THE HIGH COURT

RECORD NUMBER: 2020 121 MCA

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

BETWEEN

DANSKE BANK A/S

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

MARTIN MOORE AND MARTINA MOORE

NOTICE PARTIES

JUDGMENT of Ms. Justice Niamh Hyland delivered on 19 February 2021

Introduction

1. This is an appeal by Danske Bank A/S (the "appellant") pursuant to s. 64 of the Financial Services and Pensions Ombudsman Act, 2017 (the "2017 Act") against the decision of the Financial Services and Pensions Ombudsman (the "respondent") dated 7 April 2020 (the "Decision") upholding a complaint that, when switching to a new fixed rate mortgage in 2006, the complainants were not adequately informed by the bank that the ECB tracker rate applicable to their first loan in 2005 would not be available to them at the end of the three-year fixed period or that they were taking out a new loan.

2. The heart of the appeal against the Decision is that the mortgage documents signed by the complainants made the position clear, that the complainants' subjective understanding of

the documents and wrongful assumptions were irrelevant and that, where there was no illegality identified on the part of the appellant, the respondent was not entitled to uphold the complaint.

3. I conclude for the reasons set out in this judgment that this argument fails to recognise the import of the jurisdiction being exercised by the respondent under s.60(2)(b) and (g) of the 2017 Act, which respectively permit him to uphold a complaint on the basis that the conduct was unreasonable, unjust, oppressive, or improperly discriminatory in its application to the complainant or that the conduct complained of was otherwise improper. Having regard to this jurisdiction, it was open to the respondent to uphold the complaint under s. s.60(2)(b) and (g), irrespective of whether the appellant had acted in accordance with law. Even where the complainants had signed up to the mortgage documentation and where the appellant had no black letter duty under statute, or "soft" law obligation under a regulatory standard, to give information in a specific form as to the redemption of the tracker mortgage and the inability to return to a tracker rate under the new mortgage, the respondent was still entitled to find an ambiguity and lack of clarity in the information provided. In short, the statutory scheme and the case law on same make clear that the mere absence of a breach of law does not immunise a financial services provider from a finding of unreasonable and improper conduct under s. 60(2)(b) and (g).

Factual Background

2005 Mortgage

4. The complainants obtained a loan facility from the appellant's predecessor, National Irish Bank, advanced pursuant to a facility letter dated 22 August 2005 for the purposes of the purchase of their home at 7 The Avenue, Lakepoint Park, Mullingar, Co. Westmeath. The interest rate applicable was a tracker interest rate of the ECB plus 0.99% per annum. They had no right to a fixed interest rate under that loan.

Final financial summary letter 2006

5. Some eight months later, the complainants decided they wanted to fix their interest rate. They met with representatives of the appellant's predecessor in June and on 28 June 2006 were furnished with a letter entitled "Final Financial Summary" that referred to the meeting. That document summarised the main features of the loan, such as the purpose of the loan, the amount borrowed, and the loan repayment term. The letter provided an individualised table showing how the complainants' financial status would change after taking out the mortgage. This letter was signed by the complainants on 3 July 2006.

Housing Loan Agreement 2006

6. A Housing Loan Agreement was also drawn up on 28 June 2006, referred to in this judgment as the "fixed rate home loan" as this is how it is identified in the Decision. This identified important information such as the amount of credit advanced, period of agreement and total amount repayable. The Schedule to the letter provided further information, including the purpose of the loan, property to be mortgaged, rate of interest, period of fixing, repayment intervals and security. The letter included statutory warnings in capital letters, identifying *inter alia* the risk of losing their home if they did not keep up payments. On page 3, the following warning, again in capitals, appeared: "*WARNING – THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE".* The letter also included the bank's general conditions for annuity home loans.

7. On 3 July 2006, the complainants signed the letter signifying their acceptance and it was also signed for and on behalf of the bank. A line was struck through the section providing for witnessing of the letter.

8. Under the heading "Schedule" the letter provides at p. 2, *inter alia*, as follows:

'Rate of interest: 4.18% per annum, fixed.

4.24% per annum, variable.

Fixed rate: Roll-over date: 1 October 2009. The Roll-over Date is the start date of the standard variable interest rate at that time. The fixed rate period expires on the date preceding this day.'

9. The appellant has emphasised the General Conditions, referring to Clause 11.4 which states that at the end of the fixed rate period *'...the Loan will revert to our then applicable variable home loan rate'* and to Clause 12.1: '*If the Loan is a variable rate loan which is not linked to the ECB Refinance rate, the rate of interest applicable to the Loan will be our applicable variable home loan rate.'* Clause 12.2 refers to the conditions that apply to the ECB Tracker Variable Rate Home Loan.

10. The appellant also identifies that the post-contractual documentation informed the complainants that the tracker mortgage had come to an end, with the closing mortgage statement for the Tracker Account that issued on 3 July 2006 stating, "*to close ecb tracker*".

The complaint to the respondent

11. In September 2015, a complaint was made to the respondent to the effect that, when the complainants applied to fix their mortgage interest rate for three years in 2006, the appellant did not inform them that the ECB tracker rate interest applicable to their first loan in 2005 would not be available to them at the end of the three-year fixed interest period. They said they did not realise that in 2006 they were taking out a new loan facility with different terms and conditions than the 2005 mortgage, and they assumed the mortgage loan would revert to a tracker rate. They said they only learnt of this in 2009, when the fixed rate expired and they sought to go back on the tracker rate.

