appellant claims that he was given the impression that Dresdner Bank AG guaranteed the return of the monies invested. The notice party claims that it explained the nature of the Bond to the appellant informing him that total loss was possible, but unlikely. The conversation between the appellant and Daniel Kiely lasted only a few minutes and the appellant avers in paragraph 6 of his first affidavit that at no time was the true nature or essential features of the Bond and the risks inherent thereto explained to him. The appellant claims that he was not informed that the Bonds were in fact notes issued by Saturn Investments Europe plc and that the investment was linked to a US dollar currency bond. Moreover, the appellant claims that he was not advised that there was a swap agreement in place with Morgan Stanley.

3.2 A contract note issued to the appellant on 15th April, 2005, recording the purchase price of €50,000. The contract note referred to "Saturn's Investment Europe plc 6.25% NTS 05/07/31 EUR 1000". An accompanying letter confirmed the purchase of the Dresdner Bond and stated that for "administrative reasons this appears as Saturn's in stock description line above". The letter described this as a "brand name and in no way effects any of the terms of the Bonds that you have bought." On the 5th December, 2008 the appellant telephoned Daniel Kiely of Bloxham Stockbrokers to enquire how the Bond was performing. On the 29th June, 2009, Bloxham Stockbrokers wrote to the appellant informing him that Morgan Stanley had terminated the Swap Agreement with Saturn, and that the appellant would only receive €0.03 per €1 originally invested.

3.3 On the 15th February, 2010, the appellant submitted a complaint to the Financial Services Ombudsman. The appellant complained that at no time during his conversation with Daniel Kiely was the true nature of the Bond and the risks inherent thereto explained to him. On the 14th April, 2010, Bloxham submitted its final response to the complaint. On 30th April, 2010, the appellant set out its response to that letter. On 23rd August, 2010, the appellant received a copy of the response from Bloxham Stockbrokers to questions put to it by the Financial Services Ombudsman. On 3rd September, 2010, the appellant responded to the response of Bloxham Stockbrokers by way of letter addressed to the Financial Services Ombudsman. On 6th October, 2010, Bloxham submitted its response thereto.

3.4 On 22nd November, 2010, the appellant received a letter from the Financial Services Ombudsman stating that the investigation into the complaint had concluded and enclosing a copy of the finding. In its finding the Ombudsman held *inter alia* as follows:-

> "The Complainant had been a client of Bloxham for over twenty years, and was classified as an advisory retail client. His portfolio is largely made up of shares, and the Complainant operates a CFD account with Bloxham. Upon receipt of Bloxham's Quarterly Newsletter, Bloxham states that the Complainant contacted Mr. Daniel Kiely, a broker employed by Bloxham. The Complainant indicated that he required a long-term source of income from the funds he wished to invest at a better rate than was available on deposit. The Bond offered a good level of income.
>
> ...

Bloxham portrayed the Complainant as '... an experienced investor who... previously invested in equities through Bloxham and has also operated a contract for difference account with Bloxham.

...

Bloxham say that it told the Complainant that total loss was possible, but unlikely. The order to purchase the Bond was made by the Complainant over the telephone. The Complainant was 72 at the time of making the investment and says that because it could not be encashed until 2031, it was inherently unsuitable. However, it does not appear to be correct to say that the Bond could not be sold until 2031.

...

The Complainant was an experienced investor. The Bond was purchased by the Complainant in the secondary market 'below par'. In and of itself, this told the Complainant that the value of the investment might fluctuate.

I consider that the investment was sold in good faith by the Provider, *inter alia* on the basis that it provided the Complainant with the potentially high return that he was seeking. I am satisfied that the Provider reasonably considered that the investment was relatively secure, but also that the Complainant was advised of and knew of the possibility of fluctuation in its value.

More fundamentally, I do not perceive in this case the likelihood of any causal link between any fault on the part of the Provider, and the loss that has been sustained by the Complainant. I perceive there to be quite a degree of artificiality about a number of the submissions advanced on behalf of the Complainant, when analysing

in 2010 the circumstances surrounding the inception of this investment in March 2005.

