THE COURT OF APPEAL

UNAPPROVED

Record No.: 2021/47

Neutral Citation: [2022] IECA 77

Costello J.
Collins J.
Binchy J.

IN THE MATTER OF AN APPEAL UNDER SECTION 64(6) OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

BETWEEN/

UTMOST PANEUROPE DAC

APPELLANT/RESPONDENT

- AND -

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT/APPELLANT

-AND-

W

NOTICE PARTY

JUDGMENT of Mr. Justice Binchy delivered on the 30th day of March 2022

Background

1. The notice party is a civil servant who at all material times in the course of her employment was a member of a group income protection voluntary scheme (the "Scheme"),

subject to specific exceptions as to eligibility, as regards the notice party, expressed in the following terms:

> "There shall be no entitlement to benefit if the circumstances giving rise to a claim are directly or indirectly attributable to any affection of the spine and sacro-iliac joints or their related supporting muscular or ligamentous structures"

and,

> "No benefit shall be payable if the circumstances giving rise to a claim for benefit are directly or indirectly attributable to chronic fatigue and/or any mental or functional nervous disorder".

2. Although not specifically referred to, it is common case that these exceptions have the effect of excluding the condition known as fibromyalgia. The Scheme was originally underwritten by Friends First, but was later taken over by the appellant/respondent (hereafter referred to as "Utmost", formerly known as Generali PanEurope DAC).

3. On 8th June 2016, the notice party submitted a claim (the "Claim") for payment of benefit under the Scheme. In the section of the claim form dealing with the medical condition of the notice party, she states that she suffers from "Inflammatory arthritis – still under investigation for full diagnosis and Fibromyalgia". In support of the Claim, the notice party submitted three medical reports to Utmost, one from her general practitioner, a Dr. Rawat, one from a cardiologist, a Dr. Gumbrielle, and one from a consultant rheumatologist, a Dr. Lee.

4. On 29th July 2016, Utmost declined payment of benefit under the Scheme, citing the specific terms of the exclusion relating to fibromyalgia. The notice party exercised her entitlement (as provided for in the Scheme) to appeal that decision. Utmost requested the notice party to attend for an independent medical examination by a Dr. Donough Howard, consultant rheumatologist. Having received a report from Dr. Howard and, importantly for

the purposes of the proceedings, a subsequent clarification from Dr. Howard, Utmost informed the notice party on 17th February 2017 that her appeal had been unsuccessful.

5. The notice party then lodged a complaint with the respondent/appellant (the "FSPO") in or about April 2017 (the "Complaint"). The Complaint is described as follows by the FSPO on p. 4 of his decision handed down on 15th July 2019 (the "Decision"):

> "The complaint for adjudication is that the Provider wrongly declined the Complainant's initial claim; wrongfully declined the Complainant's claim on appeal; did not deal with the complainant's appeal correctly; and that the policy which the provider provided to the Complainant was not suitable for the Complainant".

It is apparent therefore that there are four elements to the Complaint, which gave rise to a specific submission on behalf of Utmost, to which I will return in due course.

6. On the first page of the Decision, the FSPO states that it was the notice party's case that Utmost had not dealt with the Claim and her appeal against the first refusal of cover in an objective manner, and that it focused its efforts on bringing her claim within the exclusion of cover relating to fibromyalgia. Having investigated the Complaint, the FSPO issued a preliminary decision on 14th May 2019, indicating its intention to uphold the Complaint, as well as an intention to direct Utmost to admit the Claim from the date of expiration of the deferred period as defined in the Scheme policy document. By letter of 5th June 2019, Utmost made detailed submissions to the FSPO as regards the preliminary decision. However, on 15th July 2019, the FSPO issued his final decision in the matter, i.e. the "Decision", whereby he, *inter alia,* affirmed the preliminary decision.

7. Utmost appealed the Decision to the High Court, pursuant to s. 64 of the Financial Services and Pensions Ombudsman Act 2017 (the "Act of 2017"). In a decision handed down on 10th November 2020, the High Court (Simons J.) allowed the appeal and set aside the Decision, concluding that the FSPO had made serious and significant errors in arriving

at the Decision. The FSPO indicated an intention to appeal the decision of the High Court to this Court, on a point of law as provided for in s. 64(6) of the Act of 2017. There then followed a hearing on this issue, and by further decision dated 10th February 2021, Simons J. granted leave to the FSPO to appeal to this Court for a review of the principal judgment of 10th November 2020, on three questions of law, which are set out and considered from para. 49 onwards.

Background - the Claim and the medical evidence

8. In the Claim form submitted to Utmost by the notice party, she referred to the following symptoms as preventing her from working: stiffness, pain (chronic), pins and needles, numbness, difficulty walking, dizziness and blurred vision, extreme fatigue, short term memory loss - brain fog. As mentioned above, she described her condition as being "Inflammatory arthritis – still under investigation for full diagnosis and fibromyalgia". The notice party submitted with the Claim form a report from her general practitioner, a Dr. Rawat in a standard form. In the section dealing with the nature and cause of disability, Dr. Rawat, stated: "Fibromyalgia – under care of Rheumatologist with further investigations, follow up plan and awaited for Rheumatoid Arthritis possible evolution".

9. The notice party also included reports from a Dr. Thomas Gumbrielle, a cardiologist, of 22nd March 2016, and a Dr. Ruth Lee, of 22nd April 2016. Dr. Lee, in her report, stated, *inter alia*:

> "There are no obvious swelling noted in her joints and no evidence of active synovitis noted today. She has widespread multiple painful trigger points suggestive of Fibromyalgia …
>
> There are no clinicial evidence of active Rheumatoid Arthritis despite a raised CCP Ab. Her current clinical presentations and features are more in consistent with that of Fibromyalgia."

The presence of the word "in" before "consistent" is somewhat confusing but there was no disagreement that Dr. Lee was stating that the symptoms of the notice party are more consistent with that of fibromyalgia (than rheumatoid arthritis).

10. Utmost submitted its entire file relating to the Claim to the FSPO, and included in the file was an internal email dated 27th July 2016 from a Mr. Graham Hulsman (a claims specialist with Utmost) to the Chief Medical Officer of Generali PanEurope DAC (now Utmost), namely a Dr. Deirdre Gleeson. In the opening paragraph of this email, in a passage which attracts considerable criticism from the FSPO, Mr. Hulsman states:

> "I would be grateful if you could review the case. I find it perplexing how she was not declined entry into the scheme by the Underwriter in 2006 given the history she had. Nonetheless she was accepted with multiple exclusions as you see from Ian Bowles letter of 18 October 2006."

This email then concludes with another paragraph, which also attracts criticism from the FSPO:

> "If you feel there is clear line of sight between her illness/symptoms and the exclusions, then we will likely decline, but could you clearly show how we can link up the exclusions to the FM and the symptoms she is claiming as the decline letter will need to specify this."

This email might suggest that any such declinature is likely to issue from Mr. Hulsman or one of his administrative colleagues, and not Dr. Gleeson herself, but in fact the letter declining the cover was sent by Dr. Gleeson personally on 29th July 2016. In this letter, Dr. Gleeson refers to the exclusions applicable to the notice party and then goes on to state:

> "I note from the evidence you provided that Dr. Lee diagnosed Fibromyalgia (FMA) and not any form of Arthritis. … Fibromyalgia (FMA) is recognized by doctors as a

functional psychosomatic disorder and is related to Chronic Fatigue Syndrome (CFS) and many experts believe that CFS and FMA are the same condition. …

There is a strong association between stress and FMA/CFS. Generali notes you report mental symptoms including poor concentration, poor memory and you are taking anti-depressants…

Generali are unable to consider the claim since FMA is linked to CFS and FMA directly or indirectly attributable to a mental or functional nervous disorder which are excluded in the special terms. …

Generali are further unable to consider the claim as FMA is directly or indirectly attributable to the spine, sacroiliac joints and their related supporting muscular or ligamentous structure which are excluded in the special terms. …"

11. The notice party appealed this decision (in accordance with the Scheme) by letter dated 26th August 2016. She included with this letter a medical certificate from her general practitioner of the same date, which stated that the notice party was unfit to attend work due to: "Confirmed Rheumatoid arthritis under treatment with Rheumatologist". The notice party subsequently provided a report dated 28th September 2016, from a Dr. Paul O'Connell, consultant rheumatologist, Beaumont Hospital, in support of her appeal. In this report Dr. O'Connell stated:

"It is our feeling that you probably do have rheumatoid arthritis though thankfully it is relatively early. This appears to be causing at least some of the pains in your hands, feet, knees and other joints.…"

12. Dr. O'Connell goes on to refer to the medication prescribed for the notice party and to other steps that she might take as part of her rehabilitation. He says:

"I am hopeful that there will be improvement over the next 2 to 3 months most especially in the rheumatoid component of your problems which should help the joint

pain in the hands, feet, knees, elbows and other sites. The more non-specific muscular component of your symptoms will hopefully respond to a mixture of improved sleep pattern and improved general fitness and a reduction in the total amount of pain.

