THE HIGH COURT

[2022] IEHC 557

[2021 No. 128 M.C.A.]

BETWEEN

HISCOX S.A.

APPELLANT

AND

THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

NMME ZONE LIMITED T/A THE ZONE

NOTICE PARTY

JUDGMENT of Mr. Justice Paul Burns delivered on the 6th day of October, 2022

1. This matter comes before the Court by way of a statutory appeal pursuant to s. 64 of the Financial Services and Pensions Ombudsman Act, 2017 (hereinafter referred to as "the Act of 2017"), brought by the appellant (hereinafter referred to as "the provider") against a Decision of the respondent (hereinafter referred to as "the FSPO") dated 5th May, 2021 in which the FSPO upheld a complaint by the notice party (hereinafter referred to as "the complainant company") against the provider regarding insurance policy number 8031657. The decision was actually that of a Deputy Financial Services and Pensions Ombudsman but nothing turns on this.

Background

2. At all material times, the complainant company was the operator of a children's play/activity centre known as "The Zone". Following the outbreak of the Covid-19 pandemic in early 2020, the complainant company received a communication from its industry group, Play Activity and Leisure Ireland, stating that, following advice from the Department of Health, the Department of Business and the then Minister of State for Housing and Urban Development, it was recommending that centres close. Particular reference was made to a stipulation from the Department of Health that children of school age do not mix in any social setting. On foot of the recommendation, the complainant company temporarily closed its business on 15th March, 2020.

3. The complainant company had taken out a policy of insurance with the provider which was in force at the time of the temporary closure. The said policy of insurance provided cover for losses occurring in certain circumstances and, in particular, included a *"Property - Business interruption (Office)"* cover which stated as follows:-

> *"What is covered – We will insure you for your financial losses and any other items specified in the schedule, resulting solely and directly from an interruption to your business caused by:*
>
> > *Financial losses from insured damage …*
> > *Public authority*
> > *5. Your inability to use the office due to restrictions imposed by a public authority during the period of insurance following:*

(a) a murder or suicide;

(b) an occurrence of a notifiable human disease;

(c) injury or illness of any person traceable to food or drink consumed on the premises;

(d) defects in the drains or other sanitary arrangements;

(e) vermin or pests at the premises."

4. On 19th March, 2020, the complainant company's insurance brokers notified the provider of a claim for business interruption losses arising from the temporary closure of the complainant company's business. On 25th March, 2020, following its assessment, the provider declined the complainant company's claim by way of email to the complainant company's broker. The complainant company submitted a complaint to the provider by email on 2nd April, 2020 regarding its decision to decline indemnity. The provider emailed the complainant company's broker on 26th May, 2020 and the complainant company itself on 2nd June 2020, to advise that following the completion of its internal review process, it was standing over its decision to decline the claim.

5. The main reasons given for the declinature were the interpretations placed on certain clauses in the policy by the provider so that cover was not triggered, such as:-

(i) That the loss had to be caused solely and directly from the insured peril and not caused in part by a slowdown in economic activity as a result of the pandemic;

(ii) That restrictions or closure had to be imposed specifically on the policy holder's premises; and

(iii) That the premises had closed without an instruction from the HSE to do so.

The provider emphasised that *"there is no ambiguity in the Policy wording"*.

Complaint to FSPO and Outcome Of Same

6. The complainant company made a complaint to the FSPO.

7. Section 60(2) of the Act of 2017 provides 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:

(a) the conduct complained of was contrary to law;

(b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was wholly or partly on a mistake of law or fact;

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

(g) the conduct complained of was otherwise improper."

8. In the course of dealing with the complaint, the FSPO received a substantial amount of documentation relating to the matter as well as several sets of submissions from the complainant company and the provider. In addition to other materials, the complainant company relied upon an instruction from the Central Bank to insurers dated 27th March, 2020 headed: *"Central Bank of Ireland Expectations of Insurance Undertakings in Light of COVID–19"*. This stated *inter alia*:-

> *"Although the Central Bank expects that most policy wordings are clear in terms of what cover is provided and what cover exclusions are in place, where there is a doubt about the meaning of a term, the interpretation most favourable to their customer should prevail. Firms must ensure that claims are appropriately assessed and where there is insurance cover in place that claims are accepted and paid promptly.*
>
> *In this context, the Central Bank is of the view that where a claim can be made because a business has closed, as a result of a Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction. We note that this is a view that has also been set out by the Minister for Finance, Public Expenditure and Reform."*

9. A preliminary decision was issued on 3rd November, 2020. The parties were afforded an opportunity to make further submissions in respect of the preliminary decision within a period of 15 working days. Such submissions were confined to one or more of the following: (1) to advance an additional point of fact; (2) to point out an error of fact; or (3) to point out an error of law.

10. Of note is the fact that by way of further submissions, the provider wrote to the FSPO alleging that there was an error of law in the preliminary decision in so far as the FSPO was proposing to uphold the complaint on the grounds prescribed in s. 60(2)(b) and (g) when the finding was one of contractual interpretation, which is provided for in s. 60(2)(a) (although it was submitted that a finding against it in that regard would be erroneous). The provider submitted that the issues of interpretation were highly complex and that *"the idea that the matters of interpretation are clear, and therefore form a basis for a finding of unreasonable conduct, is quite simply manifestly wrong"*. It was submitted that contractual interpretation is a matter of law and the FSPO was requested to withhold final decision until the outcome of UK litigation concerning the contractual provisions or to make no decision or refer the matter to the High Court. (The Court notes that in earlier correspondence with the FSPO dated 21st July, 2020, the provider had taken the view that the UK litigation *"can have no bearing on this complaint"* and the legal position in England was different.) It was submitted that in the absence of a finding of a breach of the Consumer Protection Code, there is no connection between the finding of unreasonable or improper conduct and the remedy proposed.