In the overall circumstances, I do not consider that it is just to fix the Provider with responsibility for the loss that has been incurred by the Complainant.

The Complaint is not substantiated."

In these proceedings the appellant seeks to challenge this finding on the basis *inter alia* that the Ombudsman erred in accepting the notice party's evidence regarding the crucial telephone conversation and in finding that the notice party had not misrepresented the nature of the investment. The appellant also submits that the Ombudsman attached too much weight to the contention that he had significant investment experience.

Applicants Submissions

4.1 The applicant submits that the Financial Services Ombudsman erred in law and in fact so that his decision is vitiated by a serious and significant error by accepting the evidence of the notice party at face value in respect of the information allegedly given to the appellant at the point of sale i.e. the telephone conversation with Daniel Kiely of Bloxham Stockbrokers. The dispute between the parties made it imperative that the Ombudsman investigate this conflict. A blanket acceptance of the notice party's evidence, submitted by a person not a party to the telephone conversation, was a manifest error that undermines the entirety of the Ombudsman's finding.

4.2 The applicant further submits that the decision of the Ombudsman is vitiated by a serious and significant error by reason of the failure to find that the notice party had

misrepresented the nature of the investment to the appellant by describing it as "Dresdner 6.25%, 2031 bond, with a credit rating of A" and by failing to inform the appellant that the instrument was in fact issued by Saturn Investment Europe plc. In addition, the notice party did not inform the appellant that his investment was subject to a complex swap agreement susceptible to termination by Morgan Stanley. There was a complete deficit of disclosure on behalf of the notice party as regards the negative features of the Dresdner Bond. The Ombudsman failed to appreciate the significance of the non disclosure of this information and failed to attach the appropriate weight thereto.

4.3 The Ombudsman erred by attaching too much weight to Bloxham's contention that the appellant had significant investment experience. The Ombudsman further erred by placing undue emphasis on the fact that the appellant had a 'contracts for difference' ("CFD") account with Bloxham. The appellant was not a sophisticated investor, and had only one CFD account on the advice of Bloxham in respect of a company with which he had been a shareholder, the vast majority of his investments were in managed funds.

4.4 The appellant submits that the conflicting evidence surrounding the information allegedly given to the appellant at the point of sale, made it imperative that the Ombudsman investigate the conflict of detail by way of oral hearing rather than simply relying on written submissions. In *J&E Davy T/A Davy v Financial Services Ombudsman* [2010] IESC 30, the issue of when the Ombudsman should hold an oral hearing was addressed by Finnegan J. in the Supreme Court as follows:-

"Assuming, as conceded by the Ombudsman, that there is a power to direct an oral hearing, then it would be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact. There is here such conflict in relation to the oral evidence given by Davy to the Credit Union and also in relation to the expert evidence as to the nature of the bonds...

What I have to decide... is whether the dispute between the parties as to (a) the reliability of the evidence before the Appeals Officer, was the Applicant's and Mr Higgins on the one hand and (b) on the accuracy of the departmental records on the other, made it imperative that the witness be examined (and if necessary cross-examined under oath before the Appeals Officer).

I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment of the issues which arose in this case."

The Ombudsman accepted without investigation Bloxham's version of the telephone conversation that took place between the appellant and Daniel Kiely of Bloxham's on the 14th April, 2005. In paragraph 3 of his second affidavit, the appellant avers that the claim by the notice party that he received a detailed description during the telephone conversation, of the Dresdner Bond and the level of risk attaching thereto is false. Bloxham's response to the schedule of questions of August 2010, contrasts radically with the appellant's recollection of the telephone conversation with Daniel Kiely. There is no requirement on the appellant to request an oral hearing of his own accord. The Ombudsman, in order to fulfil its statutory obligations, ought to have acknowledged that

this unequivocal dispute of fact required an oral hearing in order to be appropriately resolved.

