Neutral Citation: [2016] IEHC 236

THE HIGH COURT

[2014 No. 67 MCA]

IN THE MATTER OF STATUTORY APPEAL

PURSUANT TO SECTION 57 CL OF CENTRAL BANK ACT, 1942, AS INSERTED BY SECTION 15 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

AND IN THE MATTER OF APPEAL FROM A

FINDING OF THE FINANCIAL SERVICES OMBUDSMAN

BETWEEN

CHARLES VERSCHOYLE-GREENE

APPELLANT

AND

BANK OF IRELAND PRIVATE BANKING LIMITED AND THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 12th day of May, 2016.

1. This matter comes before the court by way of appeal from the determination of the second respondent ("the FSO") made on 20th January, 2014, seeking an order setting aside that determination and remitting the matter to the FSO.

Background Facts

2. The appellant has for some years been a client of the first respondent ("the bank"). He is a high net worth individual whose background is in farming. He owns approximately 700 acres of land in Co. Carlow. Since the late 1990s, the appellant has invested very significant sums with the bank in a number of different investment products. Although the appellant's complaint in these proceedings relates to property investments, he has a significant history of investing in equities and products such as CFD's (contracts for difference).

3. In 2007, the appellant invested a total of €4m. in two products being promoted at that time by the bank. The first was called the Newgrange Fund, which was equity based and the second the New Mersey Property Syndicate, the latter being an investment in a retail shopping centre in Liverpool. The appellant invested €2m. in each product. He utilised his own funds for the Newgrange investment but in respect of New Mersey, he borrowed the €2m. from the bank's parent, Bank of Ireland. The acquisition of the shopping centre was funded by a combination of private equity from investors such as the appellant and borrowings from an international financial institution. The borrowing was non recourse to the investors and contained a number of covenants including one relating to the loan to value ratio ("LTV") which provided that in the event of the value of the property falling below a certain level relative to the amount of the loan, certain consequences would ensue. These included a hike in the underlying interest rate levied by the international lender.

4. Following the global economic collapse in 2008, the value of the property fell sharply causing a breach of the LTV covenant and triggering the interest rate increase. The outgoings on the property, primarily the loan repayments, were funded by the rent roll from the tenants of the shopping centre and were largely self sufficient. However, according to the appellant's case, the interest rate increase triggered by the breach of the LTV covenant, meant that the property could no longer "wash its face" which ultimately led to the collapse of the investment and the loss of all the equity invested in the property, including the appellant's €2m.

5. Although he made a number of complaints about the manner in which the product was sold to him, the essence of the appellant's case is that the LTV covenant was never disclosed to him, it caused the loss and had he been made aware of it, he would never had made the investment.

6. On 27th April, 2011, the appellant lodged a complaint with the FSO about both the Newgrange and the New Mersey investments. Extensive written submissions were made by the appellant and the bank following which the FSO decided to hold an oral hearing. On 9th September, 2013, the FSO wrote to the appellant advising him of the FSO's decision to hold an oral hearing into the complaint. The FSO felt that this was necessary to resolve a conflict of fact which had arisen in the documents submitted. This related to the information and advice given by the bank to the appellant as to the nature of the risks attaching to the investment. The FSO indicated that he would require to hear oral evidence from the appellant and from the named witnesses on behalf of the bank, Mr. John Kennedy and Mr. Chris Reilly. The FSO went on to state:

> " If there are other individuals whom either of the parties considers should be present at the Oral Hearing, please respond in writing in order to indicate the names of the individuals in question, including any legal personnel who will represent you. Please note that whilst parties can have legal representation at the Oral Hearing if they wish, this is entirely a matter of choice, this office will not bear the costs of any legal representation or any other costs incurred by the parties."

