

APPROVED

[2022] IEHC 47

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 70 J.R.

BETWEEN

THE TRUSTEES OF THE VODAFONE IRELAND PENSION PLAN

EAMON FARRELL
MIKE O'CONNOR
JOHN KEANEY
IRISH PENSIONS TRUST LIMITED
MICHAEL FARRELL
BRIAN KAVANAGH
KEITH DALY

APPLICANTS

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

GERRY FAHY

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 February 2022

INTRODUCTION

1. This judgment addresses the interpretation and application of the limitation periods governing the making of complaints to the Financial Services and Pensions Ombudsman. More specifically, it considers the application of the limitation periods to conduct which is of a serial or continuing nature.

NO REDACTION REQUIRED

RELEVANT STATUTORY PROVISIONS

2. Section 51(2) of the Financial Services and Pensions Ombudsman Act 2017 prescribes limitation periods for the making of complaints to the ombudsman.

A complaint must be made within whichever of the following periods is the last to expire:

- (i) 6 years from the date of the conduct giving rise to the complaint;
- (ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;
- (iii) such longer period as the ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

3. Section 51(5) of the Act provides as follows:

“For the purposes of subsections (1) and (2)—

- (a) conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred, and
- (b) conduct that consists of a single act or omission is taken to have occurred on the date of that act or omission.”

4. As appears, the default position under the Financial Services and Pensions Ombudsman Act 2017 is that the limitation period is to be calculated by

reference to the date of occurrence of “*conduct*” on the part of the pension provider. It bears emphasising that the state of knowledge of a putative complainant is not relevant to the default position. It is only in circumstances where a putative complainant seeks to rely upon one of the alternative bases for calculating the limitation period that it becomes relevant to identify the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint.

5. The Act contemplates that the “*conduct*” complained of may consist of a single act or omission, a series of acts or omissions, or may be of a continuing nature. Time only begins to run for the purpose of the limitation period from the date upon which the conduct has stopped, or from the date of the last of a series of acts or omissions. This feature distinguishes the approach under the Financial Services and Pensions Ombudsman Act 2017 from that typically taken in respect of limitation periods prescribed for legal proceedings. Such limitation periods are generally defined as running from the date of a singular event. For example, the three month time-limit prescribed for judicial review proceedings runs from the date when grounds for the application first arose. This will very often be the date of a formal decision made by the public authority. The fact that the decision is repeated or reiterated subsequently will not normally be treated as a separate event which starts time running afresh.
6. Section 52(4) of the Act provides that the ombudsman “*shall*” determine a complaint to be inadmissible where it was made after the expiry of the time-limits specified in section 51. The parties are agreed that the limitation periods go to the ombudsman’s jurisdiction. This is relevant to the discussion of section 50 of the Act, at paragraphs 46 *et seq.* below.

CHRONOLOGY

7. These judicial review proceedings seek to challenge a preliminary decision on the admissibility of a complaint to the Financial Services and Pensions Ombudsman (“*the ombudsman*”). The ombudsman determined that the relevant complaint had been made within the prescribed limitation period.
8. The complaint had been submitted to the ombudsman by the notice party, Mr. Fahy (“*the complainant*” or “*the pensioner*” as convenient). The complainant had been a member of a pension scheme known as the Vodafone Ireland Pension Plan (“*the pension scheme*”). The complaint was made against the trustees of the pension scheme (“*the pension provider*”).
9. The precise parameters of the complaint made is itself an issue of controversy between the parties. For present introductory purposes, it is sufficient to state that the complaint relates to the complainant’s entitlements under the pension scheme.
10. The rules governing the pension scheme are embodied in a number of trust deeds. The rules were amended by a deed of amendment executed in the year 2012. The complainant contends that this amendment did not affect his pension entitlements in circumstances where he had already retired as an employee a number of months *prior to* the coming into force of the amended rules. The pension provider disputes this interpretation of the effect of the deed of amendment.
11. It should be explained that whereas the complainant would not be entitled to have direct access to the funds held on his behalf in the pension scheme until he reached the age of 60 years, he did have the right, in the interim, to transfer the

funds from the pension scheme to another approved pension arrangement. To this end, the pension provider was obliged to furnish, on request, details of the transfer value of the funds.

