

**THE HIGH COURT  
JUDICIAL REVIEW**

2008 No. 140 JR

BETWEEN

J. &amp; E. DAVY TRADING AS DAVY

APPLICANT

AND  
FINANCIAL SERVICES OMBUDSMAN, IRELAND AND  
THE ATTORNEY GENERAL

RESPONDENTS

AND  
ENFIELD CREDIT UNION

NOTICE PARTY

**Judgment of Mr. Justice Charleton delivered the 30th July, 2008**

1. On 21st January, 2008, the Financial Services Ombudsman ruled that the applicant, a firm of stockbrokers, should buy back from Enfield Credit Union, the notice party, three perpetual bank bonds at their original cost of €500,000. Out of this ruling have sprung three distinct cases before this court. Firstly J. & E. Davy have lodged a notice of appeal to the High Court against the ruling under Part VIIIB of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004. That appeal will look at the decision again and, having considered its merits, may either affirm the ruling of the Ombudsman or make a different ruling. Secondly, a constitutional challenge has been launched by J. & E. Davy to the authority of the Financial Services Ombudsman. The claim there is that the Financial Services Ombudsman, in exercising his jurisdiction under the legislation, is fulfilling a judicial function without being a judge under Article 34.1 of the Constitution and is outside the exception of the exercise of limited functions and powers of judicial nature provided for in Article 37 of the Constitution. Finally, judicial review is sought to impugn the decision on the basis that the Financial Services Ombudsman has misconstrued his powers under the statute and has fallen into unconstitutional procedures. It is this last case that I am dealing with in this judgment.

**Comment**

2. Having reviewed the papers, and having heard extensive argument from counsel, I am satisfied that the Financial Services Ombudsman, in making the rulings challenged in this review, carried out his function in good faith and with a high level of skill. The judicial review function of the High Court is concerned with examining whether powers exercised by judges of the Circuit and District Court and the Special Criminal Court are exercised within the terms of the authority conferred on them by statute and by the Constitution, whether officials conferred with *quasi* judicial powers and administrative functions have carried them out within their jurisdiction, whether *quasi* judicial functions have been exercised on the basis of fair procedures and, finally, whether an exceeding of jurisdiction is to be found by reason of a decision flying in the face of fundamental reason and common sense. Inevitably, in these cases, the argument on each side will tend to touch on the merits and demerits of any particular decision. It is not the function of the High Court, however, on judicial review of a decision to substitute its own view as to the merits of any case. Nor is it the function of the High Court to issue a judgment in such way that will constrain the decision maker in the exercise of a *quasi* judicial function in the manner in which any discretionary power may be exercised. In referring concisely to the facts, therefore, I am not to be taken as having formed any view as to the merits of the original ruling. This is outside my function.

**Background**

3. As I understand it, there are 438 credit unions in Ireland. The notice party is one of them. On its headed note paper it is described as a limited liability company and, I would assume, that other credit unions are similarly organised. They exist for the benefit of their investors and are owned, and managed, by committees drawn from within the local community. They have a much less prevalent professional input for a financial institution than in the case of a bank. J. & E. Davy have a relationship with 380 of the credit unions. These are organised under an umbrella group, which is called the Irish League of Credit Unions. The relationship of J. & E. Davy to the credit unions goes back over twenty years. In 1996, J. & E. Davy was chosen as a financial advisor to the Irish League of Credit Unions. Since April, 1997 they have been a formally appointed advisor. It is fair to say that the relationship has been mutually beneficial. In 2002, J. & E. Davy developed a forecasting model for the financial investments of credit unions. The individual credit unions around the country also have other advisors as to their investments. I am told that over about the last five years the level of investment by Enfield Credit Union that had been organised through J. & E. Davy has varied between 16% and 41% of the total.

4. The investment habits of a credit union may vary according to the strategy adopted by its management committee. It is possible that where they have money to invest they may choose to spread a portion of it over more risky investments which carry a greater rate of return. It is possible that this strategy might be confined to a very small percentage of its funds, or might be eschewed altogether.

5. Through J. & E. Davy, investments may be made on a world-wide basis. As stockbrokers, part of their function is to keep abreast of the kind of investment instruments that are being offered by financial institutions and to give advice to their clients as to how to manage their funds. In return, J. & E. Davy are remunerated through fixed fees assessed on the basis of a small portion of the investment, as in this case, or on the basis of fees agreed for the task, or charged at a particular hourly rate. Governments and banks can issue investment bonds. These are financial instruments that can be purchased on the open market and which can be traded depending upon the value that the market at any particular time, puts on their sale. It might sensibly be thought that