7. Enclosed with this letter was a document entitled "Oral Hearings Guidelines" giving information on the procedures adopted by the FSO in conducting such hearings. This stated inter alia:

> "[11.] Each party is permitted to be legally represented, if desired. Any costs

incurred by the party in that regard will not be born by this office and are a

matter for the party itself…

[13.] During the hearing you must do as the Ombudsman asks you. At the start the Ombudsman will explain how the hearing will run and will at any time answer any questions you may have on the procedure. Remember if you would like to, you may have someone speak on your behalf. You may bring a

relative, friend or colleague, as well as a solicitor or other professional for that

purpose."

8. The appellant replied by letter of 19th September, 2013, confirming that he would be accompanied by Mr. Richard J. Smyth, chartered accountant at the oral hearing. He went on to state:

"If the respondent confirms that they will have any legal representation at the

oral hearing, then I will also have legal representation."

9. The FSO responded on 27th September, 2013, saying:

"At this point, it is unclear as to whether the respondent financial service

provider intends to have legal representation at the oral hearing. In the event

that this information becomes available however, we will of course let you

know."

10. In an email on 6th December, 2013, the appellant wrote:

"Dear Sylvia,

I hope this finds you well. Can you tell me if [the bank] have

declared who they will be bringing to the oral hearing on Monday 16th

December?

As stated I will be accompanied only by Mr. Richard Smyth."

11. The FSO replied on the same date:

"I have checked our records and cannot see any note from the provider which sets out who it intends bringing to the oral hearing. However, just for your information, it is not unusual in cases like this for a provider to be accompanied by legal representation and even a barrister at times."

12. On Friday 13th December, the bank notified the FSO by email that it would be attending the oral hearing with three witnesses together with a solicitor and barrister. This information was not relayed to the appellant before the commencement of the oral hearing on the following Monday 16th December, 2013.

13. The oral hearing took place on the 16th of December, 2013, at a Dublin hotel. The appellant attended with his accountant, Mr. Smyth. The bank was represented by solicitor and counsel. A transcript of the hearing was put in evidence at this appeal. The applicant presented his case and gave evidence on his own behalf. He was questioned by counsel for the bank and by the FSO. Three witnesses gave evidence on behalf of the bank. The first was Mr. Chris Reilly whose involvement was confined to the Newgrange fund in respect of which the appellant withdrew his complaint. The second witness was Mr. John Kennedy, a senior manager with the bank. He had a number of dealings with the appellant over a period of time and introduced the New Mersey investment to him.

14. One of the complaints made by the appellant to the FSO was that he had been advised by Mr. Kennedy that the only way in which he could lose money on the New Mersey investment would be if the rents were to fall. Mr. Kennedy denied that he said this to the appellant. Mr. Kennedy said that he had discussed the risks with the appellant including the gearing risk. These risks, including the gearing risk, were outlined in an Information Memorandum given to the appellant. Section 8 of this document outlined the risk factors attached to the investment under the headings Currency, Tenant, Property, Liquidity, Tax, Gearing, Market and Pricing. Under "Gearing Risk", the memorandum stated:

"The investment carries a high level of debt within the structure. Although the provider of this debt has no recourse to individual investors apart from their initial investment, it increases the risk in this product versus other investment products. For this reason, Bank of Ireland Private Banking Ltd recommend that investors should fund this investment from their cash resources, and do not borrow to invest in this product. Income may fluctuate in accordance with market conditions and investments may fall as well as rise in value."

15. The executive summary to the Information Memorandum referred to the debt facility reflecting a loan to value of c. 60%. In his oral evidence, Mr. Kennedy said that in a geared property fund there are covenants within any lending that are part of the lending arrangements. He accepted that they were not clearly outlined in the Information Memorandum but said that they formed part of any commercial loan. With regard to the LTV covenant, Mr. Kennedy gave the following evidence in response to questions from the FSO:

"446Q. Now what I do not see here or anywhere else is in the document is any reference to a particular loan to value covenant?

A. That would be correct in this document.

447Q. Or in any other document that was given to Mr. Greene here?