11. Following the decision of the UK Supreme Court in *The Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors* [2021] UKSC 1, which essentially rejected the interpretations placed upon the wording by the provider, the parties were afforded a further opportunity to make submissions. In the meantime, and following on from the decision in *The Financial Conduct Authority*, the provider had confirmed that the earlier declinature was rescinded and that cover would be provided. On receipt of further correspondence from the complainant company and the provider, a final decision was issued by the FSPO on 5th May, 2021, which concluded that the complaint was upheld on the grounds prescribed in s. 60(2)(b) and (g) of the Act of 2017. Further, pursuant to s. 60(4) and s. 60(6) of the Act of 2017, the FSPO directed the provider to make an advance payment

of policy benefits to the complainant company in the sum of €25,000 and to make a compensatory payment to the complainant company in the sum of €5,000. It was further directed that interest was to be paid by the provider on the advance payment of policy benefits and the compensatory payment at a rate referred to in s. 22 of the Courts Act, 1981 if the amount was not paid within 35 days from the date of the nomination of an account by the complainant company into which the monies were to be paid.

12. It should be noted that the FSPO did not find the complaint to be upheld on the grounds set out at s. 60(2)(a), namely that the conduct complained of was contrary to law. In the course of the hearing of this appeal, counsel on behalf of the provider conceded that the earlier declinature was wrong and amounted to a breach of the contract of insurance (see transcript day 1, pp. 114 and 119).

Appeal to High Court

13. By way of originating notice of motion dated 8th June, 2021, the provider appealed the decision of the FSPO and sought an order setting aside the decision and/or the directions contained therein, as well as further alternative reliefs. The provider challenges the FSPO decision as regards upholding the complaint on the grounds set out at s. 60(2)(b) and (g) of the Act of 2017.

14. A grounding affidavit was sworn by Mr. Conor Corcoran, claims manager, which sets out, *inter alia*, a number of alleged serious and significant errors in the decision of the FSPO, both as regards the grounds on which the complaint was upheld and in relation to the directions to pay policy benefits in advance and to pay the sum of €5,000 compensation.

15. The essence of the provider's appeal is that in initially declining cover, it was acting on foot of an interpretation of the policy provisions which it genuinely believed was the proper interpretation to be applied, and which it believed was supported by the prevailing jurisprudence at the time. It is submitted that, in such circumstances, the provider was acting *bona fide* in declining cover and that thereafter it participated fully in the FSPO complaint process. The provider submits that following the judgment of the UK Supreme Court in the *The Financial Conduct Authority v Arch Insurance (UK) Limited & Ors* [2021] UKSC 1, it immediately carried out a review of relevant policies and expeditiously confirmed that cover would in fact be provided subject to the policy terms and conditions in relation to assessment of the level of same. It is submitted that, in such circumstances, the decision of the FSPO was seriously and significantly in error in holding the provider's conduct to have been unreasonable and unjust within the meaning of s. 60(2)(b) of the Act of 2017 and otherwise improper within the meaning of s. 60(2)(g). It is further submitted that no adequate reasons are set out in the decision to support such conclusions. In relation to the remedies ordered, it is submitted that same were not supported by the reasoning in the judgment and/or were not permitted as a matter of law. As regards some of the submissions of error proposed by the provider, these appear to amount to little more than forensic nit-picking and add little if anything to the essential grounds of appeal referred to herein.

16. A replying affidavit was sworn on behalf of the FSPO by Ms. Mary Rose McGovern, Deputy FSPO, in which she exhibits documentation and sets out a chronology of events.

The Test to be Applied on Appeal

17. As found by Finnegan P. in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323 at para. 35:-

> *"35. …. To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in Orange v The Director of Telecommunications Regulation & Anor and not that in The State (Keegan) v Stardust Compensation Tribunal."*

18. MacMenamin J., in Molloy v. FSO (Unreported, High Court, 15th April, 2011), held at para. 27:-

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

19. In applying that test, the Court will have regard to the degree of expertise and specialist knowledge of the FSPO. However, the courts will not defer to the FSPO on a question of pure law. The Court can intervene by reversing inferences drawn from primary facts and inferences based upon interpretation of documents and, indeed, should do so if incorrect. The Court of Appeal confirmed in *Millar v. Financial Services Ombudsman and Anor* [2015] IECA 126 that the High Court, in hearing an appeal, should not adopt a deferential stance to a decision or determination by the respondent on a "pure" question of law.

The Decision

20. By reason of the nature of the test, the focus in an appeal such as this tends to be on the Decision itself.

21. As identified by the FSPO, the conduct the subject matter of the complaint was the conduct of the provider between March 2020 and late May/early June 2020, during which it declined cover and confirmed such declinature after conducting an internal review process. In the absence of any failure to properly and adequately engage in the FSPO procedure, the decision limited itself to consideration of the conduct during that period.

22. Correspondence between the complainant company and the provider is referred to in the early part of the Decision and parts of same are set out. This essentially encompasses the dispute between the complainant company and the provider as to the correct interpretation of the relevant

contractual provisions. The FSPO at p.4 of the Decision identifies the complainant company's complaint as being "*that the Provider wrongfully declined to admit and pay its claim for business interruption losses, as a result of its temporary closure due to the outbreak of coronavirus (COVID-19)"*.

23. The Decision notes the course of correspondence between the parties, and in particular the provider's letter of 2nd June, 2020, in which the reasons for declinature of cover were set out again and in which the provider emphasised the following at p. 3:-

> *"…. The policy wording is clear and unambiguous;"* and

It was further outlined at p. 8:-

> *"…. The wording in the insuring clause is clear and unambiguous. The ordinary and natural meaning of the words is clear from the insuring clause and when read in light of the policy as a whole as set out in the preceding paragraph. It is clear that cover is not triggered…"* and
>
> *"Furthermore, there is no ambiguity in the Policy wording."*

24. The FSPO sets out at some length the arguments made by the provider in support of its interpretation of the policy and goes on to note at p. 13:-

> *"Having adopted that position at all material times during 2020, nevertheless, on 4 February 2021, the Provider advised the Complainant Company's broker that arising from the decision of UK Supreme Court in Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors on 15 January 2021, the Provider had undertaken a review of the Complainant Company's business interruption claim, and having done so, cover for the claim was confirmed, subject to the policy terms and conditions."*

25. In the course of the Decision, the FSPO specifically refers to a number of the arguments put forward by the provider at the time of declinature in support of its interpretation of various phrases in the relevant contractual provisions. The FSPO specifically referred to the provider's letter of declinature dated 25th March, 2020 at p. 15 of its Decision which advised among other things that:-