I hope this can help clarify symptoms for your insurance agent. I do believe that rheumatoid arthritis is a significant component of your problems but not the only one. I am hoping for a steady improvement over the next few months."

13. By letter dated 12th December 2016, a Ms. Deirdre Devine of the claims department of Utmost wrote to Dr. Howard, setting out the background to the matter and asking thirteen numbered and specific questions. Question 11 requested his opinion as to whether or not the notice party was fit to carry out her normal occupation on a full time basis, and question 12 asked Dr. Howard, if he was of the opinion that she was so unfit, to identify the symptoms rendering her unfit. Ms. Devine drew to Dr. Howard's attention that the notice party's consultant rheumatologist had expressed the opinion that she had rheumatoid arthritis, although he had said that it was at a relatively early stage. She also asked Dr. Howard a number of other questions, which it is not necessary to consider here. Significantly, in the Decision the FSPO described this letter as being "open and appropriate".

14. Dr. Howard provided a report, which, although undated, was apparently provided immediately following examination of the notice party on 14th December 2016. While Dr. Howard did not address the questions in the manner in which they were asked (i.e. by addressing each question specifically, in numerical sequence), he expressed the opinion that fibromyalgia was the main contributing factor to the notice party's symptoms. He confirmed that the notice party had tested positive for rheumatoid arthritis, and he expressed the opinion that the clinical picture indicated that the notice party was at the very early stages in the development of that condition. He noted that she had been prescribed certain medication arising out of which he felt the notice party would experience improvement. He also

expressed the opinion that he did not consider that the notice party was permanently disabled from work. He said that:

> "Her symptoms are currently improving with treatment of both fibromyalgia and rheumatoid arthritis. She is having a new issue with diarrhoea with some borderline incontinence with this and there may be further adjustments needed to her medication to correct this problem. My recommendation will be that she should be considered disabled from work for the next two months but at that point I feel that she should be able to return to her previous activities."

15. Arising out of the report of Dr. Howard, Ms. Devine, in an email dated 19th January 2017, asked him to clarify the following:

> "I note that [the notice party's] main issue preventing her from working is in relation to her Fibromyalgia. If we take the Fibromyalgia out of the picture (Given that this was specifically excluded at underwriting stage for this claimant), would it be reasonable to deduce that her rheumatoid arthritis is not severe enough to prevent her from working at present?"

This enquiry attracted significant criticism from the FSPO in the Decision. I will return to that presently. In a reply dated 24th January 2017, Dr. Howard states:

> "I found her to have evidence of fibromyalgia and she had very mild early rheumatoid arthritis. She did not have a significant degree of rheumatoid arthritis and I do not feel that this by itself was enough to render her disabled from work."

The preliminary decision

16. As mentioned above, the notice party made her complaint to the FSPO in or about April 2017 and the FSPO issued a preliminary decision to the parties on 14th May 2019, affording each of the parties the opportunity to comment within fifteen days. Both parties

availed of that opportunity, with Utmost submitting its response by letter dated 5th June 2019, and the notice party submitting a short email dated 18th June 2019.

17. The preliminary decision runs to some fourteen pages. On p. 10 of the preliminary decision, under the heading "The Consumer Protection Code" (the "Code") the FSPO states that he has had regard to the provisions of the Code and in particular noted the following provisions, under the heading of "Claims Processing":

> "7.6 A regulated entity must endeavour to verify the validity of a claim received from a claimant prior to making a decision on its outcome. …
>
> 7.19 If the regulated entity decides to decline the claim, the reasons for that decision must be provided to the claimant on paper or on another durable medium.
>
> 7.20 A regulated entity must provide a claimant with written details of any interim appeals mechanisms available to the claimant."

18. The FSPO also refers to other provisions of the Code, specifically Clause 5.24 and chapter 12. Having summarised these provisions however, the FSPO makes no further reference or comment about the Code and expresses no opinion one way or another as to whether or not Utmost has handled the claim of the notice party in compliance with the Code or indeed whether or not the Code has any relevance to the assessment of the complaint made by the notice party.

19. The analysis of the Complaint is to be found from p. 11 onwards. In the first part of the analysis, the FSPO summarises his remit as follows:

> "For the purpose of assessing this complaint, it is not the role of this Office to comment on or form an opinion as to the nature or severity of the Complainant's illness or condition. It is the duty of this Office to establish whether, on the basis of an objective assessment of the medical evidence submitted, the Provider has adequately assessed

the Complainant's claim and whether it was reasonably entitled to arrive at the decision it did following its assessment of the medical evidence submitted."

20. In the course of the analysis that follows, the FSPO records (on p. 10) that:

"In an email dated 23rd February 2017, and in response to previous correspondence, the Provider [Utmost] informed the Complainant [the notice party] that it was its opinion that she was '*medically fit for work and as the Insurer, we are entitled to form this opinion*.' In this e-mail, the Provider informed the Complainant that should she wish to submit further medical evidence not relating to the excluded medical conditions outlined in 2006, it would reconsider her claim. The Provider specified that such evidence should clearly and objectively outline why the Complainant is disabled from working. In an e-mail dated 7th April 2017, the Provider informed the Complainant that it would not be in a position to consider any further medical evidence after 23rd May 2017."

21. At p. 13 of the preliminary decision, the FSPO stated: "What I particularly note is that there was an acceptance [on the part of Utmost] that the Complainant was unable to work because of her ailments". This statement is somewhat surprising because it is at odds with the content of the letter from Utmost to the notice party dated 23rd February 2017, referred to in the last paragraph, and quoted by the FSPO himself in the same document. In its response to the preliminary decision dated 5th June 2019, Utmost did not expressly address the statement (that there was an acceptance by Utmost that the notice party was unfit for work) but did say, in a section of the letter headed "Error of Fact", that "Dr. Howard was quite clear that, in his professional opinion, the complainant's symptoms were not sufficient so as to render disability". Nonetheless, the statement that there was an acceptance of disability remained unaltered in the Decision.

22. The FSPO further observes (on p. 13) that what prevented Utmost from accepting the claim of the notice party was that it considered that fibromyalgia was the predominant ailment preventing the notice party from working. The FSPO then quotes from the e-mail of Ms. Devine to Dr. Howard of 19th January and the reply of Dr. Howard of 24th January 2017 (see para. 15 above) and goes on to observe that:

> "It is clear from the above that the specialist was asked by the Provider to quantify how one ailment was affecting the Complainant [sic] ability for work over and above another ailment. The problem here is that these two ailments clearly have many overlapping symptoms and it is clearly evident that there was no formal diagnosis of Fibromyalgia by the Complainant's treating doctors, for such quantification to be reasonably and fairly reached."

23. In arriving at this conclusion, the FSPO also referred to a further report of Dr. O'Connell of 17th May 2018, which the notice party submitted during the course of the FSPO investigation into the Complaint, and which states:

> "[C]learly puts a diagnosis of Rheumatoid Arthritis on the Complainant's symptoms and refers to the treatment for that condition, as opposed to any diagnosis or targeted treatment for Fibromyalgia".

It is clear that the FSPO placed some reliance on this report, even though it postdates the declinature of cover by Utmost. The FSPO also notes (on p. 14) that:

> "[T]he Provider did not follow through on its appointed specialist's opinion regarding payment of the benefit to the Complainant for two months."

24. The FSPO noted (on p. 12) that the notice party "reasonably takes issue with the Provider's representative's statement that he could not understand why she was even accepted onto the income continuance scheme given her history." This was a reference to the e-mail from Mr. Hulsman to Dr. Gleeson of 27th July 2016 (see para. 10 above) and goes

on to state that he considers those remarks inappropriate in the context of the claim of the notice party.

25. The FSPO concludes the preliminary decision as follows:

> "I conclude from the evidence submitted that there was an overemphasis by the Provider to quantify the impact that the two medical conditions had on the Complainant's ability to work and in doing so to unreasonably and unfairly find that the excluded condition predominated, thereby preventing payment of benefit to the Complainant.
>
> Having regard to all of the above it is my intention to uphold this complaint and direct that the Provider admit the claim from the date of the expiry of the Deferred period and make payments from that date, into the future. The Provider remains entitled, in accordance with the policy provisions, to further review the claim at any time in the future."

Response of Utmost to the preliminary decision

26. In its response to the preliminary decision, Utmost submitted, *inter alia*:

(1) That the conclusions of the FSPO are open to the interpretation that, contrary to his stated remit, he had weighed and evaluated the medical evidence, and that there is an implication that the report of the Chief Medical Officer of Utmost is deficient or incorrect in some respect;

(2) That the FSPO should have confined himself to assessing whether or not the report of Utmost's CMO was a reasonable basis for it to arrive at the decision that it did, having regard also to the medical evidence adduced by the notice party. In failing to do so, the FSPO erred in law.