A. Yes.

448Q. Now is that not a material risk in terms of potential risk of the investment?

A. We would perceive that, as I mentioned earlier, that any loan, commercial loan, has a number of covenants attached to it. Every lender wants to get its money back, so he is going to put in a certain number of covenants and they then to be quite standard, always part of a particular loan deal and it would have been inherent in any gearing that was doe within the project, but you are correct - -

449Q. Ok?

A. In this page here it is not – the loan to value covenants are not outlined.

450Q. Ok, well, then if I understand what you are saying is that the loan to value covenants which were in fact part of this investment were simply standard covenants. They are one that any reasonable person should expect would be there?

A. That would be correct."

16. In his written statement to the FSO, Mr. Kennedy said:

> "Mr. Greene made me aware that he had been involved in CFD trading and direct equity trading in Davy's and gave me to believe that he took positions on stocks regularly. I was given the impression he was somebody who was into risk and investments and watched the markets on a daily basis. Mr. Greene also made me aware that he put a group of his close friends into a retail property syndicate in Soto Grande in Southern Spain and that he also was in a UK property syndicate…..
>
> When discussing New Mersey with Mr. Greene I went through the documentation but explained to Mr. Greene that I was the "GP" and that I needed him to come to Dublin to meet the "specialist" i.e. the people in our property team who work on it every day and would therefore have a more in depth knowledge than I. Mr. Greene dismissed this offer against my advice. I also asked him to go on the trip to see New Mersey so as to get a feeling for the property. Again he refused to go saying he was satisfied and harvesting was due. At no point did I say 'that the only way this investment could fail was if the rents fell'. Property is subject to many variables and rent is solely one variable in a list of variables or risks."

17. The bank's final witness was Mr. David Casey, an associate director of the bank and a member of its senior management team with responsibility for the bank's property portfolio. Mr. Casey appeared to have considerably more expertise in this area than Mr. Kennedy who had described himself as a "GP". Mr. Casey gave detailed evidence concerning the risks attached to the investment and why it ultimately failed. He said the LTV covenant was not unusual and very standard. Mr. Casey was categorical in stating that the LTV covenant breach was not the cause of the loss.

Decision of the FSO.

18. In a 13 page document entitled "Finding of the Financial Services Ombudsman" and dated the 20th of January, 2014, the FSO set out the background to the matter and the details of each side's case as put before him. His consideration included of course not only the oral hearing but all the documents and written submissions and statements that had been put in by the respective parties since the complaint had initially been made in April 2011. He noted the appellant's evidence that he confirmed that all of the risks outlined in the Information Memorandum were understood by him and that he went through them in detail.

19. At the conclusion of his determination, the FSO expressed his findings as follows:

> "Ultimately, I am satisfied that the decision to borrow to fund the investment in New Mersey was the complainant's own decision. The Information Memorandum made it clear – on pages 29 and 30 – that borrowing to invest carried a much higher risk. There is evidence that at the time he obtained these borrowings from Bank of Ireland, Carlow, the complainant had substantial liquid assets. A Bank of Ireland business borrowing credit memorandum document dated the 13th of September 2007 put the complainant's total assets at a value of approximately €40m.
>
> The complainant contends inter alia that 'I made it very clear that I could not afford to risk any money' [see correspondence to this office entitled supplemental information, 12 May 2011]. On the balance of probabilities, I do not consider it likely that that assertion is correct. The complainant says that he was advised that the only way he could lose any of the investment was if the rent received was to fall. However, the Information Memorandum clearly set out an extensive list of risk factors to be considered. The complainant was familiar with and understood all of the risks in the Information Memorandum. It was clear at the oral hearing also, that Mr. Kennedy discussed with the complainant the gearing risk with the New Mersey investment [transcript e.g. p.127 and p.128].
>
> The document dated 30 July 2007 entitled 'Portfolio Options' set out other property investment options for the complainant.
>
> As regards both the Newgrange and New Mersey investments, the complainant knew that there was no capital guarantee. He is an experienced investor and a high net worth investor. There is no sufficient evidence to substantiate the complainant's assertion that the New Mersey investment was inherently flawed and should never have been recommended.
>
> I am satisfied that both of these investments were reasonably presented by the provider to the complainant; that sufficient information and documentation was furnished to the complainant about the nature of the investment; and that the decision to proceed, and to borrow in respect of New Mersey, was the complainant's own decision.
>
> The evidence in this case does not establish mis-selling; neither does it disclose instances of breach of duty on the part of the provider. I consider the evidence to demonstrate that the decision to borrow to fund the New Mersey investment was the complainant's own decision. I consider it significant in this regard inter alia the fact that at that time, the complainant had substantial assets under management with the provider which assets could have been used to fund the investment in New Mersey.

