Unapproved

THE HIGH COURT

[2017 No. 131 MCA]

IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN ACT 2017

AND

IN THE MATTER OF A DETERMINATION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN MADE ON 21 MARCH 2017 BEARING REFERENCE NO. 12/68924

BETWEEN

VAL O'DRISCOLL

APPELLANT

AND

FINANCIAL SERVICES AND PENSION OMBUDSMAN

RESPONDENT

AND

MALLOW MORTGAGE COMPANY LIMITED TRADING AS LIAM MULLINS AND ASSOCIATES

AND

THE HIGH COURT

[2017 No. 132 MCA]

IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN ACT 2017

AND

IN THE MATTER OF A DETERMINATION OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN MADE ON 21 MARCH, 2017 BEARING REFERENCE NO. 15/88059

BETWEEN

VAL O'DRISCOLL

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

IRISH LIFE ASSURANCE PLC

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 7th day of December, 2018

1. By originating notice of motion, the appellant seeks an order from the Court setting aside that part of the determination of the respondent dated 21st March, 2017 bearing reference no. 12/68924 in which the respondent found and determined that the appellant's complaints were not substantiated.

2. By separate originating notice of motion, the appellant seeks a similar order setting aside the determination of the respondent bearing reference no. 15/88059 in which the respondent found and determined that the appellant's complaint was not substantiated.

3. In respect of both determinations, the appellant, if appropriate, seeks an order remitting his complaints to the respondent for determination in accordance with the findings and judgment of the Court.

Background

4. The background to the appellant's complaints to the respondent is as follows:

5. In January, 2007, the appellant invested €350,000 in the Broad Street Geared Property Life Fund, managed by Irish Life Assurance Plc. (hereinafter "Irish Life"). The appellant's investment was made through Mallow Mortgage Company Limited trading as Liam Mullins and Associates (hereinafter "Mallow").

6. It is common case that prior to the investment, a meeting took place on 25th January, 2007 between the appellant, Mr. Mullins on behalf of Mallow and Mr. Donal O'Connell on behalf of Irish Life. The appellant completed an application form for the investment in question on 26th January, 2007. The investment was made on 30th January, 2007.

7. The fund into which the appellant invested concerned a commercial property on Broad Street, Bristol in the UK. The property was let to National Westminster Plc for a term of 60 years commencing on 1st January, 1973, at an annual rent of £1million subject to five yearly upward only rent reviews. Irish Life acquired this property and transferred it to a unit-based investment fund. This fund was sub-divided into a unit-based pension fund called Broad Street Pensions Fund and a unit-based life fund called Broad Street Life Fund. Investors paid single contributions into the Life Fund, or Pension Fund, as appropriate, in return for units in the relevant fund. The fund had raised sixty percent of the purchase price of the Broad Street building through borrowings. The appellant decided to invest €350,000 in the Broad Street Life Fund through Mallow.

8. It is common case that the investment did not perform as anticipated. The property was sold in or about June, 2013 and the appellant received a return of €152,621.55 on 26th May, 2015.

9. On 11th September, 2012, following advices from the respondent, the appellant submitted complaints against Mallow and Irish Life to the respondent. On 17th September, 2012, the respondent advised him that he should only proceed against Mallow. The respondent made a determination on 9th July, 2013 in respect of the appellant's complaint against Mallow without holding an oral hearing. That determination was appealed by the appellant to the High Court on the basis of the failure to hold an oral hearing and on the basis of misadvice in relation as to how to proceed against Irish Life. By order of the High Court (Birmingham J.) in proceedings entitled *O'Driscoll v. Financial Services Ombudsman* [2014] IEHC 462, the respondent's determination was quashed and the matter was remitted back to the respondent for further consideration.

10. Thereafter all relevant parties made additional submissions to the respondent and a full exchange of documentation took place. In essence, the appellant complained that, in breach of duty and in breach of contract, Mallow, via its representative Mr. Mullins, advised him to invest in a property fund which was not suitable to his requirements as a result of which he suffered significant losses. The appellant's complaint in respect of Irish Life was that it wrongfully advised him in relation to the investment, including misrepresenting the risk profile of the investment and recommending investing in a product which did not match his profile.

11. The respondent conducted an oral hearing in respect of the appellant's complaints against Mallow and Irish Life on 16th November, 2016. On 21st March, 2017, the respondent issued her Determinations in respect of the complaints.

The Mallow determination

12. The respondent found no evidence to show that Mallow's representative, Mr. Mullins, had provided the appellant with any advice in relation to the investment and was satisfied that it was an "execution only" investment. The appellant further found that the investment fund documentation clearly set out the policy terms and conditions and highlighted the risks of the investment. She found that there was an obligation on the appellant to read this product literature and noted his sworn evidence that he had not read the literature fully and, further, did not seek clarification of the concept of "gearing" which he said he did not understand. The respondent had concerns however that notwithstanding that the investment had proceeded on an "execution only" basis, Mallow had a specific waiver for the execution only basis which it would have been prudent for Mallow to have had the appellant sign. To mark Mallow's failure to clearly document the nature of the relationship between the appellant and Mallow in an appropriate manner at the time, the respondent directed Mallow to make a compensatory payment of €10,000 to the appellant.

13. The respondent's findings in respect of the appellant's complaint against Mallow were set out in the Determination as follows:

> "The issue to be determined is whether the Provider [Mallow], in breach of duty and in breach of contract, advised the Complainant [the appellant] to invest in a property fund, which was not suitable to his requirements.
>
> The Consumer Protection Code, 2006 … came fully into effect on 1 July 2007. While the full implementation of the CPC 2006 did not occur until July 2007, that is, after the investment date, the Code was published at the time of

the investment and it is, therefore, useful in providing a guideline in relation to the standard it was intended to be applied by Financial Service Providers regarding the sale of a product, at that time.

...

I note that during the Oral Hearing the Insurance Company's [Irish Life's] representative submitted in evidence that during the meeting on 25 January 2007 the Complainant asked him could he take out the investment directly with him. The representative of the Provider submitted that he had advised the Complainant at the time, that he was not authorised to sell financial products.

...

Having carefully considered all of the evidence before me, I am of the view that the Complainant did specify the product that he wished to invest in. While I note that the Provider has not furnished any telephone records for January 2007 as requested by the Complainant, I am satisfied to accept the evidence of the Provider's representative in relation to the initial contact regarding the sale of the investment. I note that both the Provider's representative and the representative of the Insurance Company gave a similar version of events at the Oral Hearing, that is, that the Provider's representative was not aware of the fund at the time that initial contact was made.

...

While I cannot say with certainty whether the Provider's representative advised the Complainant during the meeting of 25 January 2007 that he himself had invested in the fund on 23 January 2007, I accept, on the basis of the evidence before me, that the Provider was not familiar with the fund at the

time that contact was first made between the Complainant and the Provider's representative, regarding the potential investment.

I note that there is dispute between the parties with regard to the time and the location of the meeting on 25 January 2007. The Complainant submits that the meeting took place at his mother's 200 year old farmhouse at circa 9:30pm when he had finished milking cows, whereas the respective representative of the Provider and the Insurance Company submit the meeting took place at the Complainant's 3,000 square foot modern house at approximately 5pm/6pm at the end of normal business, and that the Complainant was not milking cows as there were no cows there to milk, at that time. I am conscious that at the time of Oral Hearing, almost 10 years has elapsed since the meeting of January, 2007, which is at issue, and clearly the parties were each doing their best to recall the necessary details. In any event, I take the view that nothing specific turns on the location of the meeting, though the Complainant's evidence that the meeting was at his mother's home which is also his house, appears to conflict with his entry on the signed Complaint Form dated 7 September 2012, the meeting had taken place at his own *"home"*. The length of time that the Complainant had to read the brochure depends only on the timing of the meeting rather than on the location. I can find no evidence that the Provider exerted any pressure on the Complainant to sign the application form the following day, that is, on 26 January 2007.

...

I note that during the Oral Hearing the Insurance Company's representative confirmed that he did not recall the Provider's representative having any engagement with the Complainant on 25 January 2007 about the need for him

to complete the financial review or the financial assessment. I, therefore, accept the Complainant's submission that the Provider's representative did not ask him to complete the financial review during the meeting on 25 January 2007. I note that the Complainant submits that the Provider's representative brought the form with him on 26 January 2007, however, he rejects the Provider's representatives' suggestion that he refused to complete it and submits that he was not asked for a financial fact find. I note, however, the Complainant's statement in his submission to this Office dated 26 February 2013: *"I was relying on the advice of [the Provider's representative] but I was not prepared to let him know all my business"*.