27. Utmost further submitted that the FSPO erred in failing to give sufficient weight to the report of Dr. Howard of 24th January 2017 in which he stated that the notice party did not

have a significant degree of rheumatoid arthritis, sufficient by itself to render her disabled from work. In its submissions, Utmost made no comment at all about the Code.

28. The notice party also made a brief submission, the contents of which are not relevant for present purposes.

The Decision

29. The FSPO then issued the Decision by letter dated 15th July 2019. With the exception of a section describing the preliminary decision process and another section addressing the submissions of Utmost following the preliminary decision, the Decision is identical in all respects to the preliminary decision.

The Proceedings

30. By Notice of Motion dated 6th September 2019, grounded on the affidavit of Mr. Marco Nuvoloni, head of legal and compliance at Utmost, Utmost seeks an order setting aside the Decision. Since the Notice of Motion issued outside the prescribed statutory time limit (for reasons that were explained), it also seeks an order extending that time limit, and the FSPO did not object to that part of the relief sought. Accordingly, the trial judge granted the extension of time.

31. The grounds of appeal relied upon by Mr. Nuvoloni in his affidavit may be summarised as follows:

(1) To the extent that the FSPO considered that a conflict of fact arose on the medical evidence, he should have convened an oral hearing to resolve such conflict;

(2) The FSPO erred in failing to determine whether or not cover had been triggered under the Policy;

(3) The FSPO erred in his treatment of the medical and factual evidence before him;

(4) The FSPO erred in concluding that a comment made by Mr. Hulsman, in an internal email, that he could not understand why the notice party had been

accepted into the Scheme originally, given her history, was in any way inappropriate;

(5) The FSPO erred in failing to apply the provisions of the Scheme policy to the Claim, having correctly observed that the Scheme policy makes clear that the medical condition relied upon by a claimant must be of such a degree that it prevents a claimant from performing the material and substantial duties of her normal insured occupation;

(6) The FSPO erred in finding that there was an acceptance that the notice party was unable to work because of her ailments, in particular having regard to the comment of Dr. Howard in his report of 14th December 2016 that the notice party could return to work after two months;

(7) The FSPO erred in his conclusion that there had been an over emphasis by Utmost "to quantify the impact that the two medical conditions had on the notice party's ability to work…."

32. No reliance was placed by Utmost on the Code in its grounds of appeal.

Statement of Opposition

33. The FSPO delivered a statement of opposition to the appeal of Utmost on 12th December 2019. This is a complete traverse of the grounds of appeal. In particular, the following pleas are advanced:

(1) Utmost has failed to establish that, taking the adjudicative process as a whole, the decision made by the FSPO was vitiated by a serious and significant error or a series of such errors. If any such errors were made, they fell short of that threshold;

(2) An oral hearing was not required in order for the FSPO to arrive properly at the Decision;

(3) It is denied that the medical evidence was clear and supported the decision taken by Utmost, as pleaded;

(4) The FSPO relies on the lack of request for an oral hearing;

(5) It is denied that FSPO erred with respect to the treatment of the medical and factual evidence.

Decision of the High Court

34. In his judgment handed down on 10th November 2020, the trial judge, having summarised the factual background, then went on to consider, firstly, the jurisdiction of the FSPO and following on from that, the jurisdiction of the High Court on appeal from a decision of the FSPO pursuant to s. 64 of the Act of 2017. At paras. 59 and following he sets out his findings. At para. 59 he stated:

> "I have concluded that the decision is narrowly drawn. The rationale of the decision is confined to a finding that the conduct of the insurance provider was unreasonable and improper insofar as it emphasised the excluded illness, i.e. fibromyalgia. The decision is thus directed to the conduct of the insurance provider in assessing the claim. The decision cannot be read as entailing a finding that the insurance provider had acted in *breach of contract* by declining the claim. Had a finding to this effect been made, then the decision would have been grounded on subsection 60(2)(a) ('*the conduct complained of was contrary to law*')."

35. At para. 60, the trial judge quotes from p. 11 of the Decision as follows:

> "For the purpose of assessing this complaint, it is not the role of this Office to comment on or form an opinion as to the nature or severity of the Complainant's illness or condition. It is the duty of this Office to establish whether, on the basis of an objective assessment of the medical evidence submitted, the Provider has adequately assessed

> the Complainant's claim and whether it was reasonably entitled to arrive at the decision it did following its assessment of the medical evidence submitted."

36. The trial judge then went on to consider the question as to whether or not the Decision is vitiated by serious and significant error. At para. 65 he concludes that the approach of the FSPO to his assessment of the conduct of Utmost was erroneous in law, that the legal errors were serious and significant and that the Decision is invalid as a result. At para. 66 he states:

> "The starting point for any proper assessment of the 'reasonableness' of the processing of the claim should have been the terms of the relevant code of conduct applicable to the insurance provider. This is the objective standard against which the 'reasonableness' of the conduct falls to be considered in the first instance."

He then sets out Clause 7.6 of the Code.

37. At para. 67 he states:

> "This clause is recited in the Ombudsman's decision (at page 10), but there is no discussion of its implications. In particular, it is nowhere explained in the decision why it is that the insurance provider's conduct in processing the claim should be regarded as inconsistent with its entitlement to verify the validity of a claim."

38. At para. 68 the trial judge states that, in assessing whether the conduct of the insurance provider was reasonable, it is also appropriate to have some regard to the underlying contract of insurance itself. He notes that the fact that conduct is in accordance with the terms of a contract does not necessarily mean that it is reasonable, but nonetheless the terms of the contract are relevant. In this case, he observes, it is common case that one legal consequence of the exclusions in the contract is that the notice party was not entitled to make a claim in respect of fibromyalgia. It was not suggested that this exclusion was improper.

39. At para. 70, the trial judge comes back to Clause 7.6 of the Code. While the FSPO had referred to this Clause in the Decision, nowhere in the Decision did the FSPO

acknowledge the entitlement of Utmost to verify the validity of the Claim. The trial judge concluded that this was a serious and significant error of law.

40. The trial judge then went on to consider the criticisms made by the FSPO arising out of correspondence between Ms. Devine and Dr. Howard in January 2017. The trial judge refers to the following passage in the Decision:

> "I am also concerned that the appointed Consultant Specialist was asked by the Provider a very pointed question that contained information that went beyond that which would reasonably and fairly be considered necessary for what the Provider was asking its specialist to consider. That is, the Provider specifically highlighted for consideration that one of the medical conditions was a medical condition that was excluded by the Provider at underwriting stage. While it may have been stated for background information, I consider that the question could have been asked without that information."

41. At para. 72, the trial judge then sets out in full the e-mail of Ms. Devine to Dr. Howard's office of January 2017, to which the FSPO was referring in the above passage:

> "I note that [the insured party's] main issue preventing her from working is in relation to her Fibromyalgia. If we take the Fibromyalgia out of the picture (Given that this was specifically excluded at underwriting stage for this claimant), would it be reasonable to deduce that her rheumatoid arthritis is not severe enough to prevent her from working at present?"

42. At para. 73, the trial judge concludes that this correspondence was, contrary to the findings of the FSPO, entirely proper. He expresses the view that the query raised was legitimate and one which Utmost was entitled to pursue with its independent medical examiner. He states that the Claim could not be properly assessed without some attempt being made to quantify the relative impact that the two medical conditions had on the notice

party's ability to work. He states that it would have been artificial not to explain the relevance of the question to the independent medical examiner. He goes on the say that the criticism is particularly difficult to understand given that the FSPO had no objection to the initial letter sent by Utmost to Dr. Howard on 12th December 2016. The trial judge dismissed any suggestion that the correspondence was a "nudge" to the consultant to give a particular answer.

43. The trial judge was of the same view in relation to the internal e-mail of Mr. Hulsman of 27th July 2016, stating that "the content of this e-mail is wholly unexceptional, and it was unreasonable for the Ombudsman to draw any adverse inference from it."

44. The trial judge then addresses a third criticism of the FSPO (of the handling of the Claim by Utmost) which, as he points out, arises out of correspondence postdating the declinature of cover by Utmost. This is a statement in the response of Utmost to the preliminary decision to the effect that Utmost had taken the decision to decline because it had been advised that the notice party had an illness which was specifically excluded. However, in the Decision, the FSPO pointed out the issue to be decided was whether or not the diagnosis of Rheumatoid Arthritis was of sufficient severity to prevent the notice party from working. The trial judge stated that the inference, which he considered the FSPO drew, that "this distinction was lost on the insurance provider is untenable". The trial judge considered that, on any fair reading of Utmost's submission (to the preliminary decision) *in toto,* it was clear that Utmost was fully alive to the critical importance of identifying which illness was the cause of any inability to work. At para. 81, the trial judge concluded:

> "In summary, the Ombudsman's approach evinces serious and significant errors of law in that it purports to make a finding that the conduct of the insurance provider was unreasonable without any attempt to measure that conduct against the relevant code of conduct; and then draws unsubstantiated inferences from certain correspondence."