The complainant placed particular reliance on the LTV covenant. However, the clear evidence from Mr. Casey on behalf of the provider was that the LTV covenant was not in any way the cause of the complainant's loss – the cause of the complainant's loss was the risks that had been clearly set out, principally deteriorating market conditions. Moreover, this office is not satisfied that the absence of reference to the LTV covenant in the documentation furnished, constitutes a basis upon which this complaint could be substantiated. This office considers that this point was adequately addressed by the provider at the oral hearing [see e.g. transcript at p. 149]. This office considers that the loss sustained by the complainant on New Mersey arose due to the coming to pass of the risk factors in the Information Memorandum. It is clear from the evidence at the oral hearing that all of those risk factors were accepted by the complainant and understood by him, prior to his decision to proceed.

This office has considered all of the grounds of complaint advanced by the complainant, and does not consider any of the grounds of complaint to be substantiated.

The complaint is not substantiated.

Conclusion.

This complaint is not substantiated pursuant to s. 57 CI (2) (g) of the Central Bank Financial Services Authority of Ireland Act 2004."

Legislation.

20. The adjudication of complaints made to the FSO is provided for in Part VIIB of the Central Bank Act 1942 as inserted by s. 16 of the Central Bank and Financial Authority of Ireland Act 2004. Section 57 BK (4) provides:

> "(4) The Financial Services Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

21. Section 57 CI provides as follows:

> "57 CI – (1) on completing an investigation of a complaint that has not been settled or withdrawn, the Financial Services Ombudsman shall make a finding in writing that the complaint –
>
> (a) is substantiated, or
>
> (b) is not substantiated, or
>
> (c) is partly substantiated in one or more specified respects but not in others.
>
> (2) A complaint may be found to be substantiated or partly substantiated 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 based wholly or partly on a mistake of law or fact;
>
> (f) an explanation for the conduct complained of was not given when it should have been given;
>
> (g) the conduct complained of was otherwise improper."

The Arguments.

22. Mr. Hayden S.C. said that the appellant had three main complaints about the FSO's finding. The first two related to a failure to accord fair procedures to the appellant at the oral hearing. The appellant had requested to be informed by the FSO if the bank intended having lawyers represent it at the hearing. He made clear that he would wish to retain lawyers in that event to ensure "equality of arms". Despite the fact that the FSO had been informed by the bank in advance that they did intend bringing lawyers to the hearing, the FSO had failed to communicate this to the appellant. As a consequence, the appellant only became aware that the bank had legal representation when he arrived at the oral hearing. This was said to have been unfair to the appellant and prejudicial to his case.

23. The second aspect of procedural unfairness contended for by the appellant was that despite attending with his accountant, the appellant was refused permission by the FSO to have his accountant sit beside him during the hearing even though he was present in the room. This again was said to give rise to unfairness to the appellant.