While I cannot say with certainty who ticked the box confirming that the Complainant wished to proceed with the transaction on an execution only basis, I accept, based on the evidence before me, that the transaction was carried out on an execution only basis. In that regard, I accept that it was the Complainant who identified the particular product which he wished to discuss investing in, and in response to that, the Provider's representative set up the meeting on 25 January 2007, where the Irish Life representative would attend to answer technical questions, as he himself had no knowledge of the product. Indeed, it seems that so little was his knowledge of the investment, and when it came to the Complainant's decision to proceed, he asked the Irish Life representative to complete the Application Form. It may well be that the Complainant did not know the exact title of the product, I accept that for whatever reason, he was seeking to invest in commercial property with Irish Life, and to that extent I accept that the Complainant identified the product and the product Provider.

I note that during the Oral Hearing both the Provider's representative and the representative of the Insurance Company submitted that it was the representative of the Insurance Company, who provided details on the structure of the investment. The Provider's representative submits that it was he himself who explained the volatility of the product. The Provider's representative confirmed during the Oral Hearing that he believed the investment to be high risk and although the Complainant was a high net worth individual, he would not have seen the Complainant as a sophisticated investor. I can find no evidence however to show that the Provider's representative provided the Complainant with any advice in relation to the investment and I am satisfied that it was instead an "execution only" investment.

I have examined the investment fund documentation and find that it clearly sets out the policy terms and conditions, and highlights the risks of the investment. I am of the view that there was an obligation on the Complainant to read the product literature and if he had any queries to clarify them with the Provider. While he acknowledged that he had read some of the information he was given, the Complainant has confirmed that prior to investing €350,000, he had not read the product brochure. He said he "*didn't get into an awful lot of detail in reading it*". The Complainant's sworn evidence was that whilst he did not understand the concept of gearing, he did not raise this with the Provider's representative or with his broker or give any indication that he did not understand this aspect, so as to enable further explanations to be given. Even after proceeding to make the investment, if the Complainant had then made contact with the Provider to express any concerns, or to say that he did

not want the investment, had the option to cancel the investment within the cooling off period. He made no such contact however.

I have certain concerns however in circumstances where the Provider has maintained, and I have accepted this investment proceeded on an "execution only" basis. The Provider has submitted a copy of its Financial Review Form and I note that on the last page of this form there is a *"Waiver for execution only business"* which was not completed or signed by the Complainant.

...

Given that the Complainant did not want to let the Provider *"know all [his business]"* and was therefore unwilling to complete the full Financial Review, and the investment was to proceed on an "execution only" basis, it would have been prudent of the Provider's representative to have the Complainant complete and sign the waiver which was specifically included in the Provider's Financial Review Form. It is disappointing that having built that requirement into its standard documentation, the Provider did not consider it appropriate to ensure it was completed. It would appear that this was an internal procedure that should have been followed and had he done so,it would have offered some form of evidence that the Provider had explained clearly the meaning of an "execution only" transaction to the Complainant. I am of the view that the Provider's representative should have taken more care over the completion of the documentation and if he had done so the Complainant's attention is likely to have been drawn in greater detail to the decision he was making on an "execution only" basis. The Provider's failure to do this, has contributed to the confusion which has ensued since the investment was made, as to the role which each of the relevant parties played.

Accordingly, to mark the Provider's failure to clearly document the nature of the relationship between the Complainant and the Provider in an appropriate manner at that time, I direct the Provider to make a compensatory payment in the sum of €10,000 to an account of the Complainant's choosing within 30 days of the Complainant's nomination of account details to the Provider".

The Irish Life Determination

14. With regard to the involvement of Irish Life with the appellant, the respondent found that "the issue to be determined is whether the Provider [Irish Life] wrongfully advised the Complainant including misrepresenting the risk profile of the investment and recommending investment in a product which did not match his risk profile"

15. The Determination went on to state:-

"While I note that the Complainant refutes that the Provider's [Irish Life's] representative stated during the meeting that he was not there in a financial advisory role, I note that the Complainant's Broker [Mr. Mullins] also gave evidence at the Oral Hearing setting out that the Provider's representative advised the Complainant at the meeting on 25 January 2007, that he was not there to sell the product but that he came to the meeting to give him the facts and technical details of the investment. Having heard the parties' evidence and the cross examination arising therefrom, I accept the Provider's evidence in that regard."

16. Later in the Determination, the respondent made the following findings:-

"On the basis of the evidence before me, I am satisfied that in January 2007, the Provider's representative gave the Complainant information on the nature of the investment but did not provide him with any advice regarding the investment and I accept the Provider's evidence that its representative clearly

informed the Complainant at the outset of the meeting, that he could not offer any advice on the investment. While I note that the Complainant disputes this, having heard the parties' evidence, and the cross examination arising therefrom, I accept the Provider's evidence in that regard.

I accept the Provider's submission that its representative was not at the meeting on 25 January 2007 in the capacity of a financial advisor, and that the responsibility to assess the Complainant's attitude to risk would fall to the Broker. While I note that the Complainant disputes that the investment was made on an execution only basis, I am of the view that based on the Complainant's application form which confirmed that he wished to proceed with the investment on an execution only basis, the Provider was entitled the form the view that the Complainant was proceeding with the investment on an execution only basis.

I am satisfied that the Provider, in its product literature, highlighted the nature of the investment and the risks attached to it. While I note that the Complainant submits that he did not understand the concept of gearing, I am satisfied that a description of the gearing basis of the Fund was outlined in some detailed in the product literature. While I also note that the Complainant submits that he was seeking a low risk investment I am of the view that the documentation clearly indicated that the investment fund was a Geared fund and was not a low risk investment. There was an onus on the Complainant to read the product documentation and if he had any queries to clarify them with the Provider or with his Broker. While he acknowledges that he read some of the information he was given, the Complainant has confirmed that prior to investing €350,000, he had not read the product brochure fully. He said he

'didn't go into an awful lot of detail in reading it'. The Complainant's sworn evidence was whilst he did not understand the concept of gearing, he did not raise this with the Provider's representative or with his broker or give them any indication that he did not understand this aspect, so as to enable further explanations to be given. Even after proceeding to make the investment, if the Complainant had then made contact with the Provider, to express any concerns, or to say that he did not want the investment, he had the option to cancel the investment within the cooling off period. He made no such contact however.

...

I note that at an Oral Hearing, the Provider's representative confirmed that the Complainant's broker contacted him on the morning of 26 January 2007 and requested that he *'call to the office just to go through the form to make sure he had everything'*. The Provider's representative confirmed that he called to the Broker's office and *'[the Complainant's Broker] had [the Complainant's] particulars on file so we completed – I completed – he was calling it out, I wrote it down and I marked with an 'X' where [the Complainant] had to sign'*. While I am of the view that it was not appropriate for the Provider's representative to have completed the Application Form, I do not believe this contributed in any way to the Complainant's decision to make the investment, given that the Complainant had already made his decision to invest at the time, and the that Complainant was not present when the Provider's representative completed the form to assist the Broker.

Having carefully considered all of the evidence before me I cannot uphold the complaint against the Provider that it wrongfully advised the Complainant and

recommended his investment in a product which did not match his risk profile. On the basis of the evidence before me, I do not accept that the Provider acted in an advisory role, or that it in any way assessed the Complainant's risk profile in January 2007, with a view to matching that profile to any particular product."

The statutory basis for the present appeals

17. The appellant's complaints against Mallow and Irish Life were determined by the Financial Services Ombudsman. The Financial Services Ombudsman Bureau was dissolved upon the coming into force of the Financial Services and Pensions Ombudsman Act 2017 ("the 2017 Act") on 1st January, 2018 (the establishment day). Section 32(2) of the 2017 Act, however, provides that any legal proceedings pending immediately before the establishment day to which the Financial Services Ombudsman is a party shall be construed with the substitution in those proceedings of the Financial Services and Pensions Ombudsman. The section further provides that the proceedings shall not abate by reason of such substitution.

18. Section 67 of the 2017 Act provides that *"any appeal to the High Court of a decision taken by the Financial Services Ombudsman...that, immediately before the establishment day, named the Financial Services Ombudsman...shall on and from that day be read as a reference to[the Financial services and Pensions Ombudsman]".*

19. The Court was thus satisfied to amend the title to the within appeals by the substitution of the Financial Services and Pensions Ombudsman for the Financial Services Ombudsman. Pursuant to ss. 26 and 27 of the Interpretation Act, 2005, the Court was further satisfied that the appellant's right of appeal as accrued under the Central Bank Act 1964 ("the 1964 Act") is not affected by the repeal of the 1964 Act

and that the appellant's proceedings may be continued under and in conformity with the 2017 Act, in particular s. 64 thereof which provides for an appeal to the High Court against a decision or direction of the Financial Services and Pensions Ombudsman.

20. The Court was further satisfied, in circumstances where there was no material modification or change to the legislative framework vis a vis the functions of the Ombudsman in receiving and dealing with complaints, or in respect of the appeal provided for to the High Court, that the applicable test on appeal, as established in case law, continues to apply.