Decision of trial judge on remedy directed by the FSPO

45. As the trial judge observed, at para. 87 of his judgment, strictly speaking it was not necessary for him to address the remedy directed by the FSPO in view of his conclusion that the FSPO had erred in his conclusion that Utmost's conduct in assessing the Claim was unreasonable or otherwise improper. Nonetheless, in case he was incorrect on this point, he addressed the validity of the remedy directed by the FSPO. At para. 90 he put the question thus:

> "The question of principle for determination in this appeal is whether, on the assumption that his findings on the substance of the complaint were to have been upheld, the Ombudsman would have had jurisdiction to direct the insurance provider to admit the claim for income protection."

46. The trial judge concluded that the FSPO had no such jurisdiction, absent a finding as a matter of contract law, that the notice party was entitled to recover under the Scheme. To arrive at that finding, the FSPO would have had to conclude that the notice party's inability to work is attributable entirely to Rheumatoid Arthritis, and he made no such finding. The trial judge stated:

> "The practical effect of this was that the Ombudsman treated the claim as if it had been well-founded and that the insured party was suffering a disability (as defined) caused by an illness which came within the terms of the insured risk. With respect, there is no lawful connection between the finding of unreasonable or improper conduct and the remedy actually imposed: it is a *non sequitur*."

47. Nor, in the opinion of the trial judge, was the direction of the FSPO saved by the rider to the effect that Utmost could review the Claim at any time in the future. This, the trial judge considered to be nonsensical in circumstances where Utmost had already determined that the Claim was inadmissible.

Conclusions of the High Court

48. At para. 93 of his judgment the trial judge summarises his conclusions as follows:

> "93. For the reasons set out above, I have concluded that the approach of the Ombudsman to his assessment of the insurance provider's conduct in its processing of the claim (and, in particular, the appeal) was erroneous in law. The legal errors were serious and significant, and the decision is invalid as a result. In particular, the Ombudsman purported to make a finding that the conduct of the insurance provider was unreasonable, without any attempt to measure that conduct against the relevant code of conduct, i.e. the *Consumer Protection Code (2012)* published by the Central Bank.
>
> 94. The insurance provider was entitled, under clause 7.6 of the *Consumer Protection Code (2012)*, to verify the validity of the claim received from the insured party prior to admitting the claim. It is nowhere explained in the Ombudsman's decision why it is that the insurance provider's conduct in processing the claim should be regarded as inconsistent with its entitlement to verify the validity of a claim."

49. While the trial judge did not finalise his orders until 10th February 2021, he proposed, in his decision of 10th November 2020, making an order pursuant to s. 64(3)(b) of the Act of 2017, setting aside the Decision and the direction of the FSPO within the Decision in their entirety. Subsequent to handing down judgment on 10th November 2020, the trial judge heard further submissions as to the form of order and also as to the certification of questions for the purposes of an appeal. Arising out of those submissions, the trial judge handed down a further judgment on 10th February 2021. In this judgment, he affirmed his order setting aside the Decision, in its entirety, and further ordered that the matter be remitted to the FSPO for review by a different decision maker within that office, having regard to the Code. The trial judge also granted leave to appeal on the following three questions of law:

"(i) Is the Ombudsman, when determining the reasonableness of the conduct of a financial services provider, required to have regard to any applicable code of conduct published by the Central Bank?

(ii) Does the Ombudsman have jurisdiction, in the absence of any finding on his part that there has been a breach of contract, to direct a financial services provider to admit a claim under a policy of insurance and to pay the benefit to the insured?

(iii) Is the High Court, in the exercise of its appellate jurisdiction in a statutory appeal under section 64 of the Financial Services and Pensions Ombudsman Act 2017, entitled to draw different inferences from documentation (in this case, correspondence) than those of the Ombudsman? Put otherwise, to what extent do the principles in *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment) apply to a statutory appeal under section 64?"

Question 1: Grounds of Appeal

Is the Ombudsman, when determining the reasonableness of the conduct of a financial services provider, required to have regard to any applicable code of conduct published by the Central Bank?

50. In his grounds of appeal, the FSPO sets out seven grounds of objection as regards the decision of the trial judge on this issue. These include:

(1) That while the FSPO is entitled to have regard to any applicable code, he is not obliged to do so;

(2) If the Oireachtas had intended that there should be an obligation to have regard to an applicable code, it would have legislated accordingly, and it did not do so. In particular, sections 60(2)(b) and (g) of the Act of 2017 make no reference to a code, whereas s.60(2)(c) makes reference to a "regulatory standard":

(3) Utmost itself did not raise the issue of compliance with the Code in the process before the FSPO;

(4) Even if the FSPO was obliged to take the Code into account for the purposes of s.60(2)(b) of the Act of 2017 (which is denied) he was not obliged to do so for the purpose of s.60(2)(g).

51. Sections 60(2)(b) and (g) of the Act of 2017 provide as follows:

"60(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."

Submissions of the FSPO on Question 1

52. In submissions to the Court, counsel for the FSPO said that the conclusions of the trial judge at paras. 66 and 67 of his judgment caused the FSPO two difficulties. The first, arising out of para. 66, is that it is open to the interpretation that in every case the FSPO will have to say that he has had regard to the Code, and for that purpose, analyse the Code, or whatever code may be relevant to the complaint in hand, otherwise he will not be able to make findings under ss. 60(2)(b) and (g). The second difficulty is that in every case reasonableness would have to be assessed against the terms of the relevant code. It is submitted that this is not correct. If the conduct concerned is not directly addressed by the relevant code, then the FSPO cannot be required to have regard to the code concerned or to explain his decision by reference to it.

53. In this case, the FSPO did have regard to clause 7.6 of the Code, but does not then go on to explain the Decision by reference to that clause, because the unreasonableness in the conduct of Utmost which the FSPO identified has nothing to do with clause 7.6 of the Code, or indeed any other obligation of Utmost under the Code.

54. It is submitted on behalf of the FSPO that the authorities all emphasise the very broad jurisdiction of the FSPO (and his predecessor, the Financial Services Ombudsman ("FSO")). They establish that while the FSPO is entitled to have regard to the Code in his decisions, he is not obliged to do so. So, for example, in *Irish life and Permanent v. FSO* [2011] IEHC 367, Hogan J. stated at para. 54:

> "For good measure I would also add that the Ombudsman was entitled to invoke Chapter 2.12 of the Consumer Protection Code (2006) …"

55. The FSPO also relied upon the very recent decision of the High Court (Hyland J.) in *Danske Bank v. FSPO* [2021] IEHC 116 in which case Hyland J., in dismissing an appeal against a decision of the FSPO upholding a complaint made under ss. 60(2)(b) and (g) of the Act of 2017 stated, at para. 27:

> "The breadth of the Ombudsman's jurisdiction under s.60(2) cannot be underestimated: he or she is effectively given a decision 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 services provider can act perfectly lawfully but nonetheless find that a complaint is upheld against it carrying with it an obligation to make specified redress".

56. Moreover, so far as ss. 60(2)(b) and (g) are concerned, these are cast in very broad and flexible terms, i.e. "unreasonable", "unjust", "oppressive", "improperly discriminatory" and "otherwise improper". It is clear therefore that it was the intention of the Oireachtas to

accord the FSPO significant latitude, and not to fetter his discretion in the carrying out of his functions by requiring him to proceed by reference to specific matters, such an applicable code.

57. It is further submitted on behalf of the FSPO that the authorities establish that he or she is required to discharge his or her functions in an informal manner. In *Hayes v. FSO* (Unreported, High Court, 3rd November 2008) MacMenamin J. stated (at para. 34):

> "He is enjoined not to have regard to technicality and legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable *simpliciter*; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57C I(2))."

58. It is also submitted that the decision of the trial judge in this case in mandating that conduct should be measured against a code before deciding whether or not it is unreasonable or improper, is contrary to the requirement to act informally, without regard to technicality and legal form.

59. Furthermore, there was no obligation on the FSPO to engage in a discussion of the implications of the Code, as the trial judge held at para. 67 of his judgment. That this is so is apparent from authorities such as *Millar v. FSO and Danske Bank* [2015] IECA 126 and 127, in which Kelly J. (as he then was) stated (at para. 31):

> "Nor is it to be expected that a decision of the respondent should be as detailed or formal as a court judgment. As O'Flaherty J. observed in *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107 at 111:
>
> > 'We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to a minute analysis.'"