12. The complaint was submitted to the ombudsman on 24 August 2018. This followed the exhaustion of the pension provider's internal dispute resolution procedure (in accordance with section 55 of the Financial Services and Pensions Ombudsman Act 2017).
13. The proximate cause of complaint had been the issuance of a statement by the pension provider on 16 February 2018 setting out the complainant's pension benefits. This statement had been requested by the complainant in the lead-up to his sixtieth birthday in August 2018. It was apparent from the statement that the transfer value of his pension benefits had been calculated on the basis that the amended rules were applicable to the complainant's circumstances, notwithstanding his retirement from the company in 2011. The differential between the two bases of calculation is very significant: were the amended rules to apply, then the transfer value of the complainant's pension benefits is reduced by more than one million euro.
14. The pension provider contends that, for the purpose of the limitation period, time should be taken as running from 2012 and not from 2018. More specifically, it is said that the limitation period should be calculated from the date of the amendment of the rules of the pension scheme in 2012. It is further said that the subsequent quotation of the transfer value represented no more than the reflection of the "*mathematical consequences*" of the amendment.

15. The pension provider places special reliance on a letter dated 7 June 2012 from their agent, AON Hewitt, to the complainant setting out the transfer value of his pension benefits. The letter, in relevant part, reads as follows:

“As you are aware, Rules 10 and 18.1.6 of Schedule III (Scheme C) have been amended with effect from 20 May 2012. Accordingly, the transfer value available to you has been calculated by reference to the amended Rules and does not make any provision for future discretionary pension increases (once in payment) in respect of the benefits accruing to you based on pensionable service completed to 14 December 2005. The Trustees may consider at some future date whether to factor in some allowance for future discretionary pension increases in the calculation of transfer values, however, no such decision has been taken at this time and there is no guarantee that such a decision will be taken in the future.”

16. As appears, it is expressly stated that the transfer value has been calculated by reference to the amended rules of the pension scheme.
17. Counsel on behalf of the pension provider has taken the court to other contemporaneous correspondence which it is said establishes that not only did the complainant know in 2012 that his pension entitlements were affected by the deed of amendment, he had actually known in advance of the intention to amend the pension scheme. The complainant had, seemingly, been a trustee of the pension scheme prior to his retirement. Counsel makes much of the fact that the complainant had, by letter dated 22 August 2011, intimated that he was considering referring any proposal likely to cause a reduction or diminution in his pension benefits to the Pensions Board or other qualified party. Attention is also drawn to a letter of 4 March 2012 wherein the complainant reserved the right to take whatever action was necessary to protect the value of his pension; and to a subsequent letter of 9 May 2012 calling upon the pension provider to

defer executing the deed of amendment until he had received confirmation that his pension benefits would not be reduced.

18. It is submitted that notwithstanding these threats of action in 2011 and 2012, the complainant elected not to pursue any challenge to the amendment of the pension scheme and elected instead to lie fallow for six years.

OMBUDSMAN'S DECISION ON LIMITATION PERIOD

19. The pension provider, through its solicitors, made a substantive response to the complaint on 19 June 2019. As part of this response, an objection was raised in respect of the limitation period. Relevantly, the conduct complained of was characterised as being the execution of the deed of amendment on 20 May 2012. On this analysis, a complaint made on 24 August 2018 was time-barred as having been made outside the six year period prescribed.
20. The ombudsman addressed this objection as follows by letter dated 4 July 2019:

“It is important that the Provider understands that the conduct of the Provider which it has suggested is not the conduct which is the subject of this complaint.

Rather, the Provider's conduct complained of, is as outlined within the Summary of Complaint issued by this office on 18 April 2019 i.e. that the Provider has failed to preserve the Complainant's pension benefits, including post retirement increases falling due, following the Complainant's cessation of service with the employer. The Complainant ceased employment on 31 July 2011, some 10 months prior to the execution by the Provider of the Deed of Amendment, which is referred to in your letter.