The applicable legal principles

21. The applicable test is set out in *Ulster Bank v. Financial Service Ombudsman* [2006] IEHC 323, where Finnegan P. stated:

> *"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."*

22. The appeals presently before the Court are not *de novo* appeals whereby the High Court will reconsider the matter afresh to determine what decision it might have

come to. It is not sufficient for an appellant to merely establish that there have been errors – an appellant must establish, having regard to the adjudicative process as a whole, that the decision was vitiated by a serious and significant error or series of such errors, being the test derived from *Ulster Bank v. Financial Service Ombudsman.*

23. In *Molloy v. Financial Service Ombudsman* (unreported, High Court 15th April, 2011), McMenamin J. emphasised that *"it is not the function of the Court to 'place itself in the shoes' of the F.S.O. the jurisprudence militates against such a course of action. The test, therefore, is whether a decision was vitiated by a serious error or a series of such errors."*

24. In *Verschoyle–Greene v. Bank of Ireland Private Banking Limited and Financial Service Ombudsman* [2016] IEHC 236, Noonan J. opined:

> *"37. ...the standard of review on appeal from the FSO is not dissimilar from that arising in judicial review is illustrated by the dicta of Hedigan J. in Smartt v. FSO [2013] IEHC 518 where he said:*
>
> > *"... in my view, the FSO had before him and relied upon relevant evidence upon which he could rely in coming to the decision he did. That is the test. It is not for this Court to either agree or disagree with his finding as long as it is one reasonably based upon the evidence before him." (at para. 12).*
>
> ...
>
> *39. It is thus immaterial that the court would have come to a different conclusion on the evidence once the conclusion actually arrived at by the FSO was one reasonably open on that evidence. Nor is the fact that the FSO may*

have made an error in arriving at his conclusion material unless the error is shown to be serious and the onus in that regard remains on the appellant. The court will adopt a deferential stance in matters involving the expertise and specialist knowledge of the FSO. Where the matter in issue is not within that expertise and specialist knowledge, for example where questions of pure law are concerned, curial deference is not required."

25. The nature of the deference to be shown to the respondent was considered by O'Malley J. in *O'Regan v. Financial Services Ombudsman* [2015] IEHC 85:

> *19. It is clear, however, from the case-law that the deference to be shown to the respondent is confined to his area of expertise and specialist knowledge. It does not extend to questions of law, such as the legal meaning of a document. Nor does it apply where the issue is one of fair procedures or the propriety of the adjudicative process - see Hyde v. FSO [2011] IEHC 422 and Lyons and Murray v. FSO [2011] IEHC 454.*
>
> *21. In my view, where the respondent has made a finding on foot of an oral hearing, the court should continue to defer to the respondent's views on evidence relating to matters within his area of expertise."*

She went on to opine:

> *" Where, however, the conflict of evidence relates to factual, non-technical matters, such as whether or not particular facts were communicated or particular assurances were given, it seems to me to be appropriate for the court to consider the case in accordance with the principles set out by the Supreme Court in Hay v. O'Grady [1992] I.R. 210 dealing with the jurisdiction of that court dealing with an*

appeal from the High Court. The principles are listed in the judgment of McCarthy J. at p. 217 as follows:

'(1) An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

(2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them.

(3) Inferences of fact are drawn in most trials; it said that an appellate court is in as good a position as the trial court to draw inferences of fact (see the judgment of Holmes L.J. in 'Gairloch', SS Aberdeen Glendine Steamship Co. v. Macken [1899] 2 I.R. 1, cited by O'Higgins C.J. in The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at p. 339). I do not accept that this is necessarily so. It may be that the demeanour of a witness in giving evidence will, in itself lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends on oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of

inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

(4) A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference ...If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trail judge...was erroneous, the order will be varied accordingly.

(5) These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows.'

...

23. In Doyle v Banville [2012] IESC 25 Clarke J. stressed the necessity for the trial judge to engage with the key elements of the case made by both sides and to explain why one side is preferred to the other. He continued:

> *'In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered*

or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's riding. The obligation is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.'

...it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this court to seek to second guess the trial judge 's view."

26. In *O'Regan v. Financial Services Ombudsman* [2016] IECA 165, Hogan J. agreed by and large with the approach adopted by O'Malley J save one reservation where he did not agree that the findings of the respondent were entitled to any particular deference:-

"65. In my judgment, the same principles apply, mutatis mutandis, to the scope of an appeal from the FSO to the High Court in a case of this kind following an oral hearing. In other words, provided that there is credible testimony to support the FSO's findings of primary fact and such are clearly stated, the scope of review by the High Court of such findings is distinctly limited and is generally governed by the

principles articulated by the Supreme Court in Hay v. O'Grady and Doyle v. Banville.

66. *In passing I might observe that I use the word 'generally' advisedly, because I agree with O'Malley J. there may be cases where the FSO might not consider itself bound by the strict rules of evidence given that it is mandated by s. 57BK(1) of the 1942 Act to act in an informal fashion. In a suitable case that very informality might be a factor which would weigh with the High Court in considering how to deal with a finding of fact made by the FSO, even though, of course, such informality could not permit a body such as the FSO 'to act in such a way as to imperil a fair hearing or a fair result': see Kiely v. Minister for Social Welfare (No.2) [1977] I.R. 267, 281, per Henchy J.*

67. *To that extent, therefore, I agree with the conclusions of O'Malley J. on this point, save for one important reservation. I do not think, with respect, that it could be appropriate to say that findings of primary fact made by the FSO should be entitled to any particular deference, even if made in respect of factual matters which are within his particular area of expertise. If this approach were to be adopted, it would mean that even though the actual experience of the FSO in relation to oral hearings is at this stage quite limited – it is understood that the first such hearings commenced sometime between 2012 to 2103 following a series of High Court decisions (including the decision of Feeney J. in the present case) to the effect that the extent of the factual controversy was so great that it could only be resolved by means of an oral hearing*

> *– and even though the person conducting the hearing might not necessarily have the experience of a trained lawyer in the finding of fact and the handling of evidence generally, it would mean that the FSO would enjoy a degree of deference in relation to fact finding which the High Court would not itself enjoy vis-à-vis a review by this Court. It is only fair to record that counsel for the FSO, Mr. McDermott S.C., expressed disclaimed any suggestion that findings of primary fact made by the FSO should enjoy some enhanced degree of deference over and above the traditional Hay v. O'Grady standard.*
>
> *68. The question of the appropriate inferences to be drawn from such findings of primary fact is, however, another matter. It may be that in certain cases the High Court would defer to the expertise of the FSO so far as such inferences were concerned if they related to the latter's area of expertise. It is, however, unnecessary to express any view on this issue for the purposes of this appeal."*

27. Based on the *dictum* of Hogan J. in *O'Regan,* it is clear that primary findings of fact made by the respondent enjoy no special deference.

28. It is against the backdrop of the aforesaid jurisprudence that the within appeals will be considered.

29. In the course of his submissions, the appellant's counsel distilled the grounds of complaint to six issues. Each will be considered in turn.

Issue one –Whether the respondent erred in finding that the transaction was an "execution only" transaction

30. The case made on behalf of the appellant is that the respondent made a fundamental error in concluding that the transaction entered into by the appellant was

an execution only transaction. Counsel for the appellant contends that once error was made, that was fatal to the appellant's case as, by reason of that finding, no duty could be said to arise on the part of either Mallow or Irish Life to give advice to the appellant. It is submitted that that error of itself merits the overturning by this Court of both Determinations.

31. In his affidavit sworn 15th June, 2017, the appellant takes specific issue with a number of findings by the respondent. At para. 17 of his affidavit, he refers to the respondent having been satisfied to accept the evidence of Mr. Mullins in relation to the initial contact in relation to the investment and the respondent having noted that Mr. Mullins and Mr. O'Connell "gave a similar version of events that [Mr. Mullins] was not aware of the Fund at the time the initial contact was made."

32. The appellant also avers that the respondent's finding that it was the appellant who had identified the product he wished to invest in and that in response to that Mr. Mullins had set up the meeting with Mr. O'Connell is contradicted by the finding that the appellant *"did not know the exact title of the product"*. The appellant goes on to aver:

> "I further say that the aforementioned findings expressly contradicts both the evidence adduced before the oral hearing and the express finding of Birmingham J. wherein he stated that "[i]f Mr. Mullins is correct in his account, then it was a considerable coincidence that just days after he made an investment in a particular fund, that Mr. Mullins should have been approached by his cousin, seeking without prompting, to invest in the very same fund." (Emphasis added)..."