60. Reliance is also placed upon the decision of Baker J. in *Law v. FSO* [2015] IEHC 29 wherein she stated at para. 31:

> "31. The Ombudsman noted that the notice party was required to demonstrate adherence to regulatory guidelines having regard to the categorisation of the consumer as an older adult. The appellants complain that the Ombudsman does not identify the regulatory guidelines in respect of which he came to this decision, and I accept the argument by counsel for the Ombudsman that it is to be presumed that, having regard to his level of expertise, that the Ombudsman was well familiar with the guidelines and the regulatory regime within which he operates, and it is not, in my view, required of him, having regard to the degree of informality in the hearing, the level of expertise and his wide jurisdiction, to identify each and every regulation in respect of which he tested the evidence. I can identify no error in this finding."

61. The FSPO also relies upon the difference in the words used in ss. 60(2)(b) and (g) of the Act of 2017 on the one hand, and s. 60(2)(c) on the other. The latter provides that a complaint may be upheld although the conduct complained of was "in accordance with the law or an established practice *or a regulatory standard* (my emphasis), the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant". It is submitted that the fact that s. 60(2)(c) makes reference to a "regulatory standard", and that sub-sections (b) and (g) of the same section do not, is a deliberate choice of the Oireachtas, and the Court should not draw an inference the effect of which is to give sub-sections (b) and (g) any wider a meaning than the words chosen by the Oireachtas. The FSPO refers to *Bennion, Bailey and Norbury* on statutory interpretation (8th Edition, 2020) at para. 23.11:

> "One of the linguistic canons of constructions is that no inference is proper if it goes against the express words the legislature has used. It is sometimes expressed as

> *expressum facit cessare tacitum* (statement ends implication)…as Lord Dunedin said 'express enactment shuts the door to further implication'…. the application of the maxim arises where provision (a) may or may not give rise to an implication and elsewhere another provision (b) contains an express statement to the contrary affect. The maxim suggests that the express statement in (b) extinguishes the possibility of finding an implication on the same point in (a)."

62. It is further submitted that for the conclusions of the trial judge set forth at paras. 66 and 81 of his judgment to be correct, ss. 60(2)(b) and (g) would have to be read as including the words: "by reference to" or "having regard to" "any applicable code or regulatory standard". This, it is submitted, is contrary to well established authorities on statutory interpretation, such as *H v. H* [1978] IR 138 wherein the Supreme Court (Parke J.) stated, at p. 146:

> "Such a construction would not be in accordance with one of the fundamental rules of interpretation i.e. that words may not be interpolated into a statute unless it is absolutely necessary to do so in order to render it intelligible or to prevent it having an absurd or wholly unreasonable meaning or effect. No such necessity arises here."

63. Finally, the FSPO submits that while he upheld the complaint under both sub-sections 60(2)(b) and (g) of the Act of 2017, paras. 66 and 81 of the judgment refer only to the assessment of what is "reasonable", and refer in this regard only to sub-section 60(2)(b). So therefore, it is submitted, even if the FSPO is obliged to take account of the Code for the purpose of sub-section 60(2)(b), he was not obliged to do so for the purpose of sub-section 60(2)(g). Accordingly, insofar as the trial judge identified an error, it is confined to sub-section 60(2)(b), and he should not have set aside the Decision in circumstances where there was an alternative basis for it.

Respondent's notice and submissions of Utmost on Question 1

64. The respondent's notice is, in effect, a complete traverse of the grounds of appeal. Counsel for Utmost submits that the issue raised by this first question certified by the trial judge has not been considered previously. The general question posed needs to be considered in the light of the analysis of the trial judge in his determination that any analysis of the reasonableness of the conduct of Utmost had to be considered in the light of its obligation to verify the Claim. This obligation to verify the Claim distinguishes this case from earlier authorities in which the Code, or the previous code, have been considered. However, the decision of the trial judge is consistent with those earlier authorities which recognise the status and importance of the Code (or the previous code, as the case may be). In this case, the FSPO, having recognised the obligations of Utmost in clause 7.6 of the Code, fell into error by failing to have regard to that obligation when assessing the conduct of Utmost. The trial judge was correct to hold that this was a serious and significant error on the part of the FSPO.

65. Moreover, it is submitted, that even if this Court were to conclude that there is no general obligation on the FSPO, when assessing the reasonableness of the conduct of a financial services provider, to have regard to the Code, that will not avail the FSPO in this case, because while the FSPO expressly relied upon the Code in arriving at the Decision, he did not then assess the conduct of Utmost by reference to its obligations under the Code.

66. Utmost relies on a number of authorities which it says confirm that the FSPO is obliged to have regard to any applicable codes in his decisions , including *Irish Life and Permanent plc v. Financial Services Ombudsman* [2011] IEHC 439, *Carr v. Financial Services Ombudsman* [2013] IEHC 182 and, more generally, *Stepstone Mortgages Funding Limited v. Fitzell* [2012] 2 IR 318.

67. Both *Irish Life and Permanent plc* and *Carr* arise out of the switching of mortgages, the general thrust of the complaint in each case being that the financial institution concerned

did not properly explain the full implications of the switch, and in particular, the loss of the entitlement of the consumer in each case to revert to the terms of a tracker mortgage, having switched from it in order to achieve a better rate (although it must be said that the circumstances giving rise to the complaint in each case were quite different). These cases involved complaints made to the statutory predecessor of the FSPO, the FSO, and involved a previous version of the Code, but are nonetheless of equal application to the Code. In *Irish Life and Permanent*, White J. held that:

> "This Court is of the view that the Financial Services Ombudsman, in considering the complaint of the Notice Parties should have applied the provisions of the Consumer Protection Code August 2006, the obligations of the Appellant under its own rules, regulations and code of conduct, and general consumer law. It is not appropriate for this Court to comment on the likely outcome if that had been applied."

68. In *Carr* O'Malley J. noted, at para. 22, that the appellant in her submissions (to the Financial Services Ombudsman) had referred extensively to the provisions of the Consumer Protection Code 2006. Then at para. 34 O'Malley J. stated:

> "It is noteworthy that at no point in this finding [against the appellant in that case regarding her complaint that the mortgage lender failed to fully advise, but in favour of the appellant in relation to the handling of her case once her financial difficulties were realised] does the respondent refer to the provisions of the Consumer Protection Code. Similarly, it is not referred to in the affidavits filed by the respondent."

69. In her conclusions, at para. 84, she stated:

> "I admit to being somewhat puzzled as to absence of reference to the terms of the Code in the finding of the respondent, in his affidavits and in the written submissions filed on his behalf. I agree with the views expressed by Hogan J. in the *ILP* case as to the propriety of consideration of the Code in the task of the respondent and might, perhaps,

> go further. The Code is a significant feature of the landscape within which the respondent [the Financial Services Ombudsman] operates and it is probably expected by many complainants that they can rely on it. It would in my view be desirable that the respondent should, therefore, make reference to it in his determinations, if only to say why he does not think it applicable in the circumstances of a given case."

70. As regards *Fitzell*, this was a different kind of complaint, being one made in the context of proceedings for possession. The code of conduct that fell for consideration by the court in that case was the code of conduct on mortgage arrears, and the court was required to consider the impact on the proceedings of the failure on the part of the plaintiff to comply with the provisions of that code. At para. 29, Laffoy J. held:

> "Notwithstanding what is stated in the preceding paragraphs, I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mortgage or charge to which the current code applies, which comes before the court for hearing after the Current Code came into force, the plaintiff does not have to demonstrate to the Court compliance with the Current Code."

71. Laffoy J. considered that the provisions of the code (as to the imposition of a moratorium on the initiation of proceedings) would be rendered nugatory if the lender did not have to adduce evidence as to the expiration of the moratorium period had expired. This, and other cases relied upon by Utmost, including the decision of Hogan J. in *Irish Life and Permanent plc v. Financial Services Ombudsman*, established that codes of conduct are not merely "soft law". As Hogan J. observed in that case:

> "These codes can certainly inform - in principle, at any rate - the thinking of regulatory authorities in assessing appropriate standards for credit institutions."

Discussion and Decision on Question 1

72. There is no dispute that financial services providers are obliged to comply with the Code in the provision of their services. At first glance therefore it is difficult to see why the proposition that the FSPO must have regard to the Code (and the obligations it imposes on the providers of financial services) when assessing the conduct of a financial services provider, should be controversial. If, for example, the conduct complained of is conduct engaged in by reason of an obligation imposed by the Code, then such conduct could hardly be considered to be unreasonable or otherwise contrary to s. 60(2)(b) of the Act of 2017, or improper for the purposes of s. 60(2)(g) thereof.

73. However, the concern of the FSPO arises out of what he perceives to be the mandatory nature of the decision of the trial judge, i.e. that in *all cases* where he is considering a complaint under ss. 60(2)(b) and (g), he must have regard to the Code. The FSPO submits that it is a matter for him to decide, at his discretion, whether or not to have regard to the Code when assessing the conduct of a provider. He is not obliged to do so. I do not agree.