12. The respondent notified the appellant of the complaint by letter on 20 May 2016 and requested certain information and documentation from the appellant on 21 January 2019. The appellant responded on 13 February 2019, submitting that the complaint should be dismissed on several grounds including that the 2006 loan agreement had been clear and transparent about

the terms and conditions which would apply to it, and that the complainants ought reasonably to have been aware that they had entered into a new loan agreement.

13. The complainants made further submissions to the respondent on 16 February 2019 and the appellant replied on 26 February 2019. An additional letter including further submissions was sent by the complainants on 28 March 2019 and on 9 May 2019 the appellant confirmed it had no more submissions to make. On 15 November the respondent requested certain information from the appellant which was provided on 27 November 2019. The complainants made further submissions to the respondent on 6 January 2020, and on 9 January 2020 the appellant also made further submissions.

14. On 15 January 2020 the respondent informed the parties that adjudication of the complaint had concluded and furnished a preliminary Decision, inviting parties to make further submissions on same. The appellant did so on 4 February 2020 and 14 February 2020 and the complainants did so on 7 February 2020.

15. In his Decision of 7 April 2020, the respondent upheld the complaint on two grounds, under s.60(2)(b) of the 2017 Act, being that the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainants; and under s.60(2)(g), being that the conduct complained of was otherwise improper.

16. The respondent directed the appellant to rectify this behaviour by applying an ECB tracker rate to the complainants' 2006 mortgage loan from 2006, repaying any interest overpaid, and coming to an arrangement to ensure the tracker rate be applied to the loan to maturity. The respondent directed the appellant to make a compensatory payment to the sum of €4,000.

The appeal

17. By way of originating Notice of Motion of 8 May 2020, the appellant applied for an Order pursuant to s. 64 of the 2017 Act setting aside the Decision. The Notice of Motion was grounded on the affidavit of Mr Michael Leonard, Head of the Non-Core division of the Irish

registered branch of the appellant, sworn 8 May 2020. The respondent filed a Statement of Opposition on 13 August 2020. An affidavit of Ger Deering, the Financial Services and Pensions Ombudsman, was sworn on 12 August 2020.

The Decision

18. The core findings in the Decision were that:

- The 'Home Loan Questions and Answers' section of the Final Financial Summary document, and the fixed rate home loan documentation, did not disclose the real nature of the transaction;
- The appellant failed to inform the complainants appropriately that if they wanted a fixed interest rate, their existing mortgage loan would have to be redeemed, meaning that the terms and conditions applicable to that loan would no longer apply;
- It was not clear to the complainants that, by signing the fixed rate home loan in July 2006, the contractual entitlement to a tracker interest rate of the ECB plus 0. 99% that had existed under their previous 2005 tailored home loan ECB tracker would no longer apply to their new loan;
- The complainants did not know that they were entering into a new mortgage subject to different conditions.

The standard of review

19. As noted above, this is an appeal under s.64(1) of the Act which simply provides that a party to a complaint before the Ombudsman may appeal to the High Court against a decision or direction of the Ombudsman. Section 64 identifies the range of orders that may be made by the High Court in determining such an appeal. Section 64(6) provides that the decision of the High Court is final save that a party to the appeal may apply to the Court of Appeal to review the decision on a question of law (but only with the leave of either of those courts as appropriate).

20. It is agreed between the parties that to succeed in an appeal of this type, a party must show that the decision reached by the respondent was vitiated by a serious and significant error. As found by Finnegan P. in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323 at para. 35:

> *"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".*

21. The above test was cited with approval by MacMenamin J. in *Molloy v. FSO* (Unreported, High Court, 15 April 2011) where he held:

> *'[27.] This widely accepted principle contains the following elements:*
>
> *1. the burden of proof is on the appellant;*
>
> *2. the standard of proof is the civil standard;*
>
> *3. the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;*
>
> *4. the onus is on the appellant to show the decision reached was vitiated by a serious and significant error or a series or such of errors – put in simple terms, the question is if the errors had not been made, would it reasonably have made a difference to the outcome; and*
>
> *5. in applying this test, the court may adopt what is known as a deferential stance and may have had regard to the degree of expertise and specialist knowledge of the F.S.O.'*

22. The Court of Appeal confirmed in *Financial Services Ombudsman v. Millar* [2015] 2 ILRM 337 that the High Court, in hearing an appeal, should not adopt a deferential stance to a decision or determination by the respondent on a "pure" question of law.

Nature of jurisdiction under Section 60(2)(b) and (g)

23. Given the arguments raised in this case, it is useful to reflect a little on the statutory framework in which s.60(2)(b) and (g) may be found. Part 5 of the 2017 Act is entitled "Complaints to the Ombudsman" and, as observed by Simons J in *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2020] IEHC 538,

> *"The Ombudsman can consider not only complaints made in respect of the provision of a financial service, but can also consider complaints in respect of conduct involving an* offer *to provide a financial service, or involving the* failure *to provide a particular financial service requested by the complainant. In such circumstances, the Ombudsman has jurisdiction to uphold the complaint on the grounds, inter alia, that the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant"* (para. 33).

24. Under s. 56(7), the Oireachtas places an obligation on the Ombudsman to inform the Central Bank or the Pensions Authority where he or she considers, during an investigation or following the completion of an investigation, that there is a persistent pattern of complaints, a persistent pattern of facts or evidence arising from the complaints, or any other matter of concern to the Bank or Pensions Authority. This power suggests that the Oireachtas viewed the work of the Ombudsman in reviewing and determining individual complaints as having an additional role in bringing systemic problems to the attention of the relevant regulatory authorities. (Indeed, in this case, the respondent decided to refer the decision to the Central Bank because of the truncated manner in which the transaction took place together with the

lack of clarity in the documentation as to the nature of the transaction (see p.24 of the Decision)).