I would ask the Provider to note that the Complainant has not sought to take issue with the Provider's execution of a Deed of Amendment. Rather, the Complainant has taken issue with the Provider's interpretation of the consequences of that Deed of Amendment, and he has raised a complaint that the Provider has wrongfully calculated his transfer value. As the Provider is no doubt aware, the Provider's own IDR form, refers to the quotation the Complainant received in 2018,

which it seems at that stage, drew his attention to this issue. I note that shortly thereafter, in August 2018, the Complainant made his complaint to this office.”

21. There was then further correspondence between the parties in respect of the application of the limitation period. The formal position of the ombudsman is set out in a letter dated 30 October 2019. This is the decision that is challenged in these judicial review proceedings. That decision-letter, in relevant part, reads as follows:

“In addition, *Section 51(5)(a)* of the Act prescribes that for the purpose of such a complaint

‘conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred’.

This office has noted your reference to a letter of 7 June 2012 sent to the Complainant by the Provider in response to his request at that earlier time, for a note of the transfer value then available to him pursuant to the rules of the pension plan. The FSPO is in agreement with the Provider that if the Complainant had wished to proceed with a complaint at that time, it would have been open to him to do so.

The FSPO is however of the firm opinion that these interactions in 2012, in no way limit the Complainant’s entitlement to proceed by way of complaint to this office, regarding the calculation of the transfer value made available to him in February 2018.

The basis of the Complainant’s grievance is that the Provider has wrongfully calculated his transfer value. If the Provider believes that the transfer value calculation undertaken in 2012, was approached in a similar fashion as the Provider approached its transfer value calculation in 2018, then in such circumstances, those alleged wrongful calculations (as suggested by the Complainant, and as denied by the Provider) appear to fall within the provisions of *Section 51(5)* of the Act, and accordingly the complaint was made within the required time limit.

The FSPO does not accept that simply because the Complainant did not proceed by way of a formal complaint

in 2012 regarding the calculation of that earlier transfer value which he had received at that time, that this in some way limits his entitlement to make a complaint arising from a transfer value quote, which he requested and received in February 2018, the calculation of which he takes issue with.

It will be a matter for the FSPO to determine, in the course of the adjudication of the merits of the complaint as to whether or not the Complainant's entitlements have been affected in any way by the Deed of Amendment executed in May 2012. This is the dispute of fact or law, within the meaning of *Section 44(1)(b)(ii)* of the Act, which is for consideration by the FSPO in the course of the adjudication of this complaint."

22. For completeness, it is necessary to refer briefly to an exchange subsequent to the issuance of the decision-letter on 30 October 2019. By letter dated 19 December 2019, the solicitors acting on behalf of the pension provider raised a number of points in respect of the impugned decision. In particular, the solicitors sought confirmation of their understanding of the impugned determination as follows:

"Point (i): our understanding of the position set out in your letter is that you consider the conduct complained of in this matter to be the calculation of the transfer value of the Complainant's pension plan. We understand that you deem this to be conduct '*consisting of a series of acts or omissions*' which should be '*taken to have occurred when the last of those acts or omissions occurred*' pursuant to section 51(5)(a) of the FSPO Act 2017. Accordingly, since the Provider most recently provided a calculation of the transfer value to the Complainant in February 2018, we understand the FSPO's position to be that the conduct complained of should be taken to have occurred in February 2018. Since February 2018 was, pursuant to section 51(2)(b)(i) of the FSPO Act 2017, within 6 years of the date the complaint was submitted to the FSPO, the FSPO considers the complaint to have therefore been submitted to the FSPO within the required time limit."