33. At para. 24 of his affidavit, the appellant maintains that it was not open to the respondent to find that the transaction was on an execution basis only. He avers that

this finding is expressly contradicted by other findings made by the respondent, namely:

- The finding that it was Mr. O'Connell of Irish Life who completed the first page of the application form on the morning of the 26th January, 2007 prior to the appellant meeting Mr. Mullins on the same date.
- That Mr. Mullins was unable to confirm that he saw the appellant tick the box on the second page of the application form confirming that the appellant wished to proceed with the transaction on an execution only basis.
- That Mr. O'Connell confirmed that he did not recall Mr. Mullins having any engagement with the appellant on 25th January, 2007 about the need for the appellant to complete a financial review.
- The respondent's acceptance of the appellant's evidence that Mr. Mullins did not ask the appellant to complete a financial review on 25th January, 2007.
- That the respondent *"could not say with certainty"* who had ticked the box confirming that the appellant wished to proceed with the transaction on an execution only basis.
- That the appellant had not completed or signed the *"Waiver for execution only business"* section of Mallow's own internal Financial Review Form.
- That Mr. Mullins/Mallow had failed to clearly document the nature of the relationship between the appellant and Mr. Mullins/Mallow in an appropriate manner at the time.

34. Counsel for the appellant reprises the appellant's complaint that the respondent erred in finding that the transaction was conducted on an execution only basis by advancing the following arguments.

35. Counsel submits that what is in issue in the within appeals is the conclusion drawn by the respondent that the transaction was execution only, a conclusion based on the facts as found by the respondent. It is emphasised that the appellant is not asking the Court to overturn all findings of fact but rather a discrete element of the findings relied on by the respondent and which led her to conclude that the transaction was execution only. It is submitted that the question for the Court is whether the respondent was correct to conclude that the transaction was execution only as a matter of law. Any such conclusion has to be arrived at based on the evidence available to the respondent. It is submitted that the respondent's and the notice parties' position is that because no advice was given as a matter of fact, then the transaction was execution only. Counsel contends that that approach conflates what occurred as a matter of fact with the legal question to be considered.

36. Counsel contends that the question to be considered is whether the transaction was execution only or advisory. It is only after that question is determined that the question of what obligations arose on the part of Mallow and/or Irish Life *vis-à-vis* the transaction in question.

37. It is also argued that the respondent wrongly determined that it was an execution only transaction and that the respondent was bolstered in her finding because the respondent found that advice was not given to the appellant by either Mallow or Irish Life. This is the conflation of which the appellant complains. Having found that the transaction was execution only, the respondent did not address what duty of care was owed to the appellant. Counsel accepts that if the respondent

correctly found the transaction to be execution the question of a duty of care to the appellant did not arise.

38. It is, however, the appellant's case in the within appeals that the respondent erred in her analysis of the nature of the transaction and that her conclusion that the transaction was execution only was based on an erroneous finding of fact.

39. Counsel submits that three elements were considered by the respondent in reaching the conclusion that the transaction was execution only. Firstly, she had regard to the portion of the application form entitled *"Customer Financial Review Consents"*. That portion reads, in part, as follows:

> *"I confirm that I have undertaken a financial review, the details of which I supplied. I am satisfied with the recommendations and agreed actions arising.*
>
> *OR*
>
> *I confirm that I have been offered a full financial review and that I have declined this. In declining this offer I confirm that I have not received any investment advice in relation to this transaction. I have clearly been advised that investments can fall as well as rise in value and I confirm that having been so advised, I still wish to proceed with the transaction on an execution only basis."*

40. In the course of her Mallow Determination, the respondent noted that beside the words *"I still wish to proceed with the transaction on an execution only basis"* in the second option there is a tick. The respondent determined that she could not say with certainty who ticked the box confirming that the appellant wished to proceed on an execution only basis. Counsel does not take issue with the respondent's finding in this regard.

41. Counsel submits that the second element of the respondent's consideration of the nature of the transaction was the respondent's finding of fact that the appellant had contacted Mr. Mullins about the transaction. Counsel acknowledges that the respondent was entitled to take account of this. It is submitted that this was the only fact upon which the respondent could reach a conclusion that the transaction was an execution only transaction.

42. Counsel states that the third element relied on by the respondent to support her conclusion that the transaction was execution only is the respondent's recorded understanding that Mr. Mullins *"had no knowledge of the product"* such that when it came to the appellant's decision to proceed with the transaction Mr. Mullins had Mr. O'Connell fill out the first page of the application form before it was presented to the appellant on 26th January, 2007.

43. Counsel submits that the respondent was not entitled to reach the determination that Mr. Mullins had no knowledge of the product as a matter of fact. Counsel takes issue with the respondent's reliance on the fact that Mallow's representative, Mr. Mullins, knew so little about the Fund that he could not give advice to the appellant. It is submitted that the finding that Mr. Mullins had no knowledge of the Fund is flawed given that Mr. Mullins had in fact invested in the Fund on 23rd January, 2007, i.e. before he met with the appellant on 25th January, 2007.

44. Counsel for the appellant further contends that there was abundant evidence for the respondent to find that the transaction was advisory and not execution only. Counsel points to the brochure for the product which, at section 8 thereof, advised prospective investors to consult their professional property and taxation advisors before investing, a warning, counsel submits, which denoted that the product was not

suitable for an execution only transaction. Counsel also points to the evidence given by Irish Life's representative at the oral hearing. In the course of outlining his role at the meeting on 25th January, 2007 Mr. O'Connell stated:

> *"Okay, so when Mr. Mullins-after we had finished our chit-chat Mr. Mullins more or less started the formal part of the meeting and said look, Val, I have brought Donal along just to answer any questions, outline the broad nature of the product and answer any questions you might have. If you have any questions, now is the time to ask. He said, Donal you might start by outlining the nature of the investment. So again I just said, Val, before I start I am here literally just to answer any questions. I cannot offer you any advice as regards the suitability of the product. Anything to do with suitability or risk you will have to discuss with Mr. Mullins, but, hopefully, I can go through the product as best I can and I will answer any questions that you may have. If there is any questions that I can't answer I will be able to find out the answer to."*

45. It is submitted that the import of Mr. O'Connell's evidence to the respondent was that the product was not one for an execution only transaction and that it fell to Mr. Mullins to advise the appellant.

46. It is further contended that in his direct evidence, Mr. Mullins stated that the appellant had asked for Mr. Mullins' and Mr. O'Connell's professional opinion on the product. In this regard, counsel points to Mr. Mullins' evidence:-

> *"Q. Was Mr. O'Driscoll put under any pressure to invest in the product by anybody at the meeting?*
>
> A. *No, nobody. We were just there to give him the information on the product. I was obliging him, coming down, give him the facts about this product. That is all we were doing here. We weren't pushing this*

product on him. We were there to give him advice on it, that is it. He came down, he asked me for our professional opinion about this product. Donal had been through the detail with him. So we weren't selling this product. We were just giving the facts of the product."

47. Counsel further points out that Mr. Mullins' evidence was that Mr. O'Connell did not give the appellant any advice, not that he, Mr. Mullins, did not give advice. It is submitted that this is especially apt since as of 23rd January, 2007, Mr. Mullins himself had invested in the product.

48. It is further submitted that the fact that a commission was paid to Mr. Mullins should also have been taken account of by the respondent when considering the nature of Mallow's and the appellant's relationship.

49. Both on affidavit, and in submissions to the Court, the respondent refutes the contention that the Determinations contain contradictory findings, as alleged by the appellant on affidavit, or that the respondent erroneously determined that the transaction was an execution only transaction.

50. In respect of both appeals, counsel for the respondent argues that what the applicant seeks to do is to challenge the merits of the respective Determinations and that, in substance, the appellant is asking the Court to disregard the findings of fact made by the respondent and to undertake a *de novo* assessment of the evidence, which is not the function of the Court. It is asserted that it is not for the Court to upset findings of fact reasonably arrived at even if the appellant is aggrieved at the respondent's preferment of a version of events other than that given by the appellant.

51. Counsel argues that it is not the case that the only evidence before the respondent to ground the finding that the transaction was execution only was the fact that a box had been ticked on the application form. Whilst the respondent could not

say who had ticked the box, she was satisfied that the ticked box recorded a decision reached by the appellant to proceed on an execution only basis. It is submitted that there was evidence before the respondent sufficient for her to so find.

52. Counsel points in particular to Mr. Mullins' testimony in the course of the oral hearing that he had no knowledge of the Fund when the appellant first approached him and, accordingly, that he arranged for the appellant to meet with Mr. O'Connell from Irish Life. It is further submitted that it is common case that the vast majority of the talking at the meeting on 25th January, 2007 was done by Mr. O'Connell. Counsel also points out that Mr. Mullins testified that on 26th January, 2007, the day following the meeting, he met the appellant at Island Gate and advised him that he needed to complete a financial review, referred to by Mr. Mullins in the course of his evidence as the "fact find". Mr. Mullins' evidence in this regard was as follows:

> *"I drove down, met him at the Island Gate. He sat into my car. I said, well, there is a fact find. I need you to sign that. He said, no, I'm not signing. I am not giving you any information. Well, if you are not I says just tick that box and sign it. So he signed it."*

53. Later in his testimony, when asked again to explain the extent of the discussion that took place with the appellant about ticking the box in the application form, Mr. Mullins replied:

> *"I said to him just, look, tick the box here that you don't want any financial review. He says, grand, and he signed it, and I just took it off him and I took the cheque off him, he signed that form and he ticked it."*

54. Counsel for the respondent thus contends that there was evidence before the respondent for her to be satisfied that Mr. Mullins had not provided advice, that factual matters pertaining to the product were provided to the appellant by Mr.