> *" … whilst there is additional cover under the Public Authorities section of our policy for mandatory closures by a Public Authority <u>this cover only applies to a mandatory closure order issued by a Public Authority which specifically applies to the insured's premises and which has arisen as a result of an occurrence of a notifiable human disease at the insured's premises</u>. This situation has not occurred and therefore this cover has not been triggered."* (Emphasis added by the FSPO)

26. The FSPO then notes that following its internal appeals process, the provider advised that it was standing over its decision to decline the claim. The FSPO notes that the complainant stated in the complaint form:-

> *"My complaint…is that there is a sole issue involved here which is [the] interpretation of the plain English in the cover provided at section 5(b) on the 22nd page of the policy."*

27. The FSPO notes the contractual provisions, that on 20th February 2020, the Minister for Health had included Covid-19 on the list of notifiable diseases and that the parties agreed there was no occurrence of Covid-19 at the complainant company's premises. The FSPO noted the interpretation contended for by the provider that, in order for cover to be in place, the occurrence of a notifiable disease had to be at the policyholder's premises which resulted in an order imposed

by a public authority specific to that premises. The FSPO states that, having considered the matter in detail, there is nothing in the policy wording indicating that the occurrence of the notifiable human disease must be at the policyholder's premises and points out the use of the term *"at the premises"* in some of the sub-clauses but not in the specific sub-clause in question, *viz.* clause 5.(b).

28. The FSPO states at p. 18:-

"I accept the Complainant Company's contention in that regard, that this is the position, on a plain English interpretation of the policy wording. As a result, I take the view that the Provider's suggestion that for cover to operate, the notifiable disease had to occur at the insured premises, was misconceived, and contrary to the plain meaning of the policy words."

29. In the Decision, at p. 19 the FSPO also considered the provider's interpretation set out in its letter of 2nd June, 2020 that:-

"The policy is only triggered if the financial losses … result solely and directly from an interruption of the business caused by an insured peril referred to in the 'Public Authority' clause…" and " *… there has not been an occurrence of an insured peril, i.e. an occurrence of COVID-19 which resulted in restrictions being imposed by a public authority on the policyholder's business. Rather it is clear that the decision to close the policy holder's premises was taken in response to the social distancing and public health measures introduced by the government."* (Emphasis added by the FSPO)

30. The FSPO then states at p. 19:-

"It seems to me in that respect that the Provider failed to recognise that the 'social distancing and public health measures introduced by the Government' which it has referred to in that letter, themselves constitute 'restrictions' imposed by a public authority, following an occurrence of a notifiable human disease, independently of any specific closure order imposed."

31. The FSPO continues at p. 19:-

"I take the view that there is nothing within the particular policy clause under 'Public Authority' at number 5, that requires the 'restrictions imposed by a public authority' to be either (i) by way of a specific closure order, or indeed (ii) to be restrictions which are policyholder specific, as opposed to more general restrictions imposed, in the context of the occurrence of a notifiable disease. I am satisfied accordingly that the Provider's approach to assessing the Complainant Company's claim, was incorrect and unreasonable, when it adopted the position that for cover to be available it was necessary for an occurrence of Covid-19 to have occurred at the Complainant Company's own premises thereby resulting in restrictions being imposed by a public authority specifically on the Complainant Company's business."

32. In essence, the FSPO indicates at this part of her Decision that the conduct of the service provider in its approach to assessing the complainant company's claim was incorrect and unreasonable in adopting the interpretations which it did as set out above.

33. The FSPO also considered the interpretation put on the relevant contractual clauses by the provider as regards the question of whether the complainant company had closed due to restrictions imposed by a public authority. The provider had maintained that the complainant company did not close because of restrictions imposed by a public authority. The FSPO states at p. 19:-

"I do not accept the Provider's position in that regard, that the Complainant Company did not close on 15 March 2020, due to restrictions imposed by a public authority. I am mindful that, on 12 March 2020, the Government directed the closure from 6pm that day of museums, galleries, tourism sites, schools, crèches, childcare and higher education facilities, to minimise physical contact between children and young people."

The FSPO noted at p. 20 that:-

"The Government urged all pupils and students from preschool to third level, to practice social distancing and to avoid meeting up. I am also mindful in that regard, of the exhortations of An Taoiseach, 'that businesses [were] to take a sensible and level headed responsible approach' in the context of the Government guidelines, including the required implementation of social distancing. I consider that it was appropriate in such circumstances for each individual business to assess its ability to continue trading, within the confines of those Government guidelines."

34. The FSPO concluded in that regard at p. 20:-

"I am satisfied from the evidence, that the Complainant Company's closure of its indoor activity centre, was effected in order to comply with the Government's guidelines at that time. Given the specific directions to schools, crèches, pre-schools and further and higher education settings, effective 6pm on Thursday 12 March 2020, I accept that it was reasonable for the Complainant Company to have interpreted this instruction from Government as applying also to its business, given that it trades as an indoor activity centre, with a customer base of mostly children, and taking account of the Government directions to comply with social distancing requirements."

35. The FSPO stated at p. 20 that, had the company not closed as it did, it would have been open to significant criticism for failing to heed the Government's directions:-

"In my opinion, if the Complainant Company's activity centre had remained open at that time, it seems likely to have represented an incentive for children and young people, to behave in a non-socially distanced way, thereby breaching the restrictions which the Government had imposed. Indeed, the Complainant Company's industry body, having sought guidance from a number of reliable Government sources, made clear its recommendation to its members to close, being mindful that 'all sports clubs and classes associated with children' were required to close in light of that Government instruction."

36. The FSPO indicated that it was only fair to be mindful that the closure of the complainant company's indoor activity centre occurred at the very outset of what had been an unprecedented health emergency for the country. The FSPO did not accept that the complainant company should be prejudiced because it could now be argued that it closed its premises some days before being unequivocally required to do so. The FSPO expressed the opinion at p. 21:-

"that it would be unjust and unreasonable if the Complainant Company's claim were to be prejudiced because it was viewed by the Provider as having precipitously closed his premises on 15 March 2020 ahead of the Government announcing further restrictions on 25 March 2020."