24. On the substantive ground, the appellant submitted that the FSO had made a serious and significant error in his assessment of the evidence and analysis of the legal duty of the bank. The appellant contended for a duty of care on the part of the bank in giving advice to him and in that respect, reliance was placed on *McCaughey v. IBRC Ltd* [2013] IESC 17 and *Irish Life and Permanent PLC v. FSO* [2012] IEHC 367. It was said that the FSO failed to provide any meaningful analysis of the existence, scope or nature of this

duty of care. It was similarly argued that the FSO had failed to properly assess the evidence concerning the LTV covenant giving rise to a serious error on his part. Reliance was placed on *Ulster Bank Investment Funds Ltd v. FSO* [2006] IEHC 323, *Koczan v. FSO* [2010] IEHC 407, *Murphy v. FSO* [2012] IEHC 92, *Law v. FSO* [2015] IEHC 29 and *Irish Life and Permanent Plc v. Feely* [2011] IEHC 439. Arising from these authorities, it was submitted that the FSO fell into serious error in failing to conclude that the bank's failure to inform the appellant of the LTV covenant constituted unreasonable, unjust or oppressive conduct within the meaning of s. 57 CL (2). Further the FSO failed to provide adequate reasons for his conclusions and for preferring the evidence of one witness over another.

25. Mr. McDermott S.C. for the FSO dealt first with a general overview of the functions of the office of the FSO in relation to the investigation of complaints and in particular how this differed from the approach of a court. The oral hearing was in fact only part of the process and was a relatively rare event.

26. On the issue of legal representation, the appellant was at all times aware that he was entitled to have a lawyer present if he so wished. The notification from the bank that they were in fact intending to bring lawyers came in any event far too late to make any practical difference even if the appellant had been informed. In particular however, the appellant himself failed to raise this as an issue before the FSO who was entirely unaware of it until he received the appellant's affidavit in these proceedings. A perusal of the transcript and the various written submissions made by the applicant points to the fact that he was not in any way disadvantaged.

27. On the question of his accountant not being allowed to sit beside him, counsel pointed out that Mr. Smyth was not permitted to sit beside the appellant when he was giving evidence which would of course be the same as in any such procedure before a court or otherwise. However, he was free to consult with Mr. Smyth at any stage and in fact was given a short break to do so whenever he requested it.

28. Finally on the issue of the LTV covenant, the FSO contended that the appellant's evidence was simply not accepted on a number of issues including that he didn't want any risk and that it was his decision to make the investment and borrow the money for doing so contrary to the written advice of the bank. The FSO also found as a fact that the breach of the LTV did not cause the loss and was in any event a standard aspect of the gearing risk of which the appellant knew. The FSO's conclusion on the issue of causation overall was perfectly justifiable on the evidence.

29. Mr. McDowell S.C. on behalf of the bank submitted that the case being made by the appellant was a serious matter in that it amounted to a claim for €2m from the bank. Before such a conclusion could be arrived at, the FSO would have to make very serious findings against the bank.

30. On the issue of not having lawyers, it was clear that the appellant's preference was not to have legal representation. The fact that he had indicated a wish not to have lawyers if the other side didn't have them meant he felt perfectly capable and competent of dealing with the matter himself. In fact he never asked the bank directly whether they were retaining lawyers or not. Furthermore, given the fact that the information about the bank's representation only became available on the Friday before the Monday hearing, there was no evidence that the appellant could have retained lawyers to represent him in such a complex matter which had been ongoing for several years over that weekend. He had made no effort to retain lawyers despite the seriousness of his claim and the fact that he was ignorant of the bank's intentions in the matter until he arrived at the hearing. When he did arrive, he expressed no concern.

31. As regards being prevented from sitting beside his accountant, the same point was reiterated that this was akin to asking if a witness could be accompanied by another party into the witness box. He was not deprived at any stage of the opportunity to consult with his accountant when he wished to do so and in reality, this was an attempt by the appellant to conjure up issues in relation to unfairness which never actually arose.