23. By letter dated 7 January 2020, the ombudsman's office confirmed that this understanding was correct.

GROUNDS FOR JUDICIAL REVIEW

24. The statement of grounds filed by the pension provider is a model of clarity and conciseness. The gravamen of the pension provider's case is encapsulated as follows at paragraphs E 23 and E 24 thereof:

“The decision of the Respondent conflates a singular event (i.e. the 2012 Deed of Amendment) with the mathematical consequences of that event which would be reflected in any subsequent quotation of the transfer value of the Notice Party's pension entitlements (as calculated in accordance with the terms of the 2012 Deed of Amendment). It is clear from the letter of 30 October 2019 that the Respondent understands the essential ‘*dispute of fact or law*’ in the FSPO Complaint as comprising an assessment as to ‘*whether or not the [Notice Party's] entitlements have been affected in any way by the [2012 Deed of Amendment]*’, and there does not appear to be any dispute between the Applicants and the Respondent as to: (a) the effective date of the 2012 Deed of Amendment; (b) the notification of the Notice Party of an earlier quotation of transfer value (which reflected the clarification outlined in the 2012 Deed of Amendment) in June 2012.

In the circumstances, the Respondent has misinterpreted and/or misapplied the provisions of Sections 51(2)(i) and section 51(5) of the FSPO Act in determining that the reflection of the mathematical consequences of the 2012 Deed of Amendment in the February 2018 Statement of Transfer Value represents one of a ‘*a series of acts or omissions*’ such that the date of the February 2018 Statement of Transfer Value is the material date in determining whether a complaint about ‘*whether or not the [Notice Party's] entitlements have been affected in any way by the [2012 Deed of Amendment]*’ was submitted within the statutory time limit provided for under Section 51(2)(i) of the FSPO Act. This must be an incorrect interpretation and/or application of the relevant statutory provisions, as it essentially renders the statutory time limit provided for under Section 51(2)(i) of the FSPO Act redundant as regards the management and amendment of the rules of pension schemes (with the associated negative consequences for trustees regarding legal certainty surrounding steps taken by them). If the Respondent is correct in his view, then all that a pension member, such as the Notice Party, would be required to do to revive a complaint in relation to an otherwise time-barred event in the history of a pension scheme would be to request

a quotation of transfer value and then to rely upon the date of receipt of such quotation of transfer value for the purposes of Section 51(2)(i) of the FSPO Act.”

DISCUSSION AND DECISION

APPLICATION OF LIMITATION PERIOD IN THIS CASE

25. The pension provider’s case, as pleaded in the statement of grounds, is that the limitation period should be calculated from the date of the amendment of the rules of the pension scheme in 2012. This is characterised in the pleadings as a “*singular event*”, and it is said that the subsequent quotation of the transfer value of a member’s pension entitlements represents no more than the reflection of the “*mathematical consequences*” of the amendment. The ombudsman is said to have erred in determining that the furnishing of a figure for the transfer value in February 2018 represented one of a series of acts or omissions. In response to a direct question from the court, counsel for the pension provider confirmed that, on his case, there is “*only one event*” for the purpose of the limitation period, and that event is the amendment of the pension scheme in 2012.
26. On the pension provider’s argument, the six-year limitation period ran from the date of the amendment of the pension scheme; and the pensioner/complainant is not entitled to rely on the alternative three-year limitation period in circumstances where he had been on actual notice of the amendment, and of the financial implications of same for the transfer value of his pension benefits, since 7 June 2012 at the very latest.
27. For the reasons which follow, I have concluded that the pension provider’s case is predicated on a mischaracterisation of the complaint made to the ombudsman. The complaint actually made is to the effect that the pension provider has failed

to preserve the complainant's pension benefits, including post-retirement increases, by purporting to apply the terms of the amended pension scheme to the complainant's circumstances. The complainant insists that, on its proper interpretation, the amendment to the pension scheme does not apply to him, for reasons including, *inter alia*, the fact that he had ceased employment a number of months prior to the execution of the deed of amendment. The pensioner calls in aid certain clauses in the (unamended) pension scheme in support of his interpretation of the temporal effect of amendments. More generally, the pensioner relies on the provisions of Part III of the Pensions Act 1990.