37. The FSPO also noted the Central Bank's correspondence to insurers dated 27th March, 2020 stating at p. 21, *inter alia*:-

"In this context, the Central Bank is of the view that where a claim can be made because a business has closed, as a result of Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction."

38. It seems clear from the above that the FSPO was setting out in her Decision the conclusion that, in adopting an interpretation that the complainant company had closed its premises precipitously or prematurely, the service provider had behaved unjustly and unreasonably in light of the circumstances and guidelines as highlighted by the FSPO, and in particular the express expectations of the Central Bank, communicated to insurers, in terms of treating Government advice as a direction to close.

39. The FSPO states that it is satisfied that there was nothing in the applicable policy wording indicating that the occurrence of a notifiable human disease was required to be at the policyholder's premises and, further, that it was appropriate for the complainant company to have closed its activity centre on 15th March, 2020. She stated at p. 21:-

"I am satisfied therefore that, following that closure of the indoor activity centre in those circumstances by the Complainant Company, the Provider ought to have admitted its claim under the policy for business interruption losses, for assessment of benefit, in accordance with the policy provision applying, to enable it to expeditiously progress the assessment of the Complainant Company's claim under the insured peril at 5.b., for the period from 15 March 2020, being the date when it closed its business in recognition of the Government restrictions."

40. The FSPO notes that, since her preliminary decision had issued, the provider had indicated that it had elected to confirm cover for the complainant company's claim but that this should not be taken to be an acknowledgment that the provider had wrongfully or unfairly declined the complainant company's claim. The FSPO notes that, while the provider said that it regarded the UK Supreme Court as providing legal clarity regarding the contractual interpretation of certain clauses and that in light of same it was no longer relying on certain arguments previously made, it nevertheless took the view that the failure of the FSPO to address those previously relied upon arguments in the preliminary decision constituted an error of law.

41. It now appears to be conceded that, as a matter of law, the FSPO was right in regarding the interpretations contended for by the provider as incorrect. However, it is the findings that the provider's conduct was unreasonable, unjust and otherwise improper, which are at the heart of this appeal.

42. In the Decision, the FSPO notes that the provider had submitted that the FSPO proposal to uphold the complaint on the grounds at s. 60(2)(b) and (g) of the Act of 2017 would be an error, when, in the opinion of the provider, the finding is one of contractual interpretation, which the provider maintained is *"provided for in section 62(2)(a) (presumably section 60(2)(a))"*. The FSPO notes and rejects the provider's contention that the preliminary decision had wrongly characterised the provider's reasons for declining cover.

43. The FSPO notes that the provider disagreed with the view of the FSPO that the plain meaning of the words made the cover position clear, and that the provider was maintaining that the issues raised in the policy were complex with references made by the provider to the UK litigation and the

litigation before the High Court in Ireland by way of the decision in *Hyper Trust Ltd. v. FBD Insurance Plc.* [2021] IEHC 279.

44. The FSPO notes the provider's attitude in relation to her declared intention to direct an interim payment of €25,000 and a compensatory payment of €5,000. She also notes the complainant company's attitude to her proposals in that regard at p. 23 and that the proposed level of compensation was "*disappointingly low*". The complainant company had also sought to have the complaint upheld under the additional ground of s. 60(2)(d) of the Act of 2017 that "*the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration"*. The FSPO did not uphold the complaint on that basis.

45. The FSPO notes at p. 23 that the complainant company had submitted that, in order to counter the prejudice caused by the provider to its business survival prospects, it had found itself obliged to borrow from friends, family and the bank to secure cash flow, which would have been available to it under the policy when it made its claim in early 2020, and that the complainant company's directors referred to being "*in massive arrears of rent and all of this is really hard to take"*.

46. The FSPO states at p. 23 that in considering the complaint:-

> *"I am cognisant of the provisions of the Financial Services and Pensions Ombudsman Act 2017('the Act') which prescribes at section12(11) that:-*
>
> *'… the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form'."*

The FSPO expressly states at p. 23:-

> "*In those circumstances I do not consider it necessary or indeed appropriate in the conclusion of this adjudication, to examine and comment on the details of certain arguments which the Provider had previously raised but which it has more recently confirmed it is no longer seeking to rely upon."* (My emphasis added)

It would appear that in light of the requirement to act in an informal manner and, according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form, the FSPO decided there was no need to address legal arguments previously raised by the provider but which the provider was no longer seeking to rely upon. I regard this as a reasonable position for the FSPO to have taken in the circumstances where those arguments were no longer being pursued.

47. The FSPO refers to jurisprudence concerning the powers of the FSPO and in particular the fact that the FSPO's task runs well beyond the resolution of contractual disputes as traditionally performed by the courts. The FSPO emphasises that the resolution of disputes by the FSPO is done according to wider conceptions of *ex aequo et bono* beyond the limitations of the law of contract. The FSPO quotes extensively from the judgment of Hyland J. in *Danske Bank A/S v Financial Services and Pensions Ombudsman and Moore* [2021] IEHC 116 to the effect that a complaint can be upheld even where the conduct of the provider was not unlawful.

48. The FSPO states that, for the reasons outlined, it was her decision on the evidence before her that the complaint should be upheld. She went on to acknowledge at p. 25 that:-

"Although I am in no doubt that some very complex arguments of contractual interpretation had been analysed by the Court in Ireland and by Courts in other jurisdictions also, I believe that it is nevertheless appropriate in this instance to accept the Complainant Company's contention that the policy wording in this particular instance was clear, on a plain English reading."

Thus, the FSPO accepted the complainant company's contention that the policy wording was clear on a plain English reading. The acceptance of that contention does not mean that the FSPO was determining that a plain English reading was the legal test which a court would adopt for interpreting provisions in an insurance contract. Indeed, the FSPO had specifically invoked her jurisdiction or power to determine matters in a manner other than in accordance with how a court of law would do so and not to be bound by considerations of whether the conduct in question was lawful or not.

49. She stated that whatever arguments the service provider may have considered it appropriate to raise in court litigation, regarding the extent of cover or calculation of benefits (in advance of clarity that certain judgments have brought about), the provider's failure in this instance was its failure in March-June 2020 to recognise that the complainant company's claim met the policy requirements of clause 5.(b) such that the provider ought to have admitted the claim in early 2020.