4.5 In the notice party's final response of 14th April, 2010, it states as follows:

> "It was explained to Mr Caffrey prior to his decision to invest that the Dresdner Bond is a dollar denominated bond. Morgan Stanley set up Saturn's to purchase the dollar Dresdner Bond. Saturn's then entered into an agreement for the swapping of the dollar income from the Dresdner Bond to a euro amount which resulted in the fixed payment to Mr Caffrey for the first 5 years of 6.25% and the floating rate thereafter in accordance with the terms of the investment. The effect of this swap agreement was to remove currency risk for Mr Caffrey in respect of the annual income and the planned repayment on maturity.
>
> Further Mr. Caffrey was told by Bloxham that there was a risk that he might lose some or all of his investment. Indeed at the time of Mr Caffrey's purchase of the Dresdner/Saturn Bond, it was in fact trading below par, clearly indicating that the value of the capital investment could decrease during the lifetime of the Bond. However, it was of course also explained to him that in Bloxham's view, at that time, having regard to the underlining collateral, namely Dresdner, that total loss was unlikely, but nevertheless still possible."

With regard to the phone call between the appellant and Mr Kiely, Bloxham's reply states:

> "Mr Caffrey contacted Mr. Kiely and discussed with him verbally a number of corporate bonds, including the Bond and decided to invest in the Bond. Specifically

he would have discussed the fundamentals of the Dresdner Bank and the rating attached to the Bank at that time. That was the usual practice; the order to purchase the Bond was made by Mr Caffrey by telephone. Bloxham duly executed Mr Caffrey's instruction to purchase the Bond and a Contract Note issued to Mr Caffrey."

The appellant complains that this information was accepted by the Ombudsman and points out that the information came from a person who was not even party to the telephone conversation. The appellant submits that the Ombudsman should have sought a recording of the telephone conversation or he should have sought evidence directly from Daniel Kiely. Instead the Ombudsman accepted at face value a third party account of the telephone conversation. It is further submitted that this is an infirmity in the reasoning of the Ombudsman which can only be cured by setting aside the decision of 22nd November, 2010.

4.6 In the affidavit of William Prasifka, the Ombudsman avers that the appellant has no legal entitlement to introduce new evidence as to the appellant's investment history. The appellant submits that the investment history formed part of the material before the Ombudsman. Bloxham's submission of August 2010, depicts that appellant as a sophisticated investor. It is submitted that the Ombudsman drew an erroneous inference from the assertions that the appellant was a sophisticated investor. It is submitted that for all the above mentioned reasons the finding of the Ombudsman of 22 November 2010 should be set aside.

Respondents Submissions

5.1 The appellant herein seeks to challenge the finding of the 22nd November, 2010, in which the Ombudsman decided not to uphold his complaint against the notice party. The main procedural complaint is to the effect that the Ombudsman erred in failing to require Bloxham to produce a recording of a telephone conversation or by not requiring them to give evidence on oath of the contents of the call. The Ombudsman submits that the appellant has failed to establish that the finding was vitiated by serious error. While a statutory appeal is not a judicial review, it nevertheless bears many of the features of a judicial review. In particular it is clear that there can be an error within jurisdiction in so far as there may be an error that falls short of being a "serious and significant error".

5.2 Section 57 BB of the Central Bank and Financial Services Ombudsman Act 2004, provides that the Ombudsman's purpose is to enable complaints to be dealt with in an informal and expeditious manner. The Oireachtas has provided for an informal, expeditious and independent mechanism for the resolution of complaints. The function performed by the Ombudsman is different to the function traditionally performed by the Courts, as he is specially enjoined not to have regard to technicality or legal form. The Ombudsman also resolves disputes using criteria that would not normally be used by the Courts. It is submitted that this Court should not review the finding made by the Ombudsman as though it were reviewing the procedures adopted by an inferior court and should not apply the same standards of procedure as it would to a court.

5.3 The appellant submitted a detailed and well argued compliant. However Bloxham put in an equally detailed and well argued response in which it addressed each of the points made. Thus this was not a case where the financial service provider was unable to answer the criticisms made of it. The Ombudsman had to come down on one side or the other and, having considered all the submissions of the appellant and the notice party, he came down on the side of the notice party. That was a matter that was within the jurisdiction of the Ombudsman to do. During the investigation the appellant declined the opportunity to mediate the complaint, declined the offer from Bloxham to join him to its case in the English courts against Morgan Stanley, and declined a without prejudice offer from Bloxham.