O'Connell and that the appellant did not want Mr. Mullins to complete a "fact find" as the appellant did not want Mr. Mullins to know his business.

55. It is thus submitted that the evidence overall was such that the respondent was entitled to conclude that Mr. Mullins had not provided advice to the appellant and that the appellant had taken a positive decision not to engage in a financial review. Counsel also points to the fact the respondent also took cognisance of the fact that the appellant never stated in evidence that he did not understand the investment or that he needed advice. Given all of those circumstances, as outlined above, the respondent's position is that there was more than ample evidence for the respondent to find that it was an execution only transaction.

56. Counsel thus highlighted the following findings of the respondent as factors reasonably relied on by the respondent in aid of the finding that the transaction was conducted on an execution only basis:

- Mr. Mullins was not familiar with the Fund at the time that contact was first made between the appellant and Mr. Mullins.
- The appellant identified to Mr. Mullins the particular product he wished to invest in and Mr. Mullins duly set up the meeting with the Irish Life representative, Mr. O'Connell, to answer technical questions in relation to the product as he himself had no knowledge of it.
- Information as to the detail of the structure of the product had been provided by Mr. O'Connell, not Mr. Mullins.
- The absence of evidence to show that Mr. Mullins provided any advice in relation to the investment.

- The evidence that the appellant did not want Mr. Mullins (his first cousin) to *"know all [his] business"* and that the appellant was, therefore, unwilling to complete a full financial review.
- Mr. Mullins' lack of knowledge of the investment such that he had asked Mr. O'Connell to complete the application form before he met with the appellant on 26th January, 2007.
- The appellant's sworn testimony that although he had not understood the concept of gearing, he did not raise this with Mr. Mullins or give any indication that he did not understand this concept.

57. Counsel for Irish Life argues that the case now being made on behalf of the appellant is not made by the appellant on affidavit.

58. It is submitted that, whilst the appellant's counsel has thus distilled the challenge to issues of law, including that the respondent failed to properly analyse or recognise that Irish Life had (a) assumed a duty of care towards the appellant and (b) that it failed in its duty of care, and that the respondent failed to apply the proper legal test in finding that the transaction was conducted on an execution only basis, it remains the case that for the Court to find for the appellant it would first have to set aside the respondent's findings of fact. It is submitted that the threshold for setting aside findings of fact is at least the same as that set out by Hedigan J. in *Smartt v. FSO* [2015] IEHC 528:

> *"The court can only intervene if it concludes that the Financial Services Ombudsman could not reasonably have come to the decision impugned based on the facts he had before him."*

59. Counsel for Mallow argues that it is clear from the Determination on the Mallow complaint that the finding that the transaction was execution only was a

finding open to the respondent on the basis of the evidence adduced. The evidence included the fact that it was the appellant who had approached Mr. Mullins, and Mr. Mullins' and Mr. O'Connell's evidence that neither had provided advice to the appellant in respect of the investment. The respondent also took account of the reduced commission to be paid to Mr. Mullins at the request of the appellant which the appellant has not disputed. Counsel also points to Mr. Mullins' testimony that the appellant had said to Mr. Mullins that Mr. Mullins was only a facilitator and therefore should not benefit from full commission.

60. Counsel further points to the appellant's refusal to give Mr. Mullins details of his financial circumstances as testified to by Mr. Mullins.

61. What falls for consideration by the Court is (1) whether it was reasonably open to the respondent to conclude that the transaction was execution only and (2) whether there was credible evidence for that finding.

62. The first issue, to my mind, is whether it was reasonably open to the respondent on the evidence before her to find that it was the appellant who made the initial contact regarding the investment in the Broad Street Fund, and that Mr. Mullins was not familiar with the product at the time the appellant first contacted him. I am satisfied that such a conclusion was reasonably open to the respondent. In the first instance, the respondent had the benefit of oral evidence from the appellant, Mr Mullins and Mr. O'Connell. The Determinations record in detail the evidence given by all three individuals, including the appellant's testimony that it was Mr. Mullins who had first approached him about the investment, and the appellant's denial in evidence that he had made the first move or mentioned to Mr. Mullins that he wished to invest in Irish Life's Bristol venture. Mr. Mullins' contrary account of the appellant having specifically approached him about the Bristol Fund is also recorded,

as is Mr. O'Connell's evidence that Mr. Mullins had telephoned him asking if Irish Life had *"a geared property investment in Bristol that was open for investment at that time...[and]the reason he was looking for brochures was that he had a client who was interested in investing in it."*

63. To my mind, based on the evidence, as reprised in the Mallow Determination, and the Transcript of the oral hearing which was before the Court, it was open to the respondent to make a primary finding of fact that it was the appellant who made the initial approach in relation to investing in the Broad Street Fund and that at the time of this initial contact, Mr. Mullins was not familiar with the product. The respondent was entirely within jurisdiction in finding, effectively, that Mr. Mullins' version of events was corroborated by Mr. O'Connell. I note that counsel for the appellant acknowledges that once the respondent found that it was the appellant who first approached Mr Mullins and that it was he who had specified the Bristol product, the respondent was entitled to take account of these factors in determining whether the transaction in issue was an advisory or execution only transaction.

64. I am also satisfied (contrary to what was averred by the appellant in his affidavit) that it was not contradictory for the respondent to find that the appellant had identified the product he wished to invest in while at the same time finding that the appellant may not have known the exact name of the product.

65. I am equally satisfied that whilst the respondent could not say with certainty whether Mr. Mullins had advised the appellant during the meeting on 25th January, 2007 that he had himself invested in the Fund on 23rd January, 2007, that did not preclude the respondent from being satisfied, on the basis of the evidence before her, that Mr. Mullins was not familiar with the product at the time that contact was first made between the appellant and Mr. Mullins. I perceive no contradiction between

these two issues such as would render unreasonable the finding that Mr. Mullins was not familiar with the investment fund at the time contact was first made between the appellant and Mr. Mullins. Based on the evidence before her, it was reasonably open to the respondent, irrespective of not being able to say with certainty whether Mr. Mullins advised the appellant on 25th January, 2007 of his own investment into the Fund, to find that Mr. Mullins was unfamiliar with the Fund at the time when the appellant first made contact. As I have already alluded to, at pages 6-10 of the Mallow Determination, the respondent sets out in some detail the nature of the evidence which assisted her finding as to the state of Mr. Mullins' knowledge of the Fund at the time the appellant and Mr. Mullins first made contact regarding the Fund. This also included Mr. O'Connell's evidence. All of this evidence was adduced in the course of an oral hearing where there was opportunity for each party to cross-examine and make submissions. The fact that the appellant's evidence was not preferred by the respondent is not a good ground of appeal absent a significant error or series of errors with regard to the finding in question, which this Court does not find.

66. In the course of her Determination of the Mallow complaint the respondent acknowledged that Mr. Mullins had himself invested in the Fund at some point between first having been contacted by the appellant and the meeting of 25th January, 2007. Thus, it cannot be said that the respondent had not weighed that particular factor in arriving at her finding as to the nature of the transaction.

67. Counsel for the appellant places great emphasis on the fact that at the time the appellant met with Mr. Mullins and Mr. O'Connell on 25th January, 2007 Mr. Mullins himself had invested in the Irish Life Fund. I do not perceive any serious or significant error on the part of the respondent in failing to find this factor determinative (either fully or partially) of the transaction having been advisory as

opposed to execution only. As I have already observed, there was evidence before the respondent that it was only after the appellant contacted Mr. Mullins that the latter sought details of the Bristol investment from Mr. O'Connell.

68. A principal argument, however, advanced on behalf of the appellant is that the respondent's finding that the transaction was execution only is fundamentally undermined by the respondent's finding that Mr. Mullins had no knowledge of the Broad Street Fund. In this regard, counsel pointed to the following extract from the respondent's Mallow Determination:

> "While I cannot say with certainty who ticked the box confirming that the Complainant wished to proceed with the transaction on an execution only basis, I accept, based on the evidence before me, that the transaction was carried out on an execution only basis. In that regard, I accept that it was the Complainant who identified the particular product which he wished to discuss investing in, and in response to that, the Provider's representative set up the meeting on 25 January 2007, where the Irish Life representative would attend to answer technical questions, as he himself had no knowledge of the product. Indeed, it seems that so little was his knowledge of the investment, and when it came to the Complainant's decision to proceed, he asked the Irish Life representative to complete the Application Form." (Emphasis added)

69. In aid of his submission that the respondent erroneously found that Mr. Mullins had no knowledge of the Broad Street Fund product, counsel points to the uncontroverted fact that Mr. Mullins himself had invested in the Fund on 23rd January, 2007 prior to the appellant meeting Mr. Mullins and Mr. O'Connell on 25th January, 2007.