32. On the substantive issue, counsel submitted that the FSO had found as a fact that the cause of the appellant's loss was not the breach of the LTV covenant, a finding clearly made within jurisdiction. The LTV covenant was part of the gearing risk of which the appellant knew and he was given every opportunity and indeed encouragement to consult with the relevant expert or specialist in this area which he declined. There was never any suggestion by the appellant to Mr. Kennedy that he was concerned about the terms of the finance. It was perfectly reasonable for the FSO to take the view that the LTV covenant was an entirely conventional one that was not in any way unusual. Nothing arising from Mr. Kennedy's discussion with the appellant would have put him on notice that the appellant required this information or that he might not have invested if he had known of the LTV covenant.

33. In reality, the appellant's claim came down to the proposition that Mr. Kennedy ought to have known that the appellant would have passed on the investment had he been told of what was in reality a normal loan to value covenant.

Appeals to the High Court.

34. The scope and nature of a statutory appeal from the FSO to the High Court has been the subject of many decisions of the Superior Courts. In *Ulster Bank Investment Funds Ltd v. FSO* [2006] IEHC 323, Finnegan P. said (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 [2000] 4 I.R. 159 and not that in The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642."

35. This was cited with approval by McMenamin J. in Molloy v. FSO (Unreported, High Court, 15th April, 2011) where he commented:

> "[27.] This widely accepted principle contains the following elements:
>
> (i) the burden of proof is on the appellant;
>
> (ii) the standard of proof is the civil standard;
>
> (iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;
>
> (iv) 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

(v) 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.

[28.] It has been repeatedly pointed out that hearings of this type are not de novo appeals, where the court is to look to all the material ab initio and make its own determination (see Orange, cited above). Instead, this Appeal Court must apply the deference which arises from a reluctance to interfere with decisions of specialist bodies. This is well established in the jurisprudence: Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34 at pp. 37 to 38, Hamilton C.J.; and ACT Shipping (PTE) Ltd. v. Minister for the Marine [1995] 3 I.R. 406 at p. 431, Barr J.

[29.] Thus a statutory appeal such as this is not a judicial review and the decision maker is to be seen as acting within his own area of professional expertise; the test set out by Finnegan P. in Orange suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as the error falls short of being one which is serious and significant. There, the court may intervene.

[30.] The decided cases emphasise the disparity in function between the F.S.O. and a court: the former is enjoined not to have regard to technicality or legal form. The F.S.O. resolves disputes using criteria which would not usually be used by the courts such as whether the conduct complained of was "unreasonable" simpliciter; whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with law, it was unreasonable or otherwise improper. It is well established that it should not be expected that a decision of the F.S.O. should be as detailed or formal as a court judgment. Decisions of this type should be not subject to a minute analysis or a "cherry picking" exercise in order to identify some error, howsoever insignificant: see the observations of O'Flaherty J. in Faulkner v. Minister for Industry and Commerce [1997] E.L.R. 107 at p. 111; and the judgment of McMahon J. in Square Capital Ltd. v. Financial Services Ombudsman & Ors. [2009] IEHC 407, (Unreported, High Court, McMahon J., 27th August, 2009).

[31.] I would re-emphasise the simple fact that it is not the function of the Court to 'place itself in the shoes' of the F.S.O. The jurisprudence militates against such a course of action. The test, therefore, is whether the decision was vitiated by a serious error or a series of such errors."

36. All the subsequent jurisprudence is to like effect. Many of the authorities point to the significant distinction between the approach of the FSO and that of a court. Whilst the FSO must accord fair procedures to the parties, he is not required to follow procedural rules such as would be followed by a court. In fact, he is expressly required by statute to act in an informal manner without regard to technicality or legal form. The Act clearly envisages that recourse to the FSO is an alternative to litigation. As McGovern J. commented in *De Paor v. FSO* [2011] IEHC 483:

> "The whole purpose of the legislative scheme is to keep the process - so far as possible - out of the courts." (at para. 18)

37. That the standard of review on appeal from the FSO is not dissimilar from that arising in judicial review is illustrated by the dicta of *Hedigan J. in Smartt v. FSO* [2013] IEHC 518 where he said:

> "… in my view, the FSO had before him and relied upon relevant evidence upon which he could rely in coming to the decision he did. That is the test. It is not for this Court to either agree or disagree with his finding as long as it is one reasonably based upon the evidence before him." (at para. 12).