5.4 In its submissions to the Ombudsman Bloxham stated that Mr Caffrey is an experienced investor who previously invested in equities through Bloxham and has also operated CFD accounts with Bloxham. This is an accurate statement of the position and the appellant has not adduced anything to suggest that it is incorrect. The appellant was an experienced investor who had been a client of Bloxham for over 20 years. A CFD is not an instrument that one would expect an ordinary inexperienced investor to invest in. Anyone who has invested in a CFD must know, or must be deemed to know, that whilst the rewards of investing can be great, equally so can the losses. In the present case he bought a bond on the open market at below par. Indeed Bloxham submitted a form signed by the appellant in what appears to be mid 2006 for a CFD transaction in which :

i) It confirms that he understands the nature and risks of margined (geared) transactions, and

ii) It confirms that he has experience of trading margined (or geared) products e.g. spot, FX futures, options, warrants, CFDs or spread betting.

5.5 The appellant learnt about the bond from a quarterly review newsletter that clearly stated:-

> "The publication is solely for information purposes and cannot be construed as a representation by Bloxham. The views in this report are expressions of opinion and are given in good faith, but are not guaranteed. These are subject to change without notice."

Mr Kiely only met with Mr Caffrey once, in July 2009, following the termination of the agreement by Morgan Stanley. It was Mr Caffrey's usual practice to give instructions in relation to his account by telephone. Mr Caffrey discussed with Bloxham the possibility of selling the bond in 2008 (when it traded at approximately 83), but decided that given the attractive coupon attached to the bond and the perceived likelihood of the Bond being called at its first call date, that he would retain the bond. In all the circumstances, based on the materials that were submitted to him, the Ombudsman was entitled to conclude that this investment was sold in good faith by the notice party and that the complainant was advised of and knew of the possibility of fluctuation in its value.

5.6 The appellant complains that the Ombudsman erred in failing to require the notice party to produce a recording of the telephone conversation in which the impugned bond was sold. In his letter to the Ombudsman dated 3rd September, 2010, Mr Moynihan acting on behalf of the appellant stated that:-

"my offer to donate €1,000 to a charity of the FSO's choice if Bloxham could produce a tape recording or any other evidence substantiating their claim still stands.(page 462 of the hearing booklet).

In its letter to the Ombudsman of 6th October, 2010 the notice party indicated that it did not retain a tape recording from the time in question:

"It is suggested that 'all 2005 tapes were destroyed a soon as [Bloxham] realised they had a problem with the Saturn investment'. This statement is untrue. Bloxham is required to retain recordings of telephone calls for a period of six months only. In practice it may have tapes for a longer period but has not had tapes from 2005 since 2007. We believe that Mr Moynihan is so aware having regard to knowledge gleaned in other cases with which he is involved, wherein Bloxham has confirmed that it does not have recordings from what is now over five years ago." (page 653 of the hearing booklet)

There is nothing to suggest that the notice party was not being truthful when it stated this.

5.7 The respondent submits that the Ombudsman acted within jurisdiction in making his finding without holding an oral hearing. In paragraph 45 of his affidavit the Ombudsman addressed the issue and explained that:

"I say that I did not believe that an oral hearing was necessary for me in order to make my Finding and I exercised my discretion not to hold one. At no stage during the investigation did the appellant or indeed the notice party request an oral hearing or suggest that one was necessary. Whilst a formal request is not a prerequisite to

the holding of an oral hearing, I say that the fact that one was never requested or suggested supports the manner in which I exercised my discretion on the issue."

It is submitted that the appellant has not pointed to anything that would lead one to the conclusion that the FSO made a manifest error in not directing an oral hearing in the present case. One might question what account persons would have been able to give of a telephone conversation that had happened some five years previously. For example at page 320 of the hearing booklets the appellant states that "I have no memory of any reference at that stage to a US Dollar bond or currency hedges."