25. Section 60 sets out the powers of the Ombudsman in respect of a complaint, permitting it to be upheld, substantially upheld, partially upheld or rejected. A complaint may be upheld either wholly or in part only on identified grounds. In this case, the grounds relied upon by the respondent were (b) and (g):

> *(2) A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:*
>
> *...*
>
> *(b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
>
> *...*
>
> *(g) the conduct complained of was otherwise improper*.

26. The grounds <u>not</u> identified by the respondent are also relevant to the nature of the challenge made by the appellant. Section 60(2) also permits the respondent to uphold a complaint on the ground that:

> *(a) the conduct complained of was contrary to law;*
>
> *...*
>
> *(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
>
> *(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;*
>
> *(e) the conduct complained of was based wholly or partly on a mistake of law or fact;*

(f) an explanation for the conduct complained of was not given when it should have been given;

27. Those subsections make it clear that the Ombudsman both has jurisdiction to uphold on grounds involving what I might describe as black letter law issues i.e. contrary to law, or based on a mistake of law but also to uphold on grounds where there has been no breach of law at all, including quite strikingly upholding a complaint where the conduct is in accordance with law, but the Ombudsman holds that the application of that law was detrimental to the complainant. The breadth of the Ombudsman's jurisdiction under s.60(2) cannot be underestimated: he or she is effectively given a jurisdiction to override the law in certain situations, in the sense that although a complainant may have no remedy in law, including under the law of contract, nonetheless they can have their complaint upheld. In other words, a financial service provider can act perfectly lawfully but nonetheless find that a complaint is upheld against it carrying with it an obligation to make specified redress.

28. Section 60(4) identifies the redress the Ombudsman may order, including directing a financial service provider to review, mitigate or change the conduct complained of or its consequences, provide reasons for the conduct, change a practice relating to the conduct, pay compensation to the complainant, or "*take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint*". The extensive and wide-ranging nature of the remedies at the disposal of the Ombudsman reinforce the sweeping nature of his or her redress jurisdiction.

29. The nature of review that a court should engage in when reviewing a decision made under subsections (b) or (g) has been considered in a relatively small number of cases. In *Governey v. Financial Services Ombudsman* [2015] 2 I.R. 616, on an application for leave, Clarke J. in the Supreme Court observed:

"39. Thus it may be seen that, while the F.S.O. is given a jurisdiction to consider, and if appropriate to find substantiated, complaints which involve issues based purely on questions of legal rights and obligations, the jurisdiction is much broader than the determining of such legal questions. It is absolutely clear that the F.S.O. retains a jurisdiction to find a complaint substantiated even though there has been no breach of the legal entitlements of the complainant.

40. It is also clear from the provisions of s. 57CI(4) that the range of remedies which can be imposed by the F.S.O. in the event that a complaint is substantiated are wide and go beyond (but do include) the form of redress which might be available in the case of someone whose legal rights have been interfered with.

...

44. There may well be a case for affording deference to the view which the F.S.O. [Financial Services Ombudsman] takes as to, for example, the unreasonableness of lawful conduct on the part of a financial institution. But it does not necessarily follow that a court is bound to afford similar deference to the F.S.O. on its view of the law or the application of the law to facts which task is, after all, one of the core functions to be found in the administration of justice."

30. In *Irish Life and Permanent Plc v. Financial Services Ombudsman and Thomas* [2012] IEHC 367, a case that bears a strong resemblance to the instant case, Hogan J. upheld a finding by the Financial Services Ombudsman, (as he was then entitled), that "*the conduct complained of was otherwise improper*" under the relevant section of the Act then in force, being the Central Bank Act 1942 as amended. The wording is identical to that in s.60(2)(g), relied upon in this case by the respondent. There, the complainants had taken out a tracker mortgage in 2007 with ILP. In 2009 they sought advice from ILP in relation to their mortgage payments and were allowed to switch to a variable rate for a redemption fee. The FSO found that ILP had

not given appropriate advice to the Thomases when they availed of the option to switch, and that they were not told that they would no longer be entitled to opt for the tracker rate at the conclusion of the fixed term that had previously applied if the fixed term was broken. The FSO found that the contractual terms were not sufficiently clear so as to advise the Thomases of the position.

31. Noting that the mortgagor/mortgagee relationship is not a fiduciary one, and that there is no duty on a bank to insist that customers take independent advice in relation to bank dealings, Hogan J. observed:

> "*The laissez-faire rules which might apply in the case of the borrowing and lending on the international capital markets cannot be applied in exactly the same way in the case of the domestic mortgage market, given that these are matters which gravely affect the long term welfare of most members of the general public. The very fact that the Office of the Financial Services Ombudsman was established by the Oireachtas is itself living testimony of this*" (para. 47).

32. He went on to observe that while counsel for the bank emphasised its role as simply giving information and not advice:

> "*this is not quite the picture which emerges from the documentation, or, again, at least, the Ombudsman – who, after all, is possessed of special skill and competence in this area – was entitled so to think.*
>
> *...*
>
> *The Ombudsman was, moreover, entitled to find that the Bank had not given the appropriate information as to the implications of a switch*" (para 49).