38. A similar approach was recently taken by the Court of Appeal in *Millar v. FSO* [2015] IECA 126.

39. It is thus immaterial that the court would have come to a different conclusion on the evidence once the conclusion actually arrived at by the FSO was one reasonably open on that evidence. Nor is the fact that the FSO may have made an error in arriving at his conclusion material unless the error is shown to be serious and the onus in that regard remains on the appellant. The court will adopt a deferential stance in matters involving the expertise and specialist knowledge of the FSO. Where the matter in issue is not within that expertise and specialist knowledge, for example where questions of pure law are concerned, curial deference is not required.

Discussion.

40. The appellant's first complaint is that he was not told in advance that the bank would have lawyers at the oral hearing and this prejudiced his position. It has to be borne in mind that unlike a court case, an oral hearing before the FSO is but one part of an overall process. In fact in the vast majority of cases before the FSO, there is no oral hearing. Such a hearing will normally only be required where there is a conflict of fact which requires to be resolved to enable the FSO to reach a conclusion and such resolution can only be facilitated by an oral hearing.

41. In the present case, the oral hearing was the final stage in a process which had been ongoing for some two and a half years by then. In his detailed written submissions, the appellant had shown himself to be very articulate and competent in presenting his case. He is clearly a highly sophisticated investor with a keen grasp of financial products and their complexities. A reading of the transcript of the oral hearing as a whole, rather than undermining that impression, merely serves to reinforce it. Although various suggestions were made in the course of the hearing of this appeal to the effect that when he arrived at the oral hearing, the appellant was entirely at sea or "like a rabbit in the headlights", the transcript conveys the opposite impression. The appellant's cross examination of the bank's witnesses was more than able and it is noteworthy that no suggestion was made during the course of this appeal that there was any particular point that the appellant had omitted to advance or articulate through anxiety or any form of "stage fright". If the appellant was in truth at any disadvantage as a result of not having lawyers present, there is no hint of it in the transcript.

42. It is clear that the appellant had long since decided that he was more than capable of presenting his own case without legal assistance. Given the magnitude of the claim he was making, one would have thought that most people out of an abundance of caution might be inclined to consult a lawyer. Clearly the appellant's preference was not to do so even despite the fact that he had been informed by the FSO that it was commonplace for financial service providers to be represented by lawyers at oral hearings. It can hardly have come as a surprise to the appellant that a bank would retain lawyers when facing a claim for some €2m.

43. In any event, it seems to me that the notice to the FSO that the bank would have lawyers came far too late to make any material difference. As submitted by the bank, there is no evidence to suggest that the appellant would have been in a position to retain and properly instruct lawyers over the weekend of the 13th to the 16th of December, 2013. All of that aside however, if the appellant did in fact feel at a disadvantage, it is surprising to say the least that he did not bring this fact to the attention of the FSO

either at the outset or at any stage during the course of the oral hearing. The suggestion that he was in some way inhibited from doing so is not borne out by the transcript as I have already noted. The uncontroverted evidence of the FSO is that he had no knowledge of any complaints in this regard from the appellant until he had sight of the grounding affidavit in these proceedings. I cannot see how the FSO could reasonably be expected to address some supposed unfairness of which he has no knowledge. The appellant presented at the oral hearing apparently ready, willing and able to proceed. He made no complaint at any stage about the procedure being adopted nor did he seek an adjournment. Thus, I can see no unfairness arising on this issue.