5.8 The appellant has referred to various matters in his affidavit such as particular details of his investment history which were not before the Ombudsman. Self-evidently the Ombudsman could only make a decision based on the evidence that had been forwarded to him. No leave has been sought by the appellant to adduce any fresh evidence and it is submitted that the Ombudsman's Finding can only be reviewed by the appellant on the basis of the evidence that was submitted to the Ombudsman. In *Ulster Bank v Financial Services Ombudsman & Ors* [2006] IEHC 323, Finnegan P (as he then was) stated:

> "Having regard to my decision on the standard of review it is appropriate that the appeal should proceed on the basis of the materials which were before the Financial Services Ombudsman only. The Court however has a discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate in the interests of justice."

The test postulated by Finnegan P requires this Court to take the adjudicative process as a whole to see if the decision made was vitiated by a serious and significant error. It is submitted that when one considers the present case as a whole there is no sufficient basis made out for this Court to intervene in respect of the decision made. For all of the above mentioned reasons, it is respectfully submitted that the appellants appeal should stand refused.

Decision of the Court

6.1 In March 2005, the appellant became aware from Bloxham's Quarterly Newsletter of the Dresdner Bond. The Newsletter stated: "The Dresdner Bond pays 6.25% per annum for the first five years followed by 4 x (10 yr Euribor –2yr Euribor). All of the Bonds should benefit from rising yields." After reading the Newsletter, the appellant contacted Daniel Kiely of Bloxham Stockbrokers. The appellant claims that he was not informed that the Bonds were in fact notes issued by Saturn Investments Europe plc and that there was a swap agreement in place with Morgan Stanley. The notice party claims that it explained the nature of the bond and that total loss was possible, but unlikely.
A contract note issued to the appellant in April, 2005, which referred to "Saturn's Investment Europe plc 6.25% NTS 05/07/31 EUR 1000". An accompanying letter confirmed the purchase of the Dresdner Bond and stated that for "administrative reasons this appears as Saturn's in stock description line above". In December, 2008 the appellant telephoned Daniel Kiely to enquire how the Bond was performing. In June, 2009, Bloxham Stockbrokers wrote to the appellant informing him that Morgan Stanley had terminated the Swap Agreement with Saturn, and that the appellant would only receive

€0.03 per €1 originally invested. In February, 2010, the appellant complained to the Financial Services Ombudsman that during his conversation with Daniel Kiely the true nature of the Bond was not explained to him. Bloxham denied this in its response. On the 22nd November, 2010 the Ombudsman issued its finding holding that the complaint was not substantiated.

6.2 To succeed in his appeal the appellant must satisfy the test laid down in *Ulster Bank v Financial Services Ombudsman & Ors* [2006] IEHC 323 where Finnegan P stated at 9:-

> "...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."

The applicant submits that the Financial Services Ombudsman's decision is vitiated by a serious and significant error because the dispute between the parties made it imperative that the Ombudsman investigate the conflict by way of oral hearing, which he failed to do.

6.3 It is clear that Ombudsman enjoys a broad discretion as to whether or not to hold an oral hearing. In *Davy v Financial Services Ombudsman* [2010] IESC 30 reference was made to the judgment of *Galvin v Chief Appeals Officer* [1997] 3 I.R. 240 where Costello P said:

> "There are no hard and fast rules to the guide appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding

of an oral hearing. The case like others must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing"

In *Davy* the Court had to decide whether the dispute between the parties made it imperative that an oral hearing be held. In that case the Court concluded that a hearing was necessary.

6.4 In paragraph 45 of his affidavit the Ombudsman addressed the issue of an oral hearing and explained that:

"I say that I did not believe that an oral hearing was necessary for me in order to make my Finding and I exercised my discretion not to hold one. At no stage during the investigation did the appellant or indeed the notice party request an oral hearing or suggest that one was necessary. Whilst a formal request is not a prerequisite to the holding of an oral hearing, I say that the fact that one was never requested or suggested supports the manner in which I exercised my discretion on the issue."