50. The FSPO then stated at p. 25:-

"I take the view that the Provider's failure to admit the claim for calculation and ultimate payment of policy benefits, was contrary to the contractual provisions in place between the parties and was also unjust and unreasonable within the meaning of Section 60(2)(b) and was otherwise improper within the meaning of Section 60(2)(g) of the governing legislation of this Office. On the evidence before me therefore, I consider it appropriate to uphold the complaint on that basis."

51. In dealing further with the provider's latter submissions, the FSPO notes the change of position on the part of the provider almost a year after the claim was originally declined and notes the obligation on the part of the provider under the Central Bank of Ireland's Consumer Protection Code to act honestly, fairly and professionally in the best interest of its customers in its dealings with them. The FSPO states at p. 26 of her Decision: *"I take the view that, in this instance, the Provider did not act fairly or reasonably in its dealings with the Complainant Company in the assessment of the claim for benefit payment made by the Complainant under its insurance policy in May 2020"*.

52. The FSPO goes on to state that it does not accept the provider's submission that the FSPO had wrongly characterised the reasons for declining cover but, rather states at p. 26:-

"…I take the view that the Provider's failure to recognise that the Complainant Company met the specific required policy criteria (regardless of whether its losses were concurrently caused or contributed to by other consequences of the occurrence of Covid-19) was unreasonable and unjust, and constitutes conduct which falls within the provisions of S.60(2)(b) of the Financial Services and Pensions Ombudsman Act 2017. I would note however that, on the evidence before me, I do not accept the Complainant Company's argument that s.60(2)(d) of the Act, is an appropriate ground for upholding the complaint, in this instance."

Discussion regarding Grounds upon which the Complaint was upheld

53. As already pointed out herein the FSPO stated at p. 25 of the Decision as follows:-

> *"I take the view that the Provider's failure to admit the claim for calculation and ultimate payment of policy benefits, was contrary to the contractual provisions in place between the parties and was also unjust and unreasonable within the meaning of Section 60(2)(b) and was otherwise improper within the meaning of Section 60(2)(g) of the governing legislation of this Office. On the evidence before me therefore, I consider it appropriate to uphold the complaint on that basis."*

The foregoing quote appears to indicate that the FSPO considered the provider's failure to admit the claim was (1) contrary to the contractual provisions in place between the parties, (2) unreasonable, (3) unjust and (4) otherwise improper. The clear statement that the provider's failure to admit the claim was contrary to the contractual provisions in place between the parties, appears to me to be a finding that the provider had acted in breach of contract and, as such, the conduct complained of was contrary to law. This appears to amount to a finding that "*the conduct complained of was contrary to law"* as provided for in s. 60(2)(a) of the Act of 2017. Indeed, the provider had indicated in its correspondence to the FSPO that the preliminary finding was one of contractual interpretation provided for in s. 60(2)(a). However, in her conclusion at p. 29 of the Decision the FSPO states:-

> *"My Decision pursuant to section 60(1) of the Financial Services and Pensions Ombudsman Act 2017, is that this complaint is upheld, on the grounds prescribed in section 60(2)(b) and (g)."*

It is not clear from the Decision why the complaint was not expressly stated to be upheld on grounds of s. 60(2)(a), in addition to the other grounds referred to. However, I do not regard the failure to do so as a serious and significant error so as to vitiate the Decision, given that it was open to the FSPO to uphold the complaint upon other grounds, and she did so.

54. Section 60(2)(b) provides for four bases upon which a complaint may be upheld under that particular clause of the subsection:-

> *"60.(2)… (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant."*

Each of these bases represents an independent ground for upholding a complaint. They are not mutually exclusive and a complaint may be upheld under s. 60(2)(b) of the Act of 2017 on foot of one or more of the said grounds. In this instance, the FSPO upheld the complaint under s. 60(2)(b) on two of the grounds, *viz.* that the conduct was *"unreasonable"* and *"unjust"*. This constitutes two separate findings for upholding the complaint. The FSPO also upheld the complaint under s. 60(2)(g): *"the conduct complained of was otherwise improper"*. Thus, there are three separate grounds upon which the complaint was expressly upheld.

55. Bearing in mind the jurisprudence as to the test upon appeal, to succeed the appellant must satisfy the Court that the Decision is vitiated by a serious and significant error or a series of such errors. In the present instance, for practical purposes, this requires the appellant to satisfy the Court that each of the said three grounds upon which the complaint was upheld is vitiated by a serious and significant error or a series of such errors and/or that, taking the adjudicative process as a whole, the Decision is vitiated by a serious and significant error or a series of such errors.

56. The terms *"unreasonable"*, *"unjust"* and *"improper"* are not specifically defined in the Act of 2017. While it is for the FSPO to decide whether particular conduct is to be characterised under any such term, and while due deference must be given to the Decision of the FSPO in that regard, this does not mean that the FSPO has carte blanche to so characterise any behaviour or to do so without identifying the reasons and evidence for doing so.

57. By their nature, such terms may not be capable of precise and exhaustive definition. However, it remains incumbent on the FSPO to identify the particular conduct so found and the reasons for that finding, as well as the evidence supporting same.

58. In terms of what is meant by *"unreasonable"*, *"unjust"* and *"improper"* in the context of s. 60 of the Act of 2017, the parties were unable to turn up any authorities specifically dealing with same. Counsel on behalf of the provider referred the Court to UK jurisprudence dealing with the concepts of *"unreasonable"* and *"improper"* in the context of conduct as regards claims for legal costs: *MXX (a protected party via her husband and litigation friend RXX) v. United Lincolnshire NHS Trust* [2019] EWHC 1624 (QB) and the cases referred to therein to the effect that *"unreasonable"* is essentially conduct which permits of no reasonable explanation, whilst *"improper"* has the hallmark of conduct which the consensus of professional opinion would regard as improper, and that mistake or error of judgment or negligence, without more, will be insufficient to amount to unreasonable or improper conduct.

59. The above cases are of very limited assistance in this matter, but nevertheless some guidance may be ascertained from same.