70. Counsel points to the direct evidence given by Mr. Mullins at the oral hearing on 16th November, 2016. The following exchange took place:-

> *"Q. In regard to your own investment in the fund, why exactly did you invest and at whose advice, was it your own advice or a third party advice? Why exactly did you invest? Why exactly did you invest and what advice did you get?*
>
> A. *I took my own advice. I looked at the property. I looked at the yield, it was making 4.5% of a yield. There was a good tenant on the property. There was 25 years left in it. There was a rent review due next year. The rent at the time was about £8 a square foot. They were paying a million Euro in rent. They were a good secure tenant. It wasn't the Pound Shop."*

It is argued that against this backdrop the respondent erroneously found that Mr. Mullins had no knowledge of the product. It is thus submitted that in light of Mr. Mullins' testimony, the respondent's finding that Mr. Mullins had no knowledge of the product is untenable.

71. It is the appellant's contention that the conclusion that it was an execution only transaction is fatally undermined by the respondent having found that Mr. Mullins *"had no knowledge of the product"*, in circumstances where when the parties met on 25th January, 2007 Mr. Mullins was by then himself an investor in the Broad Street Fund. I am not persuaded that the section of the respondent's Mallow Determination (quoted earlier in this judgment) upon which counsel for the appellant relies in support of his argument in fact supports his argument. To my mind, the respondent, in the section of the Determination with which counsel for the appellant takes issue, is essentially reprising the earlier finding she made with regard to Mr. Mullins' state of knowledge at the time the appellant first made contact with him

regarding the Broad Street product. It is most certainly the case that the respondent was alert to the fact that by 25th January, 2007 Mr. Mullins himself had invested in the product as she references this at page 10 of the Determination.

72. Even if it is the case that the respondent by the words "[Mr. Mullins] had no knowledge of the product" intended to convey that that was the position as of 25th January, 2007 (which I accept would be erroneous having regard to her earlier acceptance that Mr. Mullins had invested in the Fund on 23rd January, 2007), I am not satisfied that this is an error of such seriousness or significance as would warrant a finding by this Court that the respondent's conclusion that the transaction was execution only was wrongly arrived at. There were other factors upon which the respondent relied to reach her conclusion, not least that it was the appellant who had approached Mr. Mullins with the Broad Street product in mind, and Mr. Mullins' evidence that the appellant refused to complete a financial "fact find", evidence which the respondent found was bolstered by the appellant's statement in his submission to the respondent that he "was not prepared to let [Mr. Mullins] know all [his] business".

73. Moreover, the respondent had regard to the investment brochure which was provided to the appellant on 25th January, 2007 and which outlined the risks attaching to the Broad Street investment. She also had regard to the fact that on 13th February, 2007, Irish Life issued the appellant with a "Welcome Pack" which included provision for a "Cooling off period" enabling the appellant to cancel the investment within thirty days of receipt of the Welcome Pack. This was also addressed in the letter of 13th February which accompanied the Welcome Pack.

74. It is also the case that respondent noted Mr. O'Connell's evidence that the appellant had asked him if he could deal directly with Mr. O'Connell and that Mr. O'Connell had advised the appellant that he was not authorised to sell financial

products. I am satisfied that this informed the respondent's finding that the appellant was satisfied to execute the transaction independently of Mr. Mullins.

75. Whilst the appellant testified that he did not refuse to complete a financial review or "fact find" on 26th January, 2007, Mr. Mullins' evidence on this issue was preferred by the respondent. In preferring Mr. Mullins account, the respondent had regard also to the appellant's pre-hearing submission where he clearly outlined that at his meeting with Mr. Mullins he was not willing for Mr. Mullins *"to know all [his] business"*. The preferring of Mr. Mullins' evidence, to my mind, is something entirely within the respondent's remit as decision-maker.

76. Insofar as the argument is made that the respondent failed to take account of what is said by counsel for the appellant to be Mr. Mullins' acknowledgement in the course of his evidence that he provided advice to the appellant, I am not persuaded that the respondent made a serious or significant error in failing to find that Mr. Mullins had in fact provided investment advice. It is clear from the extract from the transcript of the oral hearing, as relied on by the appellant in this regard, that Mr. Mullins' emphasis was that the focus was on giving information about the product itself and not otherwise. I am satisfied that the respondent reasonably concluded that the advice tendered related to the product and not to the merits of the appellant investing in the product.

77. Overall, having regard to the evidence which the respondent considered as a whole in determining the relationship between the relationship between Mallow and the appellant *vis-à-vis* the investment in question, the Court has not been persuaded by the appellant that the respondent's finding that the transaction was execution only was erroneously arrived at. The Court has not found any serious or significant error or series of such errors on the part of the respondent such as would warrant a remittal of

the matter. The Court is satisfied that the respondent's conclusion that the transaction was execution only based on the facts she had before her.

78. In aid of his submission that the respondent erred in finding that the transaction was execution only, counsel for the appellant relied on the decision of the UK High Court in *Rubenstein v. HSBC Bank plc* [2011] EWHC 2304 (Q.B.) by way of guidance as to the circumstances in which the giving of information about a financial investment can amount to the provision of investment advice as opposed to a transaction proceeding on an execution only basis.

79. The facts of the *Rubenstein* case were as follows. In 2005, the plaintiff was looking to invest the proceeds of the sale of his house whilst he looked for a new property. He told one of the defendant banks' financial advisors that he wanted ready access to the money and was looking for a better rate of interest than he had been able to find advertised. The defendant gave the plaintiff details of an AIG fund. The plaintiff said he could not accept any risk to his capital and asked the defendant to confirm the risk associated with the AIG fund. The defendant replied that the risk was the same as if the cash was in a deposit account. On that basis, the plaintiff invested in the AIG fund. In 2008, following the turmoil in the financial markets, the plaintiff was due his money from the AIG fund. He received less than his original investment. The plaintiff claimed damages for bad investment advice. The defendant denied having given advice to the plaintiff and said that the basis of its contract was execution only.

80. The UK High Court held that a bystander reading the communications between the plaintiff and the defendant and the defendant's records, would have concluded that the transaction was being treated as an advised transaction rather than "execution only". In the course of his judgment, Havelock Allen J. stated:-

"49. *In assisting Mr Rubenstein to make his investment, Mr Marsden was bound to observe the requirements of the statutory and regulatory regime governing the conduct of investment business by IFAs. The terms of that regime are not in dispute. How exactly it applied to the transaction in this case is controversial. The issue, in a nutshell, is whether the transaction was an 'execution-only' transaction or an advisory one.*

...

71. *The distinction is fundamental. Ultimately it depends on what was said and what was done by the adviser, although clues may lie in the nature of the client's inquiry and in the process which was followed. I deal here with the process, which cannot be more than a pointer. Under the next two headings I shall consider what constitutes 'advice' and whether advice was in fact given.*

72. *Mr Cogley relied on the fact that nothing was said by Mr Rubenstein or by Mr Marsden about whether the contract was to be 'advisory' or 'execution only' for the inference that it was 'execution only'. But Dr Thompson and Mr Egerton were agreed that advisory relationships are much more common than execution only relationships and that most private clients, if they understood the significance of the distinction at all, would say that they expected their relationship with a financial adviser to be an advisory one. In the circumstances, there can be no default presumption that the contract is 'execution only', if the distinction between the giving of advice and the provision of information is not expressly addressed. I accept Dr Thompson's view*

that the onus was on Mr Marsden to clarify the position if it was at all unclear.

73. *It is unlikely that Mr Rubenstein understood the distinction between an advisory and execution only contract; but Mr Marsden certainly did. HSBC had a Non-Advised Sales Process under which a Non-Advised Instruction Form ('NAIF') was to be issued in the case of an execution only transaction. The distinction between advice and non- advice appeared also in the choice of services in section 3 of the 'Key Facts about our services' document. The problem is that no one ticked the non-advice box for Mr Rubenstein. The Non-Advised Sales Process was not followed. A NAIF was not issued. The FEEPAY Form was incorrectly filled in as indicating that an advisory service was being provided. Ms. Mead completed an internal Investment Services Centre ('ISC') Despatch Form for the bank's Investment Services Centre in Southampton, which described the 'Business Type' as 'Advised'.*

74. *...Mr Marsden never sent the letter of recommendation to Mr Rubenstein; but it is odd that it was promised if Mr Marsden believed that he was providing an execution only service.*

75. *All these mistakes strongly suggest that the contract with Mr Rubenstein was being treated by the bank as an advisory one. There was one significant omission which points the other way. If the relationship was advisory in the full sense, a fact find or KYC (Know Your Customer) document would have been completed in order to meet the requirements of COB 5.2. This should have been a matter of habit for Mr Marsden since the great majority of transactions executed by*

him on behalf of the bank were advisory. In this case no KYC document was compiled. Mr Marsden did not obtain a full risk profile from Mr Rubenstein. However he learned from Mr Rubenstein most of what he needed to know. The only aspect of Mr Rubenstein's circumstances which was not investigated, but which would have been investigated during a full fact find process, was his tax status and that of his wife."