33. He observed that the Ombudsman was entitled to think that the conduct was "otherwise improper" as per the relevant subsection, and that:

"*… the Ombudsman was entitled to conclude that a retail bank should properly alert its customers – if only in the most general of terms – of the potentially serious adverse consequences of a particular decision, especially where it seems clear where those customers were seeking advice and guidance from the Bank's mortgage advice centre and that these are standards which modern retail Banks might reasonably be expected to uphold*" (para. 56).

34. Finally, Hogan J. concluded by observing that it would have been advantageous and desirable for the Ombudsman to have spelled out precisely why the conduct was considered to be so otherwise improper in this statutory sense for the reasons set out in *J.& E. Davy v. FSO* [2010] 3 I.R. 324.

35. A similar observation may be made in this case. The respondent relied on both s.60(2)(b) and (g). Given that s.60(2)(b) identifies four different types of wrongful conduct individually, any one of which is sufficient for a finding of breach, the respondent ought to have identified what category of wrongdoing the impugned behaviour fell into having regard to the terms of s.60(2)(b).

36. Unlike the situation in *Thomas*, in this case the respondent did not uphold any complaint about a failure to give advice and guidance and the Decision makes this clear. But *Thomas* addresses a distinct issue unrelated to advice and guidance, being the FSO's finding that the bank should properly alert its customers of the potentially serious adverse consequences of a decision. There, similar to the instant case, there was a contractual provision providing for the loss of the tracker in certain circumstances, but nonetheless this was found by the FSO to be insufficient to convey to the complainants its meaning.

37. In *Law v. Financial Services Ombudsman* [2015] IEHC 29, Baker J. observed at paragraph 7 as follows:

"7. It is not doubted that the purpose of the establishment of the statutory complaints procedure was to afford complainants an informal, expeditious and independent mechanism for the resolution of complaints against a financial service or product provider, and that the complaint does not have to be confined to matters which would fall within the realm of contract law, the law of negligence or other defined legal rights or principles."

38. In *Utmost Paneurope,* the FSPO upheld a complaint about significant illness cover on the grounds at s.60(2)(b) and (g). Simons J. observed in respect of the jurisdiction of the Ombudsman as follows:

"35. The Ombudsman appears to enjoy what might be described as a hybrid jurisdiction, whereby he may adjudicate not only on contractual disputes, e.g. where a complainant alleges that the conduct of a financial service provider in refusing to honour a claim is in breach of contract, but may also make determinations and direct remedies in respect of conduct which, while not contrary to law, is found by the Ombudsman to be "unreasonable" or "unjust"."

39. The nature of the legislative scheme and its interpretation by the courts is relevant to the first and primary argument made by the appellant, considered below.

Argument 1: Finding of the FSPO is unreasonable/constitutes a serious error by reference to the signed contractual documentation

Contractual documentation discloses no breach of law

40. In summary, the appellant argues that the contract between it and the complainants does not afford them a right to avail of a tracker mortgage at the end of the fixed rate period; that the contractual documents made that clear, as well as making it clear that this was a new mortgage, thus ending the previous mortgage that gave a right to a tracker mortgage; that the fact that the complainants subjectively did not understand that and made assumptions that they

could revert to a tracker mortgage at the end of the three year period is irrelevant, given that in law they must be treated as being bound by what the contractual documents they sign; and that in those circumstances it was a serious and significant error by the respondent to uphold the complaint on the grounds identified in s.60(2)(b) and (g) (what I will refer hereafter by way of shorthand as the "unreasonable and improper grounds").

41. Essentially, the appellant considers that the extent of its obligations towards the complainants are delineated by the contract documents; and that it was a serious and significant error on the part of the respondent to hold in substance the appellant owed additional obligations to the complainants not part of the contractual relationship. Counsel neatly summed up the argument in the oral hearing by observing that it was impossible to separate out the question of legality from reasonableness.

42. Separately, the appellant complained that the respondent was wrong to conclude that the contractual language was insufficiently clear. The appellant argues that the express terms of the loan documentation were clear that on the expiry of the fixed rate period the appellant's standard variable rate would apply and that the respondent erred significantly in effectively disregarding that the complainants had signed the fixed rate home loan, the terms of which were unambiguous.

43. It points to the acceptance by the respondent in his Decision that the terms and conditions of the Tracker Account did not provide a contractual right for the complainants to apply a fixed interest rate to that mortgage loan, and that the respondent did not find that there was any oral agreement when the parties met in July 2006 such as to alter the terms of the written contract or to form any type of collateral contract.

44. It relies on *Smartt v. Financial Services Ombudsman* [2013] IEHC 518, where Hedigan J. found that it was not for the Court to either agree or disagree with the Ombudsman's finding as long as it was one reasonably based upon the evidence before him. The appellant argues that

given the terms of the contract documents, the finding of the respondent was not reasonably based on the evidence before him.

45. It also refers to case law on the enforceability of contracts where the customer has not read and/or understood the nature of its obligations, referring to *Danske Bank A/S (t/a National Irish Bank Plc) v. Madden* [2009] IEHC 319*,* where McGovern J. held that in the absence of special circumstances, a person will be bound by their signature and cannot repudiate these documents by saying they did not read them, since to permit this to happen would lead to chaos in the day-to-day workings of commercial life.

46. The appellant also relies upon the observation of Clarke J. in *ACC Bank plc v. Kelly & Anor* [2011] IEHC 7 to the effect that, by signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning, then the borrower must accept the consequences of having signed a commercially binding agreement.

47. In both cases, counsel for the appellant fairly noted that these were cases involving commercial transactions and not consumers, as in the instant case, but submitted that nonetheless the principles were applicable.