60. From a perusal of the Decision, what is said to constitute the unreasonable and improper conduct is the failure of the provider to recognise that the complainant company's claim met the policy requirements and this must be viewed in the context of the surrounding facts.

61. There is no finding of bad faith on the part of the provider in taking the approach it did. Despite a request from the complainant company to do so, the FSPO did not uphold the complaint on the ground of s. 60(2)(d) of the Act of 2017 that *"the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration"*. As a matter of legal interpretation, the issues were complex, despite the provider's initial description of the wording as clear and unambiguous. There was some limited support for declinature in the jurisprudence.

62. In general, a *bona fide* reliance upon a particular contractual interpretation, subsequently found to be wrong, is unlikely in and of itself to amount to unreasonable or improper conduct. A *bona fide* reliance upon an incorrect interpretation of a contractual clause so as to deny the other party a benefit under the contract amounts to a breach of contract and thus is conduct contrary to law. This is provided for as a ground for upholding a complaint in s. 60(2)(a) of the Act of 2017: *"the conduct complained of was contrary to law"*. The grounds for upholding a complaint under the other provisions of s. 60(2) must be regarded as separate from and not merely repetitious of s. 60(2)(a), albeit there may be a degree of overlap between them and that particular conduct may fall into a number of the grounds provided for. The point is that conduct contrary to law does not automatically fall into one of the other grounds although it may do so in the particular circumstances. There should be some additional factor or circumstance to justify holding the conduct to be unreasonable, unjust or improper.

63. In this instance, the FSPO clearly was of the view that it would have been unreasonable and unjust if the claim for insurance cover was to be prejudiced by virtue of the complainant company closing when it did, in compliance with the recommendations of its industry group following upon advice from the Government (see p.21 of the Decision). Yet the provider did seek to prejudice the claim for cover on that basis. Moreover, this approach was taken by the provider despite the Central Bank's correspondence to insurers dated 27th March, 2020 stating, *inter alia*:-

> *"In this context, the Central Bank is of the view that where a claim can be made because a business has closed, as a result of Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction."*

64. Furthermore, the correspondence from the Central Bank had informed the provider that:

> *"Although the Central Bank expects that most policy wordings are clear in terms of what cover is provided and what cover exclusions are in place, where there is a doubt about the meaning of a term, the interpretation most favourable to their customer should prevail. Firms must ensure that claims are appropriately assessed and where there is insurance cover in place that claims are accepted and paid promptly."*

It appears to me that it is clearly implicit in her Decision that the FSPO did not believe that such an approach had been adopted by the provider. At p. 26 of the Decision the FSPO states:-

> *"I am mindful in that regard of the Provider's legal obligations under the contract, and its regulatory obligations under the Central Bank of Ireland's Consumer Protection Code, to act honestly, fairly and professionally in the best interests of its customers in its dealings with them. I take the view that , in this instance, the Provider did not act fairly or reasonably in its dealings with the Complainant Company in the assessment of the claim for benefit payment, made by the Complainant under its insurance policy in May 2020."*

Thus, in the opinion of the FSPO, the failure to act fairly or reasonably on the part of the provider took the providers conduct beyond 'conduct contrary to law' and within the scope of 'unreasonable', 'unjust' and 'otherwise improper' conduct.

65. Determinations as to whether particular conduct is reasonable or unreasonable, just or unjust, proper or improper, as provided for under the Act of 2017 are essentially determinations of fact, or a mixture of fact and law bearing in mind the legal meaning to be given to such phrases. Such issues are not issues of pure law but, rather, incorporate the assessment of the provider's dealings with a customer in the context of industry norms, standards, best practise and guidelines. Thus, due deference must be given to the FSPO in relation to the findings in that regard. That is not to say that the FSPO has carte blanche to simply determine conduct as unreasonable, unjust or improper in the absence of a logical and reasoned explanation of such determination. In this instance, the FSPO did not simply rely upon the disputed interpretation in and of itself as the basis for her findings as regards the provider's conduct, but rather viewed same in the context of the advice from the Government to entities such as the complainant company and the correspondence from the Central Bank to the provider, as well as viewing same in light of the Consumer Protection Code.

66. This case, at least as regards the findings of unreasonable and improper conduct, might be seen as a marginal one, and it may be that a Court could take a different view of the conduct, but

it is for the FSPO to make such marginal calls and provided this is done within the ambit of the deference to be given to the FSPO then it is not for this Court to strike down such findings or substitute alternative findings. I regard the findings made by the FSPO in respect of the provider's conduct in this instance as falling within that ambit of due deference to be afforded the FSPO. The provider has failed to establish that such findings by the FSPO are vitiated by a serious and significant error or a series of such errors.

67. As regards the finding of the FSPO that the conduct of the provider was unjust, it appears to me that this was less of a marginal call than the findings of unreasonable and improper conduct. Counsel did not refer the Court to any authority in relation to the interpretation of *"unjust"* conduct in the context of the Act of 2017. The extract from Stroud's Judicial Dictionary which was submitted was not of any practical assistance. Counsel on behalf of the provider submits that the interpretation of *"unjust"* in s. 60(2)(b) of the Act of 2017 is one which excludes any reference to, or regard for, the consequences of the conduct in question. I find it difficult to conceive how particular conduct could be regarded as unjust without regard to the consequences of same. It appears to me that unjust conduct must encompass conduct which results in or works an injustice to another person. I consider that whether or not a person's conduct was unjust is to be determined on a case-by-case basis as opposed to the application of some pre-set formula.

68. It appears to me that a provider may well engage in conduct which was lawful, and even conduct which was not unreasonable and/or improper, but which nevertheless, may amount to unjust conduct insofar as it results in or works an injustice to the customer. The fact that the conduct in question is subsequently held to have been unlawful may be significant but is not decisive. The issue is whether the conduct in question worked an injustice upon the customer. Each case must be determined on its own merits.