74. In my view the position adopted by the FSPO on this issue is both illogical and untenable. Codes adopted by the Central Bank are adopted following a process of consultation with stakeholders. As the name implies, the Consumer Protection Code is intended to afford consumers a measure of protection in their dealings with financial services providers which, for the most part, will enjoy a position of commercial dominance over the consumer. The imposition of a Code of Conduct on the provision of financial services by service providers, necessarily influences the manner in which such services are provided, as well as the interactions between consumers and financial services providers as regards the provision of such services. The Code also serves an additional and useful purpose in providing an objective benchmark against which complaints of consumers and standards of service of financial services providers may by assessed, thereby affording both consumers

and providers protection against potentially arbitrary or subjective decisions on the part of the FSPO.

75. In the very vast majority of cases (unlike in this case) it is consumers, and not financial services providers who will seek to rely upon the Code when advancing a complaint. Whether the Code is relied upon by a complainant, or by a financial services provider in responding to a complaint, it can hardly be doubted that once reliance is placed on it, the FSPO must have regard to it when determining the reasonableness of the conduct of the financial services provider. But even where it is not relied upon by either party, the Code may nonetheless have a relevance to the determination of the complaint, and it is reasonable to expect the FSPO, having regard to the expertise imputed to that office, to have due regard to the Code when assessing the reasonableness of the conduct of a financial services provider. By "due regard" I mean to consider whether or not the conduct complained of was conduct (a) necessitated, directly or indirectly, by any provision of the Code or (b) was in breach of any provision of the Code.

76. In this case the FSPO did have regard to the Code. It was the FSPO who raised, in the Decision, clause 7.6 of the Code. What is not agreed however, and where the real controversy lies in this case, where this issue is concerned, is the conclusion of the trial judge that, in assessing the reasonableness of the conduct of Utmost, the FSPO should have had regard to the obligation of Utmost to verify the Claim under clause 7.6 of the Code. So, in the opinion of the trial judge, it was not enough for the FSPO merely to mention clause 7.6 of the Code; he needed to go further, and assess the conduct of Utmost by reference to its obligation under clause 7.6, and in failing to do so, the FSPO, in the view of the trial judge, was in serious and significant error.

77. However, with respect to the trial judge, I do not think this conclusion withstands scrutiny. As the trial judge acknowledged, the FSPO had identified the obligation of Utmost

to verify the Claim. Utmost undertook this obligation, which in practical terms is no different to its contractual obligation to members of the Scheme, on receipt of a claim for benefit. What more can be said about that obligation? There is no mystery about it, and Utmost itself had not asserted that its obligation to verify a claim in and of itself influenced its conduct in the assessment of the Claim, or the outcome of that assessment. There is no connection at all, for present purposes, between the fact of being required to conduct such an exercise on the one hand, and the manner in which it is conducted on the other.

78. So, therefore, even if the FSPO had, in assessing the reasonableness of the conduct of Utmost in its handling of the Claim, expressly alluded to the fact that this was an exercise which Utmost was obliged to engage in pursuant to the Code, this could have led to no further conclusion and would have made no difference to the outcome of the Complaint. In particular, it would not have shed any light at all on the manner in which the Claim was handled by Utmost, and whether Utmost behaved unreasonably or in any other manner contrary to its statutory obligations. The conclusions that the FSPO arrived at in relation to these matters arose from his examination of documents, and was not and could never have been influenced by the mere fact that the exercise Utmost was undertaking was an obligation under the Code. In my view, there was nothing more to be said about clause 7.6 of the Code, than was said by the FSPO in the Decision.

79. The outcome of the Complaint was determined by an altogether different issue, that being the interpretation given to specific e-mails referred to by the FSPO in the Decision, one being an internal e-mail from Mr. Hulsman to Dr. Gleeson of 27th July 2016, and the other being the e-mail of 19th January 2017 from Ms. Devine to Dr. Howard (see paras. 10 and 15 above). Whether or not the interpretation given to these e-mails by the FSPO constitutes a serious and significant error such as to justify the intervention of the High Court,

and the setting aside of the Decision depends upon the answer to the third of the questions certified by the High Court, to which I now pass.

Question 3:

Is the High Court, in the exercise of its appellate jurisdiction in a statutory appeal under s.64 of the Financial Services and Pensions Ombudsman Act 2017, entitled to draw different inferences from documentation (in this case correspondence) than those of the Ombudsman? Put otherwise, to what extent to the principles in *Fitzgibbon v. The Law Society* [2014] IESC 48; [2015] 1 IR 516 (at paras. 127 and 128 of the reported judgment) apply to a statutory appeal under s.64?

80. In the context of these proceedings, the significance of the question arises in the context of the conclusion of the trial judge that the FSPO committed a serious and significant error of law in drawing unsubstantiated inferences from certain correspondence (para. 81 of the judgment, see para. 44 above).

81. The FSPO submits that the standard of review by the High Court on an appeal from the FSPO is well established, that being the test in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323 wherein Finnegan P. held at p. 9:

> "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* …"

82. The submissions of the FSPO refer to a number of other subsequent authorities in which this test was repeatedly affirmed, including *Millar v. FSO.* In that case, the court was required to consider whether deference should be accorded to a decision of the Financial

Services Ombudsman on a question of interpretation of contract. The court held at para. 15 that "where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, … the court should not adopt a deferential stance to the decision or determination on the question of law". Later in the same paragraph Finlay Geoghegan J. stated: "with respect to the Ombudsman he does not have expertise or specialist knowledge, certainly relative to the High Court, in deciding questions of law."

83. At paras. 16 - 18, Finlay Geoghegan J. continued:

> "16. However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High Court is required to 'examine afresh' that issue in the course of the appeal. Rather the correct position is that the general principles set out in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* still apply to the determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding.
>
> 17. This means that on appeal to the High Court from a finding which includes a decision on a pure question of law, the burden of proof remains on the appellant; the onus of proof is the civil standard; the court should consider the adjudicative process as a whole and the onus is on the appellant to show that the decision was vitiated by a serious and significant error. The court will normally determine the appeal on the evidence and material before the Ombudsman.
>
> 18. The construction of a contract is not a pure question of law. It is a mixed question of law and fact. In relation to a contract in writing *Chitty* on Contracts 31st Ed.Vol.1, para.12 – 046: -

> 'the construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and secondly, their legal effect or the effect which is to be given to them. Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word of technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (where they are relevant) are questions of fact.'"

84. It is submitted that in circumstances where there is a considerable body of case law on s. 64 appeals, the introduction of another judgment from another context is of limited assistance.

85. *Fitzgibbon* concerned an appeal on a point of law only from a decision of the respondent in that case. The passages from *Fitzgibbon* referred to in the third question are as follows:

> "127. The applicable principles were helpfully summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act, 1997, as follows: -
>
> > 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following: -
> >
> > > (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision…'

This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in *Sheedy v Information Commissioner* [2005] ICSC 35, [2005] 2 I.R. 272.

128. In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error of law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision-maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)".

86. The FSPO submits that even if the standard in *Fitzgibbon* is applied, it would favour its case on this appeal, because while the trial judge disagreed with the assessment of and conclusion drawn by the FSPO from the documentary evidence, and concluded that the FSPO had drawn "unsubstantiated inferences" from correspondence, the trial judge did not

conclude that no reasonable Ombudsman could have drawn such inferences, and nor did he conclude that there was no evidence to support such inferences. That said, the FSPO acknowledges that the trial judge did describe as "unreasonable", an inference drawn by the FSPO from one particular document – the internal e-mail of Mr. Hulsman to Dr. Gleeson of 27th July 2016, and at para. 79 he also described as "untenable" another inference of the FSPO. This was in reference to a distinction between the fact that the notice party suffered from an excluded illness, i.e. fibromyalgia, on the one hand, while on the other hand her disability may have been caused by a covered illness - rheumatoid arthritis. The FSPO had inferred that Utmost did not appreciate the distinction, and the trial judge considered that it was clear from the documents before the court that it did.

87. The FSPO further submits that he did not draw inferences of fact from documents; rather he assessed the conduct of Utmost in verifying the claim by reference to the correspondence reviewed. Accordingly, there were no inferences of fact drawn by the FSPO from the documents which can be said to constitute a serious or significant error.

88. In its submissions, Utmost argues (on the basis of *Fitzgibbon*) that in this case the appeal from the FSPO to the High Court is an appeal against an error (the error being the inferences drawn by the FSPO), and not an appeal on a pure point of law. Accordingly, there is a lower degree of deference afforded to the decision maker (on matters of fact), and in such circumstances the court is entitled to form its own view on the proper inferences to be drawn. Utmost relies upon the concluding part of para. 128 in *Fitzgibbon* in support of this proposition. It is also submitted that this follows from the decision in *Ulster Bank Investment Funds Ltd. v. FSO*, by reason of its adoption of the test in *Orange Ltd. v. Director of Telecoms (No.2).* The trial judge was, therefore, entitled to draw different inferences from documentation to those drawn by the FSPO from the same documentation.