48. Further, it argued that, contrary to the claim made by the complainants that the implications of fixing their mortgage were not adequately explained to them, no such obligation arises, relying upon the finding of White J. in *Irish Life & Permanent v. Financial Services Ombudsman* [2011] IEHC 439 that there is no fiduciary relationship between a customer and a bank. I accept that proposition; but as found in similar circumstances by Hogan J. in *ILP v. Thomas*, discussed above, the lack of a fiduciary relationship is by no means dispositive in this type of case.

Discussion

49. Had the respondent made his decision under s.60(2)(a) or (c) to the effect that the conduct was contrary to law or based on a mistake of law, the approach taken by the appellant to challenge the Decision, i.e. to consider whether the complainants had any legal right to revert to a tracker either contractually or because of a statutory or regulatory breach by the appellant, would be entirely on point. I would decide the case on the applicable law, without deference to the respondent's evaluation of same.

50. But the argument made fails to recognise the import of the jurisdiction being exercised by the Ombudsman under s.60(2)(b) and (g), as discussed earlier in this decision. In principle, a financial service provider may have acted entirely in accordance with law and still be found to have acted unreasonably or improperly. It may have no black letter duty under statute or "soft" law obligation under a regulatory standard to give unambiguous information as to the loss of the tracker mortgage and the inability to return to a tracker rate under the new mortgage but may be still be found to have acted unreasonably and improperly in not doing so. A customer may be bound by their contract with the bank but nonetheless may obtain redress which amounts in substance to a setting aside of those contract terms. As noted in the introduction to this judgment, the mere absence of a breach of law does not immunise a financial services provider from a finding of unreasonable and improper conduct under s. 60(2)(b) and (g) by the regulator. The statutory scheme and the case law referred to above makes this clear.

51. For that reason, in this case, the appellant's reliance upon case law concerning the extent to which parties will be bound by contractual documents even where they did not read or understand them – even if such case law applies *mutatis mutandi* to consumers – is only of marginal relevance given the reliance by the respondent upon s.60(2)(b) and (g). To a black letter lawyer, there may be something heretical about this jurisdiction. But that is what is prescribed by the Act and the respondent is entitled to proceed on that basis.

52. Thus, once it is accepted that the respondent was entitled to evaluate the conduct otherwise than through the lens of whether the appellant complied with the law, the argument of the appellant falls away. The respondent is entitled to find that there was unreasonable/improper conduct on the part of the appellant in not making clear the nature of the new transaction, even where the law does not require such notification.

53. Separately, the appellant says the complainants' subjective understanding of the contract documents should have been ignored by the respondent. That argument might have succeeded if the respondent had found breach under s.60(2)(a) on the basis of conduct contrary to law. However, the appellant has failed to put forward any reason why subjective understanding may be not be taken into account once it is accepted that the respondent is entitled to look at matters that would be irrelevant in a legal context.

54. (In fact, even if this were a decision based on the conduct being contrary to law, it is possible that the subjective understanding of the complainants might have been relevant. In *Law v. FSO*, admittedly in quite a different context concerning the mis-selling of a financial product, Baker J. allowed the appeal against the decision of the Ombudsman by a complainant, *inter alia* on the basis that it was not appropriate to consider whether there was objective evidence "*when the matters before him related to the actual and subjective state of understanding of the investors, and the actual information and knowledge imparted to them and whether this was sufficient for their subjective understanding*" (para. 30)).

55. I should add that it does not seem to me that the respondent only considered the subjective understanding of the complainants. The respondent certainly took the complainants' subjective understanding of the documents into account: but he also evaluated the contractual documents in an objective fashion as demonstrated by the paragraph at the bottom of p.14 of his Decision as follows:

"In these circumstances, I do not accept the Provider's submission that it was clear to any reasonable person reviewing the document that a new mortgage was being taken out. Rather, I am of the view that the document specifically indicated to the Complainants that they were repackaging, restructuring their lending and amending the rate of interest applicable to their mortgage loan to a 3 year fixed rate at that time".

Ambiguity of language

56. The appellant makes an alternative argument to the effect that the respondent should not have found the language was ambiguous or insufficiently clear having regard to the terms of the contractual documentation. Of course, I must not fall into the error of deciding whether I myself think the language was sufficiently ambiguous. Rather, I must consider whether the respondent in reaching such a conclusion made a serious and significant error.

57. That brings me to the question as to how a court should treat an appeal against the exercise of the unreasonable and improper jurisdiction. How should I review a finding that the conduct was unreasonable, unjust, oppressive, improperly discriminatory or, the catch all ground at (g) of "otherwise improper"? The principles identified in the case law reviewed above lend assistance. As Hedigan J. in *Smartt* observed, the decision should be reasonably based upon the evidence before him. That should not be interpreted as the judicial review standard – a serious and significant error will vitiate the decision – but nonetheless, a court must identify whether the material before the respondent was capable of justifying the decision. Further, the expertise of the respondent and the deference the court will afford his or her evaluation having regard to same is important in this respect.

58. Here, I do not think the respondent made a mistake in deciding the language was not sufficiently clear. There was enough material before him to come to that decision. At page 9 of his decision he identified the final financial summary that had been provided to the complainant, noting that under the question "loan purpose", the following answer was given:

"restructure of lending", that under the heading "borrower type" it had the answer "repackage" and that a credit application was submitted to the appellant for a fixed rate home loan on 28 June 2006 and in the comments section of the credit application the following appears: "amending existing mortgage to a 3 year fixed rate".