69. Adopting a particular interpretation of a contractual clause so as to deprive the other party to the contract of a benefit thereunder may, in some circumstances, be reasonable and/or proper, insofar as the interpretation was adopted *bona fide,* but nevertheless that conduct may be regarded as unjust in circumstances where the interpretation adopted was wrong and, not only resulted in a breach of the contractual provisions, but also resulted in or worked an injustice to the other party to the contract. Counsel on behalf of the provider accepted that where someone had acted unlawfully and, as a result of their unlawful act, had caused loss, damage, inconvenience and distress, such conduct could be rightly regarded as either just or unjust depending upon the circumstances (see transcript day 2, p. 76). In this instance, the FSPO had before her evidence of conduct of the provider in declining cover on the basis of particular interpretations which were found by the FSPO to be contrary to the contractual provisions in place between the parties. Indeed, to all practical effect the provider has accepted the declinature was wrong. The FSPO also expressly regarded the conduct of the provider in treating the complainant company's closure as premature and its attempt to prejudice the complainant company as a result of that as unjust. The guidance document issued by the Central Bank is of significance in that regard. The FSPO also had evidence before her of the consequent impact which that conduct had upon the complainant company by way of causing inconvenience and significant hardship, inability to meet ongoing costs and the need to borrow from friends and family.

70. As Hyland J. noted in *Danske Bank* at para 27:-

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

71. The provider has failed to establish that in coming to the findings she did, and in upholding the complaint upon the grounds she did, the FSPO had committed a serious and significant error or a series of such errors so as to vitiate her decision.

72. It appears to me that much of the controversy generated in the current proceedings arises from the failure on the part of the FSPO to specifically and expressly uphold the complaint on the grounds that the conduct complained of was contrary to law as provided for by s. 60(2)(a) of the Act of 2017. Had the FSPO done so, then the provider could not seriously dispute the validity of such a finding or the jurisdiction of the FSPO to give directions pursuant to s. 60(4)(a) on foot of same, although it could obviously contest the validity of any particular direction given. The failure to expressly uphold the complaint on the grounds prescribed in s. 60(2)(a) is surprising in light of the invitation by the provider that the FSPO do so (albeit that such invitation was by way of an alternative to the findings under s. 60(2)(b) and (g)). The failure to do so is also surprising in light of the clear statement by the FSPO in the Decision at p.18:-

"I take the view that the provider's failure to admit the claim for calculation and ultimate payment of policy benefits, was contrary to the contractual provisions in place between the parties …"

73. It may be that the failure to expressly uphold the complaint on grounds prescribed in s. 60(2)(a) of the Act of 2017, in addition to s. 60(2)(b) and (g), was simply an oversight, I cannot say. I do note in passing that in line with the reasoning in *Millar* referred to at para. 19 herein, in upholding the complaint under s.60(2)(a) the FSPO decision may not attract the same degree of judicial deference if the issue is a pure question of law. However, as already indicated herein, I do not regard the failure to uphold the complaint on grounds prescribed in s. 60(2)(a) of the Act of 2017, as a serious and significant error so as to vitiate the Decision, given that it was open to the FSPO to uphold the complaint upon other grounds, and she did so.

74. While the Decision of the FSPO could have been structured in a more cogent fashion, considering the Decision as a whole, the FSPO did identify the reasons for holding the conduct of the provider to have been unreasonable, unjust and otherwise improper and identified the circumstances capable of supporting same. Taking the Decision as a whole, I am not satisfied that the provider has established any serious or significant error on the part of the FSPO in finding the conduct of the provider to have been unreasonable, unjust and otherwise improper.

Discussion regarding Directions on Remedial Action

75. Section 60(4) of the Act of 2017 provides that where a complaint is found to be upheld, substantially upheld or partially upheld, the FSPO may direct the financial service provider to:-

> *"60.(4)(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 regard to all the circumstances of the complaint."*

76. In this matter, the FSPO, having upheld the complaint, directed the provider to make a preliminary payment of the complainant company's claim in the sum of €25,000, to pay compensation of €5,000 and to pay interest upon such sums if same were not paid over within a certain timeframe.

77. As regards the direction to make a preliminary payment of €25,000 in respect of the loss claimed pursuant to the policy, the provider essentially argues that same was unnecessary as the provider had conceded cover, was prepared to make a preliminary payment, if same was regarded as appropriate, and had sought to engage with the complainant company as regards adjusting the losses claimed but the complainant company had failed to engage with it in that regard. The provider also challenged this direction on the basis that there was no rationale for the figure arrived at by the FSPO, that same was disproportionate and that same could result in a situation where the provider was obliged to pay over to the complainant company a sum which could subsequently transpire to be in excess of that which was actually due and owing.

78. The FSPO, in her Decision, specifically referred to the fact that, in the period up to February 2020, the turnover of the complainant company was in excess of €500,000 whereas the turnover for the following 12 months up to February 2021 was a fraction of that figure, but acknowledged that it was not a matter for the FSPO to calculate the complainant company's losses which fell to be recovered by way of a claim on the policy. The FSPO noted that the provider had confirmed that it did not intend to rely upon the trends clause in the contract. She stated that, in recognition of the fact that almost a year had elapsed before the provider confirmed cover and being mindful that the claim assessment might take further time to finalise even if the complainant company elected to engage swiftly and noting that the maximum figure for claim was €70,000 under the policy, she considered it appropriate to direct an advance payment of policy benefits to the complainant company of €25,000 pending calculation of any further interim payments or the final benefit figure payable. It should be noted that the complainant company had suggested an advance benefit payment of double that amount which the FSPO rejected.