Discussion and Decision on Question 3

89. Firstly, in so far as it is argued on behalf of the FSPO that he did not draw inferences of fact from documents, this is not correct. Having reviewed the internal communications of Utmost regarding the claim of the notice party, and external communications with medical advisors retained by Utmost, the FSPO concluded that "there was an over emphasis by the Provider to quantify the impact that the two medical conditions had on the Complainant's ability to work and in doing so to unreasonably and unfairly find that the excluded condition predominated, thereby preventing payment of benefit to the Complainant."

90. This was an inference drawn not from a contract but from correspondence. The interpretation of this correspondence is not a matter of law, but nor is it a matter of any particular expertise of the FSPO. That being the case, there is no reason why a court should be required to afford deference to the interpretation of the FSPO of a letter or an email as a matter of general principle, although it is possible to envisage circumstances where deference is appropriate. For example, in circumstances where the correspondence uses specialist terminology, or where evidence was given to the FSPO about the correspondence, or where the correspondence concerned is just a small part of a much greater volume of correspondence considered by the FSPO. But none of those considerations arise here.

91. *Fitzgibbon* (which was neither cited nor discussed in *Millar*), makes clear, *inter alia*, that in considering an appeal on a point of law, an appellate court may set aside primary facts if there was no evidence to support such findings. Moreover, it may reverse inferences drawn from such facts, if those inferences were based on the interpretation of documents, and should do so, if incorrect. This must apply, *a fortiori*, to the court of first instance hearing a statutory appeal. It would be entirely illogical that an appellate court is free to correct such errors, but the court of first instance is precluded from doing so (I appreciate of course that the appellate court is reviewing the decision of the lower court, and not the decision of the statutory body, but this is immaterial for this purpose).

92. In my view, *Fitzgibbon* is clearly applicable to statutory appeals under s.64 of the Act of 2017. The only argument advanced against the application of *Fitzgibbon* to such appeals was to the effect that the standard of review is governed by *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman*. However, in my opinion, a "serious and significant error" of the kind referred to in *Ulster Bank* must surely include an inference drawn from documents which no reasonable decision making could draw, per *Fitzgibbon*.

93. In this case, the trial judge held that the Decision was vitiated with serious and significant errors for two reasons, the first being that the FSPO failed to measure the conduct of Utmost against the Code, and the second being that the FSPO drew unsubstantiated inferences from certain correspondence. In saying that the Decision was vitiated with serious and significant errors, the trial judge was of course using the language of *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman*. For the reasons given earlier, I do not think the Code was of any relevance, but I do think the trial judge was correct in his determination that the FSPO drew unsubstantiated inferences. The trial judge provided detailed reasons for his conclusions as regards the drawing of unsubstantiated inferences, which he has concluded at para. 81 of his judgment, constituted serious and significant errors. Whether considered on the basis of the test in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* (i.e. was the Decision vitiated by a serious and significant error?) or *Fitzgibbon* (which makes clear that findings of primary fact may be set aside where they are unsupported by evidence, and that inferences incorrectly drawn from documents on which the findings of fact were based should be set aside) I am satisfied that the trial judge was entitled to draw different inferences from the documentation than those drawn by the FSPO in this case.

94. While it has been submitted on behalf of the FSPO that the trial judge did not conclude that no reasonable Ombudsman could have drawn the inferences the Ombudsman drew, I do

not think that it is necessary for the trial judge to express himself in precisely these terms. He described the inference drawn by the FSPO from the e-mail of 27th July 2016 as being unreasonable. He described another inference as "untenable". As regards the e-mail of Ms. Devine to Dr. Howard of 19th January 2017, he says that this correspondence was, contrary to the findings of the FSPO, "entirely proper". There can hardly be any doubt that it was the opinion of the trial judge that no Ombudsman, acting reasonably, would have drawn the inferences that were drawn by the FSPO. For the reasons stated, such a conclusion was within the jurisdiction of the trial judge.

95. Since the appeal to this Court is on a point of law only, the conclusions of the trial judge as regards the inferences drawn by the FSPO from the documentation are not reviewable by this Court. If they were so reviewable however, I would wholly endorse the conclusions of the trial judge. I say so for the following reasons:

(1) The e-mail of Mr. Hulsman to Dr. Gleeson of 27th July 2016, which the trial judge described as being "wholly unexceptional" was an internal e-mail in which Mr. Hulsman expressed surprise that the notice party had been admitted to the Scheme in the first place, because of her history. That was no more than an observation, and he proceeds to say: "nonetheless she was accepted with multiple exclusions" and he then goes on to analyse her claim, and the medical reports submitted with her claim. He noted that the symptoms reported by the notice party appeared to "directly line up" with the excluded symptoms. It is hardly surprising in these circumstances that Mr. Hulsman would seek an opinion from Dr. Gleeson, the Chief Medical Officer of Utmost, as to whether or not the symptoms complained of by the notice party were the same symptoms in respect of which cover was excluded, and that he should ask Dr. Gleeson to explain this clearly if she was of this opinion.

(2) The e-mail of Ms. Devine to Dr. Howard of 19th January 2017 was sent in response to Dr. Howard's report of mid-December 2016, in which he expressed the view that, firstly, he did not consider the notice party to be permanently disabled from work, and secondly, that the excluded condition, fibromyalgia, was the main contributing factor to her symptoms. Those conclusions might well have been sufficient to warrant the notice party declining cover without further enquiry, but nonetheless Ms. Devine sought clarification with a very simple question: "would it be reasonable to deduce that her rheumatoid arthritis is not severe enough to prevent her from working at present?". It is very difficult to see how the FSPO could take issue with this enquiry, or the manner in which it is expressed, but nonetheless on p. 16 of the Decision, the FSPO describes this question as being: "very pointed" because it "contained information that went beyond that which would reasonably and fairly be considered necessary for what the provider was asking its specialist to consider". However, on p. 15 of the Decision, the FSPO stated: "the issue to be decided in this regard [in reference to what was causing the notice party to be unfit for work] is whether or not the diagnosis of rheumatoid arthritis was of sufficient severity to prevent the complainant from working". This description of the "issue to be decided", by the FSPO himself, is almost indistinguishable from the query put by Ms. Devine to Dr. Howard in the e-mail of 19th January 2017.

(3) Moreover, the FSPO criticises Utmost for making its decision to decline based on the letter received from Dr. Howard of 24th January 2017, without having had the notice party further examined, in circumstances where she had been examined only weeks previously, on 14th December 2016.

(4) I also consider the trial judge was also correct in his use of the word "untenable" by the FSPO in drawing an inference that Utmost placed very considerable emphasis on the diagnosis of fibromyalgia, but did not apply the same level of scrutiny to the impact of rheumatoid arthritis on the notice party's ability to work. The correspondence between Utmost and its medical advisors evinces appropriate efforts to establish the extent to which the notice party was disabled from work, and the causes for any such disability.

(5) Finally, even when informing the notice party of its decision on her appeal, in February 2017, Utmost still left it open to the notice party to submit further evidence in support of the Claim for consideration - see para. 20 above. This is hardly suggestive of a service provider with a pre-determined outlook or a closed mind.

Question 2:

Does the Ombudsman have jurisdiction, in the absence of any finding on his part that there has been a breach of contract, to direct a financial services provider to admit a claim under a policy of insurance and to pay the benefit to the insured?

96. The trial judge observed that in view of his conclusions that the Decision was vitiated by serious and significant error, it was not strictly necessary for him to address the validity of the remedy directed by the FSPO, but he proceeded to do so lest he be found to be incorrect in his other conclusions. In doing so he was , in effect, addressing the second question asked on this appeal.

97. In looking at the question he (correctly) did so on the assumption that the findings of the FSPO on the substance of the complaint, were upheld. He concluded that the FSPO did not have jurisdiction to direct the admission of the Claim. He noted (at para. 91) that:

> "The Ombudsman did not find, *as a matter of contract law,* that the insured party was entitled to recover under the group income protection scheme. The Ombudsman made no finding to the effect that the insured party's inability to work is attributable entirely to rheumatoid arthritis. Yet, the remedy directed was precisely that the insurance provider admit the claim".

98. The trial judge held that the remedy directed could not stand because there was no lawful connection between the finding of unreasonable or improper conduct, and the remedy imposed.

99. On behalf of the FSPO, it is argued that the jurisdiction that he enjoys, and in particular the powers conferred on him pursuant to s.60(4) of the Act of 2017 is a broad jurisdiction; that this is apparent from the terms of the section itself and from the authorities. In this particular case, it is submitted that the remedy granted was appropriate and within the jurisdiction of the FSPO.

100. Utmost argues that the effect of the Decision is to require Utmost to admit a claim which is expressly excluded under its contract with the notice party, and the cost of which could exceed €400,000. Moreover, if Utmost failed to comply with the direction of the FSPO, the FSPO would be entitled to bring an application to the Circuit Court for the making of an order in the terms of the FSPO direction to admit the notice party to cover (pursuant to s.65 of the Act of the 2017), and that order in turn could be enforced through the sequestration of the assets of Utmost, or the attachment and committal of its directors and officers.