59. He identified that the schedule section of the fixed rate home loan detailed as follows "purpose of the loan: restructure of lending, as specified in your loan application".

60. At page 13 of his Decision he refers to the fact that the final financial summary refers to a "repackage", "restructure of lending" and "amend rate to 3 year fixed". He concludes that:

> "*none of these phrases or terms were of such a nature that would inform the Complainants and put them on notice, that in order to apply a fixed interest rate to the mortgage loan, that what was going to occur was that mortgage loan account ending 318 would be redeemed and a new mortgage loan ending 621 would be drawn down on different terms and conditions to the original mortgage loan"*.

61. He also responded to the comments that had been made by the appellant in its submissions on the preliminary decision to the effect that he had not adequately taken into account identified features of the final financial summary making it clear that a new mortgage was being taken out. He concluded that he had taken into account the final financial summary document as a whole and accepted there were certain references in the document that might typically be understood to be references to new lending. But he noted that the references highlighted by the appellant were all standard text whereas the most pivotal section of the final financial summary was the home loan questions and answers section, the text of which it appears was typed into the document in response to the questions discussed between the complainants and the appellant at the meeting in or around 28 June 2006. He observed that the phrases or timed contained in that section did not "*disclose the real nature of the transaction that was proposed to be undertaken to the complainants*".

62. He concluded that the letter enclosing the final financial summary of 28 June 2006 specifically indicated to the complaints that they were repackaging, restructuring the landing and amending the rate of interest applicable to the mortgage loan to a 3 year fixed rate at that time, observing "*whilst these three terms in and of themselves can be construed to mean different things, none of them would properly be understood to describe the process of redeeming an existing loan and drawing down a new mortgage loan under entirely new terms and conditions*".

63. Having regard to the material before him and the reasoning employed by him, I cannot conclude that there was a serious and significant error. There was sufficient material before him for him to conclude that there was ambiguity and a lack of clarity in the documentation presented to the complainants, particularly that part of the documentation that was specially tailored to them i.e. the home loan questions and answers section. He went about his task in a systematic way identifying all relevant material, including that which was favourable to the appellant. He set out clearly his reasons for finding that the documentation was ambiguous, founded in the material before him. Weighing up everything, he decided that on balance there was a problem with the documentation. I must defer to his evaluation of the contractual material, given his extensive experience of dealing with complaints from consumers relating to the clarity of mortgage documentation. In all the circumstances, I cannot find an error in his evaluation.

64. Finally, I should note that Counsel for the respondent identified ambiguity in the various descriptions of the mortgage itself in the documentation provided to the complainants. Had I been considering the question of ambiguity of language afresh, that argument would have commended itself to me. However, the respondent did not rely on any such ambiguities and therefore I cannot take them into account.

Alleged "hindsight" vision of respondent

65. The second argument identified by the appellant goes to the respondent's appreciation of what was reasonable or proper. In short, it alleges that the conduct of the appellant ought to have been assessed on what was known, or capable of being known, on 3 July 2006 in respect of tracker mortgages. Instead, it was wrongly assessed on the respondent's knowledge and approach to the loss of a tracker mortgage in 2020.

66. Specifically, the appellant asserts that the respondent failed to engage with the evidence that, at the time the complainants fixed their interest rate in July 2006, the ECB tracker rate had been steadily increasing and was not materially advantageous, and it could not have been predicted that it would become so. In those circumstances, the appellant suggests that it was unreasonable on the evidence for the respondent to find that the complainants would not have entered into the loan facility in 2006 if they knew they were foregoing their entitlement to a tracker rate, given that the ECB rate had increased from 2% in June 2003 to 4.25% in July 2008.

67. It is important to note that the respondent's finding that the complainants would not have gone ahead with the fixed rate loan in June 2006 had they full information about the transaction is made in the redress part of his Decision (see p.24). He relies upon this finding to conclude the complainants are entitled to the application of a tracker interest rate from July 2006.

68. On the other hand, that part of the Decision where the respondent upholds the complaint is not premised upon the consequences of the lack of notice. In other words, the respondent's conclusion at p.22 is simply that the complainants were not adequately put on notice of the nature of the transaction. Therefore, even if the respondent was wrong in finding that the complainants would not have entered into the mortgage had they been given full information, it would not provide a basis for setting aside his decision on breach, as any such error is not material to his core finding of lack of information.

69. Turning to the question of whether any error was made, Counsel for the appellant correctly says they could not have known that the appellant would stop offering trackers in 2008, or that trackers would become highly desirable and unavailable anywhere in 2008/2009. He also argues that because they took a further fixed rate mortgage in 2012, an inference ought to have been drawn that they were risk adverse and would still have taken a fixed rate mortgage in 2006 even if they knew they would lose the tracker.

70. But none of the above persuades me that the respondent made a serious and significant error in accepting what the complainants' evidence as to what they would have done had they understood what was being offered to them. I must afford deference to the respondent's evaluation of the evidence before him. The respondent had extensive submissions from both parties, both prior to the preliminary decision and after. The complainants asserted they would not have taken the fixed rate mortgage had they understood the consequences. The appellant did not seek an oral hearing to test to test the veracity of that assertion.

71. The respondent was entitled to accept their claim in circumstances where it was not in any way an outlandish one. After all, they were entering into a mortgage for 30 years. As of the date of this judgment, they still have another 14 years to go on the mortgage. It was not unreasonable for them to assert, and the respondent to accept, that even on their state of knowledge about trackers in 2006, they would have decided to remain with their tracker mortgage rather than taking a short-term fixed rate of 3 years and losing the tracker.