28. Crucially, the pensioner/complainant does not seek to challenge the validity of the deed of amendment nor does he seek its rectification. Indeed, it would be doubtful whether the ombudsman would have jurisdiction to entertain complaints of this type given the wording of section 61 of the Act. Rather, the complaint actually made is more nuanced: it is alleged that the pension provider has misinterpreted or misunderstood the legal effect of the amendment. It is the continued conduct of the pension provider in refusing to acknowledge the enhanced value of the complainant's pension, by reference to the pre-2012 version of the pension scheme, that forms the subject-matter of the complaint.
29. The pension provider has consistently maintained the position that the 2012 amendment applies to the complainant's pension. This is implicit in the transfer value figures furnished to the complainant in June 2012 and February 2018. The pension provider's position has since been made explicit in the context of the internal dispute resolution process entered into prior to the making of the complaint to the ombudsman in August 2018. The pension provider had set out, in detail, its rationale for saying that the deed of amendment does apply. The

complaint to the ombudsman was submitted within a matter of weeks of the conclusion of this internal dispute resolution process.

30. The ombudsman has determined that the interactions between the pension provider and the pensioner/complainant in 2012 in no way limit the pensioner's entitlement to make a complaint regarding the calculation of the transfer value made available to him in February 2018. This is so notwithstanding that the ombudsman is in agreement with the pension provider that it would have been open to the pensioner to make a complaint in 2012.
31. The ombudsman's determination is correct. This is because the limitation period runs from the date of the *last* of a series of acts or omissions, not from the first. This is expressly provided for under section 51(5) of the 2017 Act. The index date is, therefore, the date of the occurrence of the most recent act complained of, namely the provision, in February 2018, of a statement of benefits which, on the pensioner's argument, entails a gross underestimation of the true transfer value of his pension.
32. Nothing has been said on behalf of the pension provider which establishes that its conduct in furnishing transfer value quotations in 2012 and 2018, respectively, entailed separate and distinct acts. Rather, the pension provider's entire case is predicated on there having been no change in its position between 2012 and 2018. It is said, variously, that there is nothing "*new*" or "*different*". It is expressly submitted that the "*reasoning and principles*" underlying the two quotations are identical, and that the gravamen of the complaint is the deed of amendment upon which both transfer value quotations are premised.
33. Counsel relies on case law in respect of the time-limits governing judicial review proceedings in support of the proposition that a decision which is a reiteration of

a previous decision is not a new decision, and that time, therefore, begins to run from when the decision had first been made (*Sfar v. Revenue Commissioners* [2016] IESC 15). It is said that it is artificial to suggest that the request for, and receipt of, an updated statement of the transfer value of the complainant's pension benefits represents a new event from which the limitation periods can be applied.

34. As explained earlier, the pension provider's characterisation of the complaint as directed to the deed of amendment is incorrect. For the purpose of the present discussion, however, it is significant that—far from seeking to demonstrate any break in continuity between the events of 2012 and 2018—the pension provider seeks to rely on the fact that it has been entirely consistent in its position that the pension now falls to be calculated by reference to the amended rules introduced by the deed of amendment in 2012. With respect, this argument proves too much, and ultimately undermines the pension provider's case on the limitation period. At the risk of belabouring the point, the approach to limitation periods under the Financial Services and Pensions Ombudsman Act 2017 is radically different from that governing legal proceedings, especially judicial review proceedings. The limitation period under the 2017 Act runs from the date of the *last* of a series of acts or omissions, not from the first.
35. The pension provider's reliance upon case law in respect of judicial review is thus misplaced. Moreover, even in the context of judicial review proceedings, the application of the three month time-limit is adjusted in circumstances where an administrative action has a continuing effect. See, for example, *Mungovan v. Clare County Council* [2020] IESC 17 (at paragraphs 19 and 20).

36. Finally, it should be observed that it is inaccurate to suggest that, in furnishing figures for the transfer value of the pension benefits, the pension provider has merely engaged in a mechanical mathematical exercise. Rather, in each instance, there will have been a logically anterior decision made on a *question of principle*, namely whether the amended rules should be applied to a person in the pensioner's position.