101. While Utmost recognises that the authorities confirm that the FSPO has a wide discretion in selecting an appropriate remedy, it is submitted that the FSPO is required to exercise that discretion in a manner that is proportionate. It is submitted that it could not have been the intention of the Oireachtas to confer a jurisdiction on the FSPO to direct the

provision of a financial service in circumstances where the FSPO has not upheld the complaint pursuant to s.60(2)(a) of the Act of 2017 i.e. on the basis that the conduct complained of was contrary to law. Where the FSPO directs a financial services provider to admit a person to cover contrary to the terms of a policy of insurance, this has the effect of setting at nought the terms of the contract between the parties, and is disproportionate. This could not have been contemplated by the legislature.

102. Accordingly, Utmost submits, the answer to the second question must be that the FSPO does not have the jurisdiction to direct a financial services provider to admit a claim under a policy of insurance, absent a finding that there has been a breach of contract by the insurer concerned. Utmost further submitted that the saver in the direction order of the FSPO (that Utmost could review the matter at any time, in accordance with the Scheme policy) was ineffective in circumstances where it has already been determined, on the basis of medical evidence, that the Claim is inadmissible, and furthermore, the private contractual rights of the parties would not be engaged in any such review.

Discussion and Decision on Question 2

103. Section 60(4) of the Act of 2017 provides:

> "(4) Where a complaint is found to be upheld, substantially upheld or partially upheld, the Ombudsman may direct the financial service provider to do one or more of the following:
>
> (a) review, rectify, mitigate or change the conduct complained of or its consequences;
>
> (b) provide reasons or explanations for that conduct;
>
> (c) change a practice relating to that conduct;

(d) pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of;

(e) take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint."

104. The breadth of jurisdiction conferred on the FSPO by this section is self-evident. In its previous incarnation (s.57 CI (4) of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act, 2004)) it was considered in several cases, including *Governey v. Financial Services Ombudsman* [2015] 2 IR 616. At para. 40 of his judgment in that matter, Clarke J. stated:

"It is also clear from the provisions of s. 57 C I (4) that the range of remedies which can be imposed by the FSO 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".

More recently, s.60(4) was considered by Hyland J. in the High Court in *Danske Bank A/S v. The Financial Services and Pensions Ombudsman* wherein Hyland J. observed that the jurisdiction conferred on the FSPO in effect includes a jurisdiction to override the law of contract (see para. 55 above).

105. It is clear from the express terms of s.60(4) that jurisdiction of the FSPO is not limited to cases in which the FSPO has found a financial services provider to be in breach of contract. The powers conferred upon the FSPO are indeed very broad and are clearly intended to reflect the intention of the Oireachtas to provide a swift, informal and effective mechanism for the resolution of disputes as between consumers and financial services providers. Of its very nature, an investigation conducted by the FSPO is of an altogether different character to legal proceedings, and the powers conferred upon the FSPO are not circumscribed by the

requirement that the FSPO should make a determination as to legal rights, before directing a remedy.

106. All of that said, and as the FSPO very properly acknowledged, he does not enjoy a *carte blanche* when directing remedies. The remedies directed should be proportionate to whatever findings the FSPO has made as a result of his investigation, and the specific basis upon which a complaint has been upheld. In order to establish whether or not a particular remedy is proportionate, it is necessary for the FSPO to have due regard to the impact of any order that he is contemplating making, upon the financial services provider, and in particular the likely cost of such an order. If necessary, in appropriate cases the FSPO should invite submissions from the parties on this issue.

107. Furthermore, the remedy directed by the FSPO should bear some logical relationship to the conduct which the FSPO has found wanting. It is not open to the FSPO to impose remedies which bear no relationship to the conduct giving rise to the complaint, or to rewrite or completely ignore the contractual arrangements between the parties. While there may well be circumstances where the FSPO will be justified in overriding strict contractual arrangements – for example where there has been an egregious delay or wholly unreasonable conduct on the part of the service provider such as to render it unconscionable for the service provider to be permitted to rely upon its strict legal entitlements – the making of an order to direct a financial services provider to admit a claim under a policy of insurance and to pay benefit to the insured, in the absence of any finding of a breach of contract on the part of the provider, is one that requires the most careful of consideration taking account of all of the matters referred to above, and any other relevant considerations.

108. In this particular case, the remedy directed by the FSPO for the mischief identified (accepting for present purposes that that finding of mischief was correct) was, on any analysis, disproportionate and unconnected to that mischief. It was not in dispute that the

appellant suffered from an excluded illness, but the FSPO concluded that Utmost over emphasised that illness in considering eligibility for benefit, to the exclusion of another, covered illness, rheumatoid arthritis. It is very difficult to see how the remedy directed (payment of the benefit) logically follows from the conduct with which the FSPO found fault, not least in circumstances where the notice party suffers from an excluded illness.

109. Moreover, the Court was informed by Utmost (by way of submission, rather than by way of evidence) that the admission of the claim of the notice party, if continued for her lifetime, could cost of the order of €400,000. That was countered by an argument that the direction of the FSPO leaves it open to Utmost to review the eligibility of the notice party to benefit under the Scheme at any time in the future, and so Utmost will not be left paying a benefit which it is not obliged to pay by contract, if properly obtained medical evidence supports that position. Utmost however expressed concern about the utility of such a process in circumstances where the medical condition of the notice party and its impact upon her ability to work has already been assessed and determined in accordance with the Policy. It is not necessary to resolve these conflicting positions or concerns in view of my decision on the third question. However, what all of this makes clear is that the FSPO should be careful, when considering making orders of this kind, to appraise himself of the likely financial consequences of any such order before reaching his decision in the matter, as they will undoubtedly have a bearing on the assessment of proportionality of any remedy he is considering.

110. For the foregoing reasons, and subject as aforesaid, I am of the view that that the FSPO does have jurisdiction to direct a financial services provider to admit a claim under a policy of insurance, absent a finding that there has been a breach of contract by the insurer concerned.

111. It follows from my conclusion on question three that the order of the trial judge setting aside the Decision should be affirmed. However, before considering what further orders are appropriate, it is necessary to return to an issue to which I alluded at the very outset of this judgment, at para. 5, that there were four elements to the Complaint. In the course of her submissions to the Court, counsel for Utmost made the point that the FSPO had made a finding in respect of only one of those elements of the Complaint, that being that Utmost did not deal with the complaint of the notice party correctly. Since the Decision is to be set aside, the other three elements of the Complaint once again come into focus. Whatever reasons the FSPO may have had for not deciding these elements of the Complaint, they can no longer be relevant once the Decision is set aside. Accordingly, I consider it appropriate that the Court should receive submissions as to the orders that should be made by the Court arising out of the answers provided by this judgment to the questions certified by the High Court.

General Observations

112. More generally, while it is well recognised that in discharging his functions the FSPO it is not bound to do so with the same degree of formality or in the same level of detail as a court must do, nonetheless it is important that the FSPO should either make a decision on the matters that he himself has identified as being before him by way of complaint, or if he is not doing so in respect of any given matter, he should explain briefly why he feels it is not necessary or appropriate for him to do so. In this case, it may be that the FSPO deliberately did not address the first two elements of the Complaint, i.e. that Utmost had wrongly declined the initial claim and then wrongly denied the appeal of the notice party, on the basis that it was unnecessary or even inappropriate for him to decide these issues because he found in favour of the notice party on the third element of the Complaint, or for some other reason. Whatever the explanation, however, he should have explained his treatment, or non-treatment of these issues in the Decision.

113. Moreover, and more importantly, whatever the reasons for there being no decision on the first and second elements of the Complaint, these are unlikely to explain why the FSPO made no decision on the fourth element of the complaint, i.e. that the Policy was not suitable for the notice party. That is surely an issue of fundamental importance to both Utmost and the notice party.

114. Finally, and relatedly, while the FSPO stated in the Decision that the Complaint was upheld on the grounds prescribed in sub-sections 60(2)(b) and (g) of the Act of 2017, he did not specifically tie any of his findings regarding the conduct of Utmost to either of these statutory grounds. It may be that he took the view that the conduct he found fault with fell foul of both grounds, but when upholding a complaint, the FSPO should, when explaining his decision, expressly refer to the statutory ground or grounds upon which each element of a complaint is upheld, and on what basis. Similarly, any directions made pursuant to s.60(4) of the Act of 2017 should refer to the sub-section pursuant to which they are made.

Costs

115. As far as costs are concerned, it seems to me to be appropriate that the parties should make submissions in the light of this decision, before this Court arrives at any conclusion. Accordingly, the parties are invited to exchange submissions on the issue of costs no later than 5pm on 9th May 2022.

116. Since this judgment is being delivered electronically, Costello and Collins JJ. have authorised me to confirm their agreement with it.