72. In summary, there is no evidence upon which I can conclude that the complainants' assertions were so manifestly lacking in credibility that a serious mistake was made in accepting them.

73. At the oral hearing, the argument was developed such that it was submitted that the decision of the respondent on unreasonableness was informed by what was described as a "wave of sentiment" over the issue of tracker mortgages, given later events in respect of the

withdrawal of trackers by various banks and the investigation of same by the Central Bank. This argument challenges the respondent's evaluation of conduct as unreasonable and improper. Considerable deference must be shown to this evaluation, deriving as it does from the respondent's specialist expertise.

74. I accept that the respondent should evaluate the conduct of the appellant from the standpoint of events in 2006. But in this case, I cannot find the Decision was obviously influenced by later events, either explicitly or implicitly. It was quite reasonable for the respondent to conclude that a bank should ensure that, when a customer is taking an irrevocable step by redeeming one mortgage and taking out an entirely new mortgage, with quite different terms and conditions in respect of a vital matter i.e. interest, the nature of the transaction must be made absolutely clear to them. The facility letter in 2006 identified the amount of money being lent as €256,212 and the amount of interest that would be repaid over the life of the loan as €191,111. The interest is a very significant portion of the money the complainants will repay over 30 years. The change from one mortgage to another, with different interest conditions, had significant implications for the complainants.

75. In that context, the finding by the respondent that the nature of the change ought to have been made absolutely clear to the complainants made sense viewed through the lens of the banking climate in 2006, irrespective of later issues with trackers. Accordingly, I do not believe there is any evidence upon which I could conclude that the finding only made sense viewed with the benefit of hindsight or a 2020 vision of the world and was accordingly flawed on that basis.

Argument 2: The warning to obtain legal advice and the 'strike through'

76. At pages 15-17 of the Decision, the respondent made the following findings in respect of the witnessing of the 2006 fixed rate home loan: that the "witnessed by" section of the loan had been struck through; that it had been struck through by the appellant's representative; that,

irrespective of who struck through the section, the appellant had offered no explanation as to why it did not deem it necessary to have the complainants' signatures witnessed; that there was no evidence that the strike through took place following the complainants telling the appellant that did not want independent legal advice (though the "witnessed by" section is typically signed by a solicitor as part of the mortgage draw down process); and that the previous loan had been witnessed by the complainants' solicitor.

77. The respondent made clear that his Decision was not establishing that there were obligations on the appellant to advise the complainants to seek legal advice, to keep a record of a decision not to seek legal advice, or that the signature had to be witnessed by a solicitor or some other person.

78. The appellant submits that the respondent fell into error in finding that it was *'unreasonable' 'unjust' 'oppressive'* or '*improper*' for the complainants to have entered into the fixed rate account in circumstances where they were advised to take legal advice by the fixed rate home loan documentation but elected not to. The appellant argues that had they taken such advice, the implications of opening a new mortgage account would likely have been explained to them.

79. Reliance is placed upon *Bank of Ireland v. Smyth* [1995] 2 I.R. 459 where the Supreme Court held *inter alia* that the bank had not owed any duty to the second defendant, a spouse claiming protection under the Family Home Protection Act, 1976 to fully explain the charge to her or to suggest that she get independent advice but rather it should have taken these steps to ensure that it got good title. The appellant also cited *ACC Loan Management Ltd v. Connolly* [2017] 3 I.R. 629, where the defendant's argument that the bank was under an obligation to ensure that the guarantor is given independent legal advice prior to executing the guarantee was rejected.

80. The appellant quotes the response of the complainants to the respondent of 18 February 2019 where they wrote: *'We are not experts in banking and in 2006 we did not think that we needed to employ a solicitor or a financial expert to examine the paperwork issued.'* The appellant argues that the complainants read the warning, considered it and took the decision not to obtain independent legal advice.

81. Next, it is alleged that the respondent fell into serious error in finding, on the one hand, that there was no obligation on the appellant to advise the complainants to seek legal advice and, on the other hand, to find that it was inappropriate that the 'witnessed by' section of the form was struck through (Decision, p. 17). The appellant argues that the inconsistency in the Decision was so pivotal as vitiate it in its entirety.

82. Finally, the appellant argues that the extent of the error made by the respondent is accentuated by the finding that it was the appellant's employee who struck out that section of the form when there was no evidence before the respondent, factual or expert, on that issue whatsoever.

Discussion

83. First, in order to vitiate a decision, I must find not only that there were serious and significant errors but also that they were material to the Decision. Here at page 16 of the Decision, the respondent identifies that in arriving at his Decision he has had regard to the totality of the evidence before him and has not *"placed emphasis on any singular issue as identified in my decision".* Even if the appellant is correct in its criticisms of the discussion in relation to the witnessed by section (and I find that it is not), that part of the Decision is not in my view so material to the core finding as to warrant a quashing of the Decision. Rather, the essence of the Decision is that the appellant failed to make clear the nature of the transaction to the complainants.

84. In relation to the question as to who struck out the "witnessed by" section, the respondent explains that he decided based on the colour of the ink used by each signatory and the weight of pen stroke that on the balance of probabilities, the section was struck through by the bank's representative (page 15 of the Decision). The appellant criticises that finding; yet it did not bring forward any evidence to the respondent, such as a handwriting expert, nor did it seek an oral hearing so that this matter could be fully tested. Nor has any evidence been put forward to suggest that the respondent was wrong in his conclusion. Accordingly, the appellant has not discharged the burden of showing that a mistake has been made by the respondent in this respect.