STANDARD OF JUDICIAL REVIEW

37. Thus far, the discussion has involved a consideration *de novo* of the underlying merits of the ombudsman's determination that the complaint has been made within the prescribed limitation period. Put otherwise, the judgment has proceeded, to this point, on the working hypothesis that the court is entitled to examine the correctness of the ombudsman's determination. I turn now to address whether this is, in truth, the appropriate standard of review, or whether the court should instead confine itself to a consideration of the legality of the ombudsman's determination.
38. The present proceedings take the form of an application for judicial review under Order 84 of the Rules of the Superior Courts, rather than a statutory appeal pursuant to Part 7 of the Financial Services and Pensions Ombudsman Act 2017. The statutory right of appeal is expressly confined to a "*decision*" of the ombudsman under section 60 or section 61. Put otherwise, the right of appeal is confined to a decision made by the ombudsman following the *completion* of the investigation of a complaint.
39. Here, the ombudsman has made a preliminary decision to the effect that the complaint has been submitted within the limitation period, and should be

investigated and determined. Both parties are agreed that the statutory right of appeal does not extend to a preliminary decision by the ombudsman on the eligibility of a complaint. Such a preliminary decision does not come within the meaning of “*decision*” for the purposes of Part 7 of the Act. This is because such a decision marks the *commencement* of the formal investigation, whereas the statutory right of appeal only arises upon the completion of the investigation.

40. There does not appear to have been much discussion, in the case law to date, of the appropriate standard of review to be applied in the context of judicial review proceedings. By contrast, there is a well-developed body of case law on the standard to be applied by the court in the context of a *statutory appeal* under Part 7 of the Financial Services and Pensions Ombudsman Act 2017. It is proposed to examine the principles identified in that case law, before turning to consider the extent to which those principles might translate to judicial review proceedings.
41. The case law on statutory appeals has been summarised most recently in *Molyneaux v. Financial Services and Pensions Ombudsman* [2021] IEHC 668 (at paragraphs 13 to 24). As appears, the courts have consistently held that a statutory appeal is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed against. The leading authority in this regard is the judgment of the High Court (Finnegan P.) in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323. The threshold for a successful statutory appeal was stated as follows (by reference to the statutory precursor of the Financial Services and Pensions Ombudsman Act 2017):

“[...] To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative

process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in *Orange v The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal*.”

42. The threshold is modified where the decision under appeal entails a determination on a question of law. The Court of Appeal confirmed in *Millar v. Financial Services Ombudsman* [2015] IECA 126 and 127; [2015] 2 I.R. 456; [2015] 2 I.L.R.M. 337 that the High Court, in hearing an appeal, should not adopt a deferential stance to a determination by the ombudsman on a “pure” question of law. The position is put as follows by Finlay Geoghegan J. at paragraphs 15 and 16 of her judgment (page 480 of the Irish Reports):

“I agree with the trial judge that where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, that the court should not adopt a deferential stance to the decision or determination on the question of law. This follows from the statutory scheme applicable to the Ombudsman and the judgments in *Orange Ltd v Director of Telecoms (No.2)* [2000] 4 I.R. 159 and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 and those following. Section 57CK(1) expressly permits the Ombudsman, at his own initiative, to refer a question of law to the High Court. The relevant deferential stance on appeal as explained by Keane C.J. in *Orange* at p.185 is that ‘...the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the [Ombudsman].’ With respect to the Ombudsman he does not have expertise or specialised knowledge, certainly relative to the High Court, in deciding questions of law.

However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High Court is required ‘to examine afresh’ that issue in the course of the appeal. Rather the correct position is that the general principles set out in *Ulster Bank Investment Funds*

Ltd v Financial Services Ombudsman still apply to the determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding. [...]”

43. I turn next to consider the extent, if any, to which these principles might be relevant to an application for judicial review.
44. The Financial Services and Pensions Ombudsman Act 2017 draws a sharp distinction between (i) the pre-investigation stage wherein the eligibility of a complaint is being assessed, and (ii) the investigation and decision-making stage. There is no right of appeal against a decision made at the first stage. Instead, a party aggrieved is confined to a remedy in judicial review.
45. The legislative intent thus appears to be that the grounds upon which the High Court can intervene to set aside a decision made at the first stage are narrower than at the second stage. The threshold to be met before a court will intervene on an application for judicial review will be higher than on a statutory appeal. This is because it is implicit in the creation of a statutory right of appeal against a decision of a public authority that the Oireachtas intended to confer a broader jurisdiction upon the High Court than that which it would enjoy in any event as part of its inherent judicial review jurisdiction. See, for example, *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 129 and 130).
46. This interpretation is borne out by reference to section 50(2) of the 2017 Act as follows:
- “Where a question arises as to whether the Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman whose decision shall be final.”
47. The effect of this section is to displace the normal assumption that a decision-maker does not have competence to rule on their own jurisdiction. Here, not

only does the ombudsman have such competence, his decision on a question of jurisdiction is expressed to be “*final*”. It should be emphasised, however, that the ombudsman does not contend that the section represents an ouster clause, intended to preclude judicial review of a determination by the ombudsman that a complaint has been made within the limitation periods prescribed under the 2017 Act. Rather, the ombudsman accepts that a decision on jurisdiction remains amenable to judicial review pursuant to Order 84 of the Rules of the Superior Courts. Nevertheless, the section, at the very least, indicates that some deference is to be shown to the ombudsman’s decision on a question of jurisdiction.

48. The pension provider contends that no deference need be shown to the ombudsman’s decision in circumstances where the dispute between the parties is said to present a question of statutory interpretation. The dispute is characterised as involving a pure question of law. It is said that there are very few, if any, facts in controversy.
49. With respect, the position is more nuanced than the submissions on behalf of the pension provider suggest. The assessment of whether a complaint to the ombudsman is time-barred is a mixed question of law and fact. Whereas the interpretation of the legislation—including, relevantly, the rules for the reckoning of time under section 51(5)—is a question of law for the court, the application of the legislation to the particular circumstances of any case may require the resolution of disputed questions of fact. This is certainly true of the present case. The principal area of disagreement between the parties centres on the characterisation of the complaint. As explained earlier, the pension provider seeks to portray the complaint as involving some sort of challenge to the rules

of the pension scheme introduced by way of deed of amendment in 2012. By contrast, the ombudsman has expressly found that the complainant has not sought to take issue with the execution of the deed of amendment, but rather has taken issue with the pension provider's interpretation of the consequences of that deed. (See, in particular, the ombudsman's letter of 4 July 2019, cited above at paragraph 20).

50. The making of a determination upon the nature and extent of a complaint is quintessentially a question of fact for the ombudsman. Similarly, the assessment of whether the conduct complained of represents serial or continuing conduct, or, alternatively, consists of a single act or omission, is a question of fact for the ombudsman. This court, on an application for judicial review under Order 84, would only intervene to set aside such a determination were an applicant able to demonstrate that the ombudsman's determination was unreasonable or irrational.
51. In the present case, the ombudsman has found, first, that the complaint is not directed to the execution of the deed of amendment; and, secondly, that the provision of the transfer value quotations in 2012 and 2018, respectively, are part of the same series of acts or omissions. Neither of these findings can be impeached as being irrational, nor as having been reached on an incorrect interpretation of the legislation. The application for judicial review therefore fails. As it happens, these two findings would have been upheld even had this court been entitled to consider the matter *de novo* (for the reasons set out under the previous heading above).
52. Finally, for completeness, it should be recorded that it would equally have been open to the ombudsman to have characterised the actions of the pension provider as conduct that is of a "*continuing nature*" for the purposes of section 51(5). The

section is not intended to create a rigid distinction between the overlapping concepts of a series of acts and of continuing conduct. The legislative intent is that where the conduct complained of is ongoing—as opposed to a single act or omission—then time does not run from the first event. This is so irrespective of whether the ongoing conduct is continuous or is intermittent, i.e. consisting of a series of acts or omissions.

53. Here, the complaint made is that the pension provider has consistently refused to acknowledge what the complainant insists is the correct basis of calculation for his pension benefits. The distinctive feature of the legislation is that time does not run from the first occasion upon which the conduct complained of occurred, i.e. the furnishing of a statement which, on the complainant's case, entails a gross underestimation of the transfer value of his pension benefits. It does not matter, for this purpose, whether the ongoing conduct is described as continuous or serial.

TIMING OF APPLICATION FOR JUDICIAL REVIEW

54. It should be noted that there was some debate at the hearing before me as to the *timing* of any legal challenge to a preliminary decision on a question of jurisdiction. There appears to be some suggestion in the written submissions filed on behalf of the ombudsman that it would have been preferable had the pension provider awaited a determination on the substance of the complaint before instituting legal proceedings. The implication being that the objection that the complaint was time-barred could have been raised as part of a statutory appeal against the final decision on the complaint.

55. Having regard to the course of correspondence between the parties, I am satisfied that these judicial review proceedings are not premature. The correspondence indicates that the ombudsman contemplated that the determination in respect of the limitation periods might be challenged as a stand-alone decision, prior to the ombudsman embarking upon his investigation of the underlying merits of the complaint. (See, in particular, the ombudsman's letter of 19 December 2019). Having taken this position in correspondence, it is not now open to the ombudsman to raise a prematurity point.
56. This finding is confined to the particular circumstances of the present case. In other cases, it may be more pragmatic to await the completion of the investigation of a complaint before having recourse to court. It does not necessarily follow that because a preliminary decision on the limitation period is amenable to judicial review that it will always be appropriate or necessary to move against the decision immediately. It may be preferable to await the completion of the investigation and the substantive decision on the complaint. This is especially so where the finding in respect of the limitation period is inextricably linked with the substance of the complaint. Indeed, there may well be circumstances where the ombudsman should not determine the limitation period as a standalone preliminary issue, but should instead consider the submissions on the substance of the complaint *de bene esse* before ruling on the time point. This is similar to the approach sometimes adopted in legal proceedings which raise an issue in respect of the Statute of Limitations.

CONCLUSION AND FORM OF ORDER

57. There are no grounds for interfering with the ombudsman's determination that the notice party's complaint was made within time. The approach to limitation periods under the Financial Services and Pensions Ombudsman Act 2017 is radically different from that governing legal proceedings, especially judicial review proceedings. The limitation period under the 2017 Act runs from the date of the *last* of a series of acts or omissions, not from the first.
58. The ombudsman has correctly characterised the conduct complained of as ongoing conduct, entailing a series of acts on the part of the pension provider. The index date is, therefore, the date of the occurrence of the most recent act complained of, namely the provision in February 2018 of what, on the pensioner's argument, is a gross underestimation of the true transfer value of his pension benefits. The complaint was made within a matter of months of this date, following the exhaustion of the internal dispute resolution process. The complaint was well within time.
59. Accordingly, the judicial review proceedings are dismissed in their entirety.
60. As to costs, my *provisional* view is that the ombudsman, having been entirely successful in resisting the application for judicial review, is entitled to recover his costs as against the pension provider. This reflects the default position under Part 11 of the Legal Services Regulation Act 2015. The notice party has not participated in the proceedings and thus would not appear to be entitled to any costs.
61. If any party contends that the form of costs order should be other than that indicated above, such party should file written legal submissions with the registrar by close of business on Monday, 21 February 2022. The proceedings

will be listed before me, for final orders, on Friday, 25 February 2022 at
10.45 am.

Appearances

Rossa Fanning, SC and Paul Hutchinson for the applicants instructed by McCann
Fitzgerald LLP

Eoin McCullough, SC and Francis Kieran for the respondent instructed by Byrne
Wallace

Approved
Gemma S. Mans