79. The FSPO has a very wide discretion in terms of the remedies which it can give following the upholding, wholly or in part, of a complaint. It is not limited to the type of remedies which would traditionally be available through the court system. In *Governey v. Financial Services Ombudsman* [2015] IESC 38 on an application for leave, Clarke J., as he then was, in the Supreme Court, referring

to the earlier legislative framework concerning the Financial Services Ombudsman, observed at para. 40:-

> *"40. It is also clear from the provisions of s. 57CI(4) [of the Central Bank Act, 1942] that the range of remedies which can be imposed by the F.S.O. in the event that a complaint is substantiated are wide and go beyond (but do include) the form of redress which might be available in the case of someone whose legal rights have been interfered with."*

80. In *Danske Bank*, Hyland J. stated at para. 28 of her judgment:-

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

81. The FSPO specifically referenced the fact that almost a year had elapsed since the wrongful declinature of the claim made by the complainant company. The complainant company had suffered a catastrophic drop in its turnover figures which, for the year prior to February 2020, had been in excess of €500,000. Thus, there was evidence before the FSPO to support the view that a significant loss had been incurred by the complainant company. In the documents submitted by the complainant company to the FSPO, it had set out the considerable hardship and inconvenience which it had suffered since the closure of its business and the declinature of cover. In such circumstances, in order to mitigate the adverse position which the complainant company found itself in, was the FSPO entitled to direct an interim payment? I am satisfied that she was. As regards the amount of such a payment, I note that the FSPO did not purport to base same upon any loss adjustment calculation but, rather, was taking a broad approach to a situation where there had been a catastrophic fall in previous turnover and where the maximum amount recoverable under the policy was €70,000. While there was some risk that the figure of €25,000 might have transpired to be in excess of the amount actually due and owing, I am of the view that the approach taken by the FSPO fell within the parameters of her discretion as to what directions to give and was capable of being supported by the evidence before her.

82. As regards the direction that the provider pay over a sum of €5,000 by way of compensation in order to take account of the inconvenience which the complainant company had suffered in a particularly difficult period, again I note the wide range of remedies open to the FSPO, the evidence before the FSPO as to the inconvenience and hardship which the initial declinature had caused to the complainant company and the modest amount of compensation directed. I do not regard the amount of compensation as disproportionate. Regardless of what remedies might have been available to the complainant company before a court of law, I am satisfied that, in directing the payment of a modest sum of €5,000 compensation, the FSPO was acting within the parameters of the powers she has under the Act of 2017 and that such direction was capable of being supported by the evidence before her.

83. In *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman and W.* [2020] IEHC 538, Simons J. noted at para. 89 of his judgment:-

"89. …. If, for example, the Ombudsman has jurisdiction to direct the payment of financial compensation in the particular circumstances of a case, then the assessment of the precise quantum is something to which deference will be shown."

84. As regards the question of interest, I note that s. 60(6) of the Act of 2017 specifically provides that a direction under s. 60(4) requiring a financial service provider to pay an amount of compensation may provide for interest to be paid at the rate referred to in s. 22 of the Courts Act, 1981, where the amount is not paid by a date specified in the direction. The statutory provision does not expressly provide for the payment of interest as regards sums other than compensation. I see no reason in law or logic why a similar power should not be exercisable by the FSPO in respect of other payments to be made on foot of directions given by it. Given the very broad nature of the power to issue directions, it appears to me that there is nothing which excludes the FSPO from giving a direction as to interest payments in an appropriate case. Indeed, in certain circumstances, the failure to direct the payment of interest could lead to further loss in real economic terms to a complainant who has already suffered loss by reason of the conduct of the service provider. I do not accept that same would have to be specifically legislated for.

General

85. As stated earlier herein, it appears to me that much of the controversy generated in the current proceedings arises from the failure on the part of the FSPO to specifically and expressly uphold the complaint on the ground that the conduct complained of was contrary to law as provided for by s. 60(2)(a) of the Act of 2017. In relation to the findings of unreasonable and improper conduct, the manner in which the Decision is structured has not assisted the task of tying in the upholding of the complaint on specific grounds with the findings or reasons for doing so as regards each such ground and the evidence supporting same. This gave rise to some difficulty in discerning the reasoning for finding the conduct of the provider to have been *"unreasonable"* and *"otherwise improper"* although there was less difficulty as regards the reasoning in respect of the finding that the conduct was "unjust". I do not regard the structure of the Decision in this matter to amount to a serious and significant error, but greater clarity in the structure of the Decision would have been helpful for all concerned. Whilst acknowledging that a Decision of the FSPO is not required to have the structure or level of detail that a Court judgment may be expected to have, it is nevertheless a matter of great importance to the parties concerned and so should be structured in such a way that the reasoning and evidential support for the reasoning may be discerned without undue difficulty.

86. In *Murphy v FSO and Allianz* [2012] IEHC 92, Peart J. emphasised that it is important for the Ombudsman to be clear in identifying the reasoning for its decision at para. 46 of his judgment:-

"46. In relation to the manner in which the Ombudsman expressed his conclusions and did not demonstrate therein any analysis of the competing expert views, and simply stated that he was satisfied that the alarm was inoperable and that accordingly endorsement EO2 applied, it is certainly arguable that if this Court was deciding an application for judicial review, the Finding might be vulnerable to arguments of unreasonableness, and that it failed to give any or any adequate reasons for the decision, thereby making it almost impossible

to challenge by way of judicial review. Nevertheless, even though the Ombudsman is performing a different function than a judge, he is as a matter of general fairness required to enable a party to the dispute, particularly the party who is unsuccessful perhaps, to understand the reasons why one party succeeded and the other lost. It seems to me that where there are conflicts of evidence which require to be resolved before a decision can be reached by the Ombudsman, he ought to set forth and analyse the evidence which was provided to him, and then express his conclusions in a way that makes the basis of the decision clear to the parties. It seems to me that if the unsuccessful party is to be able to make a decision whether or not to exercise his right to appeal the Ombudsman's decision to the High Court, that party must be able to understand clearly the basis on which the decision has been arrived at. I appreciate that the process by which the Ombudsman deals with complaints is intended to be informal and expeditious, but that relates to the assembly of material and submissions relevant to the complaint, and the manner in which it is considered and examined, but it does not in my view justify informality or undue brevity in the manner in which the ultimate decision of the Ombudsman is expressed."

87. I reiterate the comments of Binchy J. in *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman and W.* [2022] IECA 77 at para. 114:-

"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 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."

Conclusion

88. Taking the adjudicative process and the Decision as a whole, I am not satisfied that the provider has established any serious or significant error or any series of such errors on the part of the FSPO in finding the conduct of the provider to have been unreasonable, unjust and otherwise improper, or in giving the remedial directions given in respect of same. I dismiss the provider's appeal.

89. It seems to me that this is a matter in which the costs should follow the event, and unless either party indicates that it wishes to make a submission to the contrary within ten days of receipt of this Judgment, then the final Order will include provision that the costs of the proceedings be awarded to the FSPO against the provider.