44. As regards the submission that the appellant was denied fair procedures because Mr. Smyth was not allowed to sit beside him, the appellant's request in this regard was made as he was being sworn in for the purpose of giving evidence. It would clearly be entirely inappropriate for any witness when giving evidence, and more particularly when being cross examined, to have another party sit beside him to be consulted. It is again clear from the transcript that when the appellant required the opportunity to consult with Mr. Smyth, he was given time to do so and facilitated with a short adjournment for that purpose. This point appears to me to be somewhat contrived and unreal and has in my view no substance.

45. What remains therefore is the challenge to the substance of the FSO's determination. The appellant complains that the FSO accepted the bank's evidence about the LTV covenant without subjecting it to detailed analysis particularly in circumstances where it is alleged that there was a conflict between the bank witnesses on this point. It is claimed that the FSO did not explain how he resolved this conflict and further he erred in law in his analysis of the duty of care owed by the bank to the appellant. However, I cannot see how a duty of care could be said to arise in the context of the findings of fact made by the FSO. Quite apart from the issue of curial deference in relation to expert tribunals, it seems to me that the court cannot interfere with findings of fact arrived at by a tribunal that has had the opportunity of seeing and hearing the evidence and demeanour of witnesses who have been subjected to cross examination, unless there is no evidential basis to support such finding. It has to be borne in mind that the purpose for which the oral hearing was convened in the first place was to resolve conflicts of fact with regard to how the financial products in question had been sold to the appellant.

46. The appellant maintained the position throughout that he could not afford to risk any money in this venture. The FSO did not accept this evidence. This was clearly an investment which carried a significant level of risk as the Information Memorandum which the applicant accepted that he read and understood made clear. Similarly the appellant alleged that he had been advised that the only way he could lose money on the investment was if the rent was to fall. This assertion was also rejected by the FSO again on the basis that the Information Memorandum set out an extensive list of risk factors. The appellant confirmed in his evidence that he understood all of these and that Mr. Kennedy discussed the gearing risk with him. A finding of fact was also made by the FSO to the effect that the appellant is an experienced investor and a high net worth investor who knew that there was no capital guarantee in the product in which he was investing. The appellant also gave evidence that he was advised by the bank to borrow money for this investment and this too was rejected by the FSO in the light of the clear statement to the contrary contained in the Information Memorandum with which he was familiar.

47. In the light of these findings of fact, it is clear that the FSO had considerable reservations about the appellant's evidence in a number of critical respects. It is not suggested, nor could it be, that there was no evidence before the FSO upon which he could have arrived at these conclusions. In the light of that, it is difficult to understand what duty of care could be contended for by the appellant and how it can now be argued that the FSO somehow misconstrued an alleged duty of care which he plainly considered did not exist on the facts of this case.

48. As regards the LTV covenant issue, extensive evidence was given in relation to this by all of the witnesses including the appellant himself. It is clear that the evidence from Mr. Casey was accepted by the FSO to the effect that the LTV covenant was not the cause of the complainant's loss but rather deteriorating market conditions which were extensively analysed by Mr. Casey in his evidence. Whether Mr. Kennedy may or may not have a different view, and that in itself is highly debateable, is neither here nor there. The fact is that the FSO was perfectly entitled to accept Mr. Casey's evidence and cannot in my view be criticised for doing so. Mr. Casey clearly had more expertise on this issue than any other witness who gave evidence at the oral hearing. Having regard to this conclusion, being one fully open on the evidence, I cannot see how the appellant can be heard to complain about the alleged non disclosure of something which was found to be both immaterial to his loss and perfectly standard in any event. It was but one aspect of the gearing risk with which the appellant was fully au fait. Not only did he seek no further information about the gearing risk but expressly declined the opportunity of consulting those who could have acquainted him with it.

Conclusion.

49. For the reasons explained, I am of the view that the appellant has failed to demonstrate any error in the finding of the FSO, let alone one which could be classed as serious, substantial or significant. It seems to me that in reality this appeal represents an attempt to appeal the decision of the FSO to the court on the merits. As the authorities discussed above show, this is not permissible.

50. Accordingly I must dismiss this appeal.