81. I am satisfied that the factual matrix in *Rubenstein* was substantially different to the present case. Notwithstanding the appellant's reliance on *Rubenstein*, in light of the evidence available to the respondent and the various findings made by the respondent which preceded her finding that the transaction was conducted on an execution only basis (which the Court has not seen fit to disturb), I am satisfied that it was reasonably open to the respondent to find that the transaction was done on an execution only basis.

82. In all of those circumstances, I find that the appellant's reliance on *Rubenstein* is misplaced, particularly in circumstances where, unlike the position in *Rubenstein* (where the plaintiff was actively seeking advice), the respondent found as a matter of fact that the appellant had the Irish Life product already in mind when he made contact with Mr. Mullins and subsequently met Mr. Mullins and Mr. O'Connell on 25th January, 2007. Moreover, the respondent found as a fact that the appellant did not want to let Mallow "*'know all [his] business'* and was therefore unwilling to complete the full Financial Review". This Court has not found that finding to be vitiated by serious or significant error or a series of such errors.

Issue two-Is the respondent's Mallow Determination vitiated by serious and significant error by reason of the respondent's finding regarding the "Waiver for execution only business" portion of Mallow's Financial Review Form?

83. Counsel for the appellant points to the failure of Mr. Mullins to ensure that the appellant completed the *"Waiver for execution only business"* which was set out on the last page of the internal Mallow Financial Review Form.

84. Counsel for the appellant argues that had the waiver been completed, it would, as a matter of law, have relieved Mallow of its legal obligations to provide advice to the appellant. However, he argues that the converse must also be the case. Counsel contends that the failure of Mr. Mullins/Mallow to have the appellant complete the waiver means that Mallow's obligations as financial advisor to the appellant remained in place. It is further contended that whilst this failure was criticised by the respondent in the Mallow Determination, and whilst the respondent recognised the importance of the waiver, she failed to attach any weight to the substantive issue of the failure to complete the waiver, and, accordingly, it is submitted that the respondent erred in failing to find that its non-completion militated against a finding that the transaction was an execution only transaction. It is argued that given that the waiver had legal consequences by its execution as a matter of law, it follows that its non-execution must also have legal consequences as a matter of law, namely that the appellant did not waive his rights.

85. Counsel also contends that there was no evidence before the respondent as to why the waiver was not executed. Nor was there any evidence that the appellant had been asked or refused to complete it. The only evidence of a refusal on the part of the appellant was in relation to the "fact find".

86. Counsel for the respondent submits, however, that there is no basis for the contention that the non-completion by the appellant of the "*Waiver for execution only business*" militated against a finding that the transaction was execution only in circumstances where, as found by the respondent, the appellant had declined to complete a financial review after being asked to do so by Mr. Mullins. Counsel further submits that, in this regard, the appellant's circumstances can be distinguished with those of the plaintiff in *Rubenstein*. While it accepted by counsel for the respondent that it would have been better had Mr. Mullins ensured the completion by the appellant of the "*Waiver for execution only business*" section of Mallow's own Financial Review form, the respondent nevertheless found as a matter of fact that the appellant had completed the waiver on the actual product document.

87. Counsel for Mallow likewise submits that in light of the factors which informed the respondent's finding that the transaction was conducted on an execution only basis, Mr. Mullins' established failure to have the appellant execute the "*Waiver for execution only business*" cannot reasonably be said to be sufficient for the respondent to find either that Mr. Mullins provided advice to the appellant or that the transaction was otherwise than an execution only transaction.

88. Notwithstanding the appellant's submissions in relation to the "*Waiver for execution only business*" document, I am not persuaded that the respondent's treatment of Mr. Mullins' failure to have the appellant complete the document in question is a sufficient basis for the Court to conclude that the respondent made a serious and significant error in finding that the transaction was execution only. I so find in light of the other evidence which was before the respondent and from which I am satisfied that she was reasonably entitled to conclude that the transaction was done on an execution only basis.

Issue three- The appellant's contention that the respondent failed to pay regard to the appellant's status as an unsophisticated investor

89. The case is also made by counsel for the appellant in his submissions to the Court that implicit in the respondent's Determinations is a finding that the appellant was an unsophisticated investor. He submits that albeit accepting that the appellant was not a sophisticated investor, the respondent erred in failing failed to consider what duty of care was owed to him by Mallow and Irish Life.

90. Counsel further submits that even if he in wrong in asserting that such a finding is implicit in the respondent's Determinations, the respondent should have made such a finding on the evidence that was before her. In this regard, counsel points to Mr. Mullins's direct evidence that the appellant was not a sophisticated investor.

91. It is submitted that as a matter of law, the position of the unsophisticated investor has been recognised as requiring protection.

92. The respondent submits that contrary to the appellant's submission, there was no explicit finding by the respondent that the appellant was an unsophisticated investor. It is further submitted that the respondent was not required to make such an explicit finding as she was satisfied on the evidence before her that the transaction had proceeded on an execution only basis. The respondent's position is that as the appellant chose to proceed on an execution only basis, it was not for the respondent to make a finding regarding his level of sophistication as an investor.

93. Counsel for Mallow likewise submits that there was no requirement for the respondent to make a finding as to whether or not the appellant was an unsophisticated investor.

94. I do not believe that there was any finding, implicit or otherwise in the Determinations that the appellant was an unsophisticated investor. Details of the appellant's investment history are, however, alluded to by the respondent. Furthermore, albeit that that there is no finding as to the level of the appellant's sophistication as an investor, the evidence of Mr. Mullins was that the appellant, albeit not a sophisticated investor, was an *"astute"* and *"experienced investor"*.

95. In the circumstances of this case, and particularly having regard to the findings of the respondent which this Court has upheld, I am constrained to find that the respondent did not fall into serious and significant error in failing to determine whether the appellant was or was not a sophisticated investor.

Issue four-Alleged errors on the part of the respondent in her treatment of Irish Life's interaction with the appellant

96. It is argued on behalf of the appellant that albeit that Irish Life was at a remove from the appellant compared to Mr. Mullins, it remains the case that Irish Life had sent a representative to the meeting of 25th January, 2007. Accordingly, counsel contends that Irish Life cannot be divorced from the process that took place *vis-à-vis* the appellant's investment. This is particularly so given that Irish Life's brochure stated that investors should talk to professionals before investing. Counsel further submits that the product in issue here was never intended to be sold by way of an execution only transaction to an unsophisticated investor.

97. Counsel for the respondent submits that there was ample evidence for the finding that Mr. O'Connell did not act in an advisory capacity to the appellant. Counsel also points out that it was accepted by the appellant that Irish Life did not carry out any risk profile of him. Furthermore, it is apparent from the Irish Life Determination that the respondent preferred the evidence of Mr. O'Connell that he

told the appellant at the meeting on 25th January, 2007 that he was not there in an advisory capacity. It is thus submitted that from Mr. O'Connell's evidence, it was open to the respondent to conclude that Mr. O'Connell did not advice to the appellant. Counsel submits that it is not for the appellant to ask the Court at this juncture to prefer his evidence over that of Mr. O'Connell and Mr. Mullins.

98. It is submitted that insofar as the appellant in his affidavit, refers to Mr. Mullins having testified at the oral hearing that Mr. O'Connell *"did 100% advise on the product"*, that averment is not an accurate account of Mr. Mullins' evidence. What Mr. Mullins in fact stated was that Mr. O'Connell *"did 100% give advice on the product and went through all the technical details of the product"*. Moreover, the respondent accepted that the information provided by Mr. O'Connell was in relation to the nature of the product and not that he gave advice in respect of it. Counsel also points out that Mr. Mullins' further testimony when pressed on the matter was as follows:

> *"No, I suppose he went through the technical details of the product and just gave the full facts of the product like. I suppose he wasn't there to sell it, as he said at the start. He was just here to answer any questions that might arise on the product and go through all the details of it"*.

99. It is argued on the part of the respondent that the fact that the details on the application form signed by the appellant were filled in by Mr. O'Connell on 26th January, 2007, albeit found by the respondent not to be proper, was nevertheless correctly found by the respondent to have no impact on the appellant's decision to invest in the fund. Accordingly, counsel argues that this issue is not relevant to the question of whether Mr. O'Connell acted in an advisory capacity on 25th January, 2007.