85. Moreover, the Decision makes it clear that irrespective of who struck out the witnessed by section, the appellant should nonetheless have identified why the section had been struck out but did not do so. Given that the fixed loan documentation was generated by the appellant and it had inserted a "witnessed by" section, and given the status of the complainants as consumers, it appears reasonable to me to have expected the appellant to explain its failure to ensure the form was fully completed in this respect. The appellant does not explain why the respondent was obliged to ignore, on its case, the relevance of the failure to complete this part of the form.

86. In relation to the question of legal advice, the Decision makes it quite clear that no finding is made that the appellant ought to have advised the complainants to seek legal advice or to have their signature witnessed by a solicitor. Equally, observing that there was no evidence that the strike through was made at the complainants' request or that they had indicated they did not wish to seek legal advice seems to me a reasonable comment by the respondent, in circumstances where the appellant had not put forward any evidence as to the circumstances of the strike through.

87. In summary, the gist of the respondent's comments in this regard are focused on the fact that although a new mortgage was being taken out, the appellant had allowed the form to be completed without being witnessed, in circumstances when normally such witnesses would be solicitors in the context of a loan approval process. Had a solicitor advising the complainants witnessed the document, it would have been considerably harder for the complainants to persuade the respondent that they did not understand what they were signing up to. Conversely, where no such advice was obtained, it lent support to the complainants' claim of lack of understanding. The respondent was entitled to take into account that factual context, even while acknowledging that the appellant had no duty to advise the complainants to obtain legal advice. It was not in my view a mistake on the part of the respondent to do so.

88. The appellant submits that the respondent conflated two issues i.e. the witnessing of the signature and the question of whether legal advice was required. However, the respondent was correct to observe that as a matter of fact those two issues are often linked, in that generally the persons who witness loan approval documents will be the customers' solicitors. Therefore, I cannot identify an error in that respect on the part of the respondent.

Argument 3: The Abridged Procedure

89. At page 12 of the Decision, the respondent noted that the process undertaken by the appellant in late June/early July 2006 was a "*significantly truncated version of what would typically be understood to be the process of applying for, taking out and drawing down a new mortgage loan, in contrast to the process that had been undertaken by the Complainants some 10 months earlier*". At page 18, it is noted that "*none of the steps which would typically be undertaken by a solicitor in the process of taking out a new mortgage loan were required by the Provider with respect to this transaction with the Complainants. To me this is a further indicator that supports the Complainant's submission that they did not know that they were taking out a new mortgage loan at the time*."

90. At page 19, the Decision identifies that the general conditions for annuity home loans applicable to the fixed-rate home loan in this case identified nine preconditions that must be met before the loan is drawn down. These included matters such as anti-money-laundering materials, evidence of good marketable title, security, survey/valuation of the property and insurance. It is noted in the Decision that the only precondition that was in fact required was the first one i.e. the signing of the agreement and that this supported the complainants' understanding that they were not in fact taking out a new loan (Decision, p. 19).

91. At page 20, the appellant's submission that these preconditions had already been satisfied by the complainants in respect of the 2005 mortgage is accepted. However, the Decision continues as follows: "*There is no indication in the fixed rate home loan that was signed on 03 July 2006, that as those preconditions had already been satisfied by the Complainants with respect to mortgage account ending 318, these preconditions were not required to be satisfied by the Complainants with respect to the new loan … such that would have put the Complainants on notice that they were in fact taking out a new mortgage loan in July 2006, in the same manner as they had done in October 2005*".

92. The appellant argues that it was a serious error on the part of the respondent to place such importance on the fact that eight of the preconditions to draw down were not required to be satisfied, given that the respondent knew that the appellant was already in receipt of all the documents listed at Clauses 2.2 to 2.8 of the fixed rate home loan documentation, including the property valuation, house insurance and life assurance and the anti-money laundering documents. It was argued that the finding that the shortened process contributed to the complainants' misunderstanding of the impact of the new loan did not stand up to scrutiny, *inter alia*, in the context of the acceptance and authority section of the fixed rate home loan and the other contractual wording referred to above.

93. In fact, it is clear from the extract quoted above that the respondent was not criticising the appellant for failing to obtain information and material that it already had obtained in the context of the 2005 mortgage. The respondent accepted that such material was not required because the bank already had obtained it. Rather, the criticism made by the respondent was that the appellant failed to explain to the complainants that, although they did not have to supply the information normally required for a new mortgage, this was nonetheless a new mortgage. The respondent has already held the language of the mortgage documents in 2006 was insufficiently clear to permit the complainants to understand the implications of the move to fixed rate. But had the appellant explained why the usual mortgage documentation was not being sought, it might have assisted the complainants to understand that a new mortgage was being taken out. What the respondent is focusing upon is the negative effect of the lack of such an explanation in circumstances.

94. It seems likely to me that, had the complainants been asked to provide all of the usual documentation required for a mortgage again, it might have focused their mind upon the fact that they were taking out a new mortgage and therefore assisted in their understanding of the transaction.

95. In those circumstances, the respondent was entitled to observe that the bank ought to have explained to the complainants why they were not being asked to furnish the usual mortgage documentation, and that its failure to do so was a relevant factor when considering whether there was a breach of s.60(2)(b) and (g). I cannot conclude that the respondent made any error in so doing, let alone a serious and significant one.

Conclusion

96. For the reasons set out in this judgment, I refuse the relief sought by the appellant.