The Ombudsman exercised his discretion not to hold an oral hearing. It is doubtful that the parties would have been in a position to give an accurate and detailed description as to the contents of a short telephone conversation that occurred five years previously. This is borne out by page three of the appellant's responding submission of the 30th April, 2010, he states:-

"I have no memory of any reference at that stage to 'a US dollar bond' or 'currency hedges.'

In the case of *Molloy v. Financial Services Ombudsman* (Unreported High Court 15th April, 2011) a respondent sought an oral hearing five years after the events complained of. McMenamin J held as follows at 13:-

> "It is necessary to bear in mind that what was before the FSO were matters which had taken place five years previously in 2005. Thus, other than looking at the documents, It is now unclear what effect an oral hearing would have had other than to demonstrate that Ms Finn had no recollection of what happened and/or that the documents at least indicated that Mr Cantwell had drawn the applicants attention to some parts of Section C. An inference from all this that an oral hearing would not have progressed matters further was not unreasonable and was within the FSO's statutory remit. It is not reasonably established, even taking into account the case at its height, and accepting that the appellant could have shown that Bank officials had imperfect recollections, even different recollections, that an oral hearing would have affected the outcome."

It seems to me that in this case the fact that no oral hearing was requested is a factor that should be weighed in the balance. I am satisfied that it was reasonable for the Ombudsman to determine that an oral hearing was unnecessary. This was a decision made within jurisdiction.

6.5 An issue has been raised in this case as to whether the Ombudsman should have made an order requiring the notice party to produce a recording of the disputed telephone conversation. The appellant's Representative Mr Moynihan wrote to the Ombudsman on the 3rd September, 2010, stating that:-

"my offer to donate €1,000 to a charity of the FSO's choice if Bloxham could produce a tape recording or any other evidence substantiating their claim still stands." (page 462 of the hearing booklet).

the notice party wrote to the Ombudsman on the 6th October, 2010, stating that:-

"Bloxham ... has not had tapes from 2005 since 2007. We believe that Mr Moynihan is so aware having regard to knowledge gleaned in other cases with which he is involved...."

It seems to me that it was clear to all that no such tape recording existed and in these circumstances it would have been futile for the Ombudsman to make a production order in this case.

6.6 The appellant submits that Bloxham's wrongly depicted him as a sophisticated investor. In his affidavit the appellant seeks to contradict this portrayal by giving a detailed account of his investment history. The respondent argues that no leave has been sought by the appellant to adduce any fresh evidence and it is submitted that the Ombudsman's Finding can only be reviewed by the appellant on the basis of the evidence that was submitted to the Ombudsman. At the heart of this issue is the question of what level of expertise was attributed to the appellant. In his finding the Ombudsman stated that:-

"The Complainant had been a client of Bloxham for over twenty years, and was classified as an advisory retail client. His portfolio is largely made up of shares, and the Complainant operates a CFD account with Bloxham...

...

> Bloxham portrayed the Complainant as '... an experienced investor who... previously invested in equities through Bloxham and has also operated a contract for difference account with Bloxham.
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> ...
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> The Complainant was an experienced investor. The Bond was purchased by the Complainant in the secondary market 'below par'. In and of itself, this told the Complainant that the value of the investment might fluctuate."

To describe the complainant as a sophisticated investor would be to attribute a high level of expertise in financial instruments to the appellant. The Ombudsman never described the appellant as being a "sophisticated investor" in his finding. What the Ombudsman in fact said was that the appellant was an "experienced investor" this is a very different thing. It was reasonable for the Ombudsman to conclude that based on the length of time that the appellant was a client of Bloxham and the type of accounts that he held with them that he was an experienced investor and this was a factor which the Ombudsman was entitled to weigh in the balance in making his decision. It seems to me that whether or not the appellant was entitled to introduce new evidence to show he was not a sophisticated investor is largely irrelevant as he was not found to be a sophisticated investor by the Ombudsman. I am not satisfied that there is a sufficient basis for the Court to intervene in the decision made by the Ombudsman. For all the above mentioned reasons I must refuse the relief sought herein.