100. Counsel for Irish Life submits that the most crucial finding of fact made by the respondent in respect of Irish Life was that at the outset of the meeting on 25th January, 2007 Mr. O'Connell had clearly informed the appellant that he could not offer advice on the investment. It is submitted that the respondent had ample evidence for this primary finding of fact and that such evidence is recorded in the determination. In particular, the respondent found that it was not just Mr. O'Connell but also Mr. Mullins who testified that Mr. O'Connell told the appellant that he was not there to sell the product but rather to apprise the appellant of the facts and technical details relating to the product. This evidence was accepted by the respondent. It was for the respondent to assess that evidence.

101. Counsel further contends that the respondent was entitled to treat the appellant's evidence that he had been told by Mr. O'Connell at the meeting that Mr. O'Connell himself was investing in the product as not credible given that the appellant had earlier stated in his Complaint document that Mr. O'Connell had told him at the meeting that he had already invested in the fund. Counsel points out that under cross-examination the appellant had no explanation for the inconsistency in his account of this issue. It is submitted that this was a factor which weighed with the respondent in her assessment of the appellant's credibility.

102. In my view, as is evident from her Determination, the respondent was satisfied that Mr. O'Connell did not provide the appellant with any advice regarding the investment in the Fund. Albeit the appellant disputed that Mr. O'Connell had ever said he could not proffer advice, the respondent preferred Mr. O'Connell's evidence to that of the appellant. She did so following an oral hearing where there was full opportunity to all parties to give their evidence and be cross-examined. In circumstances where the respondent made a primary finding of fact supported by

credible evidence this Court cannot set same aside. The words of McCarthy J. in *Hay v. O'Grady* come to mind:

> *"If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them."*

103. Furthermore, the respondent found that Mr. O'Connell had accurately explained the nature of the product to the appellant including that it was a high risk investment. Additionally, the respondent found that Irish Life had "in its product literature, highlighted the nature of the investment and the risks attached to it". The appellant does not seek to challenge that finding. Moreover, the appellant's own testimony was that he had not fully read the Irish Life brochure.

104. I am satisfied that the fact that Mr. O'Connell provided information on the investment product does not equate to Mr. O'Connell having a duty of care to give advice to the appellant. Moreover, In circumstances where it is not being contended by the appellant that it was Mr. O'Connell who ticked the box on the application form which denoted that the transaction was an execution only transaction, I accept Irish Life's argument that having received the signed application form from the appellant, duly ticked as an execution only transaction, the respondent was reasonably entitled to conclude that Irish Life was entitled to regard the matter as an execution only transaction.

Issue five-The alleged failure by the respondent to properly consider the manner in which the Broad Street property into which the Fund invested was ultimately dealt with by Irish Life

105. It is also contended on the appellant's behalf that Irish Life hugely increased the risks for investors by funding the property investment over a short period only without any provision for extending the bank loan which had part financed the investment. Counsel also argues that the appellant had never been advised that the renewal of the loan would be refused. In the brochure provided to the appellant by Irish Life, it was never said that the bank would not advance further monies to the fund. All that was said in the brochure was that the period of investment might be extended beyond the contemplated period, with which the appellant had no issue. Irish Life, however, had never intimated that the loan funding the acquisition of the Broad Street property might not be refinanced.

106. Counsel for the respondent submits that insofar as the appellant now seeks to argue that Irish Life mismanaged the investment, the appellant did not allude to this in his grounding affidavit. Moreover, at the oral hearing before the respondent, the appellant was asked what his grievance was. His reply was that Mallow and Irish Life had advised him to invest in a low risk investment which in fact was high risk. It is submitted that that was the basis of his complaint to the respondent, not that Irish Life had mismanaged the investment. It is further submitted that in the course of the oral hearing, the appellant accepted that it had been explained to him in the brochure that Irish Life had the discretion to change the term of the investment and that were they to try and sell the building purchased by the investment fund it might prove difficulty to sell.

107. Counsel for Irish Life, likewise, disputes the appellant's attempt in the hearing of the within proceedings to make complaint that Irish Life was wrong to sell the Broad Street Building rather than renew the loan on the building. Counsel submits that this was not a complaint made by the appellant to the respondent in September,

2012. Moreover, when on 9th December, 2015 the respondent advised Irish Life of the appellant's complaint there was no reference to any complaint by the appellant to Irish Life having sold the building.

108. Counsel points out that when invited by the respondent on 3rd March, 2016 to make further submissions, the appellant's response was that he had nothing further to add to his complaint. Counsel also points to the fact that when invited to outline his complaints during the course of the Oral Hearing on 16th November, 2016, the appellant did not make any complaint about Irish Life selling the Broad Street Building or failing to renew the loan on the said building.

109. By way of response to Irish Life's submissions that the appellant did not complain to Irish Life regarding this matter, counsel for the appellant points to correspondence sent by the appellant to Irish Life on 16th April, 2012, Irish Life's reply of 20th April, 2012 and the appellant's further letter of 23rd April, 2012. Moreover, he points out that in the course of the oral hearing Mr. O'Connell testified that Irish Life had sold the Broad Street property because Irish Life's lenders would not extend the loan. Counsel submits that nowhere in the product brochure did Irish Life say or warn that it might not be able to secure continued bank funding to finance the product. It is submitted that the respondent erred in not dealing with the appellant's complaint in this regard.

110. Having regard to the parties' submissions on this issue, I am not persuaded that the respondent's Determination is vitiated by serious or significant error in this regard. In determining whether the respondent erred in not specifically addressing this issue, I have had regard to the fact that the appellant had the product brochure at all relevant times (as noted by the respondent) and could have raised queries in respect of same. Moreover, I find substance in the argument that the thrust of the appellant's

case to the respondent was that he had not been advised of the risks in respect of the investment, not that the investment was mismanaged by Irish Life.

Issue six- The alleged failure of the respondent to consider the duty of care owed to the appellant by Mallow and Irish Life

111. Part of the appellant's case is that the respondent failed to provide any analysis whatsoever of the existence, scope and nature of a duty of care on the part of Mallow and/or Irish Life to the appellant. As to the duty of care owed to the appellant, counsel points to *Bank of Ireland v. Lennon* (High Court, 27th February, 1998) where Lavin J. stated:-

> *"Where a banker chooses to explain the terms and effect of a security document in circumstances where he knew or ought to have known that the person to whom the explanation is proffered would rely on it in deciding whether or not to execute the security, it is likely that a duty of care will arise on the part of the banker not to misstate the position proffered. The duty of care owed by a banker to a customer in relation to the terms and effects of a security document arose in Cornish v. Midland Bank plc [1985] 3 All E.R. at page 513 which in my view is authority for the proposition that where a banker chooses to explain the nature and effect of a security he must take care not to misstate the position. However, it was also suggested by Kerr L.J., that in certain circumstances, a bank may owe a duty to the giver of security at least if he is a customer to proffer some explanation as to the nature and effect of the security document to be executed. However, he expressed this duty to care to confined to customers only and this in my view is indicative of the fact that the duty may indeed be contractual in nature and therefore must be taken*

to arise from an implied term of the contract between the banker and the customer."

112. Counsel for Irish Life contends that the fact that Irish Life did not give advice to the appellant precludes any consideration of whether a duty of care is owed by Irish Life to the appellant. Furthermore, and in any event, there was no evidence before the respondent of a voluntary assumption of risk by Irish Life. Accordingly, insofar as the appellant relies in his written submissions on the test set out in *Customs and Excise Commission v. Barclays Bank Plc* [2006] UK HL 28, it is submitted that the first limb of that test, namely *"(a) whether there has been an assumption of responsibility"* cannot be met in the present case as the respondent has made a primary finding of fact that Mr. O'Connell clearly apprised the appellant on 25th January, 2007 that he was not at the meeting to advise the appellant. In the absence of a voluntary assumption of risk there can be no duty of care owed to the appellant.

113. It is further submitted that the appellant's circumstances are clearly distinguishable from the factual matrix in *Bank of Ireland v. Lennon.* Unlike that case, it cannot be said Mr. O'Connell knew that the appellant would rely on his representations in circumstances where as a matter of fact, as found by the respondent, the appellant knew from Mr. O'Connell that his attendance at the meeting of 25th January, 2007 was not for the purposes of advising the appellant.

114. The Court notes that in the course of his submission, counsel for the appellant agreed that if the respondent was correct in her finding that the transaction was execution only, the issue of the duty of care owed to the appellant would not arise for consideration. As the Court has found that the respondent reasonably concluded that the transaction was execution only and that the respondent did commit serious or significant error in formulating the factual matrix which underpinned her finding that

it was an execution only transaction, the issue of the respondent's failure to consider the duty of care does not arises for consideration by this Court either in respect of Mallow or Irish Life.

Summary

115. For the reasons set out in this judgment, the relief sought in the two notices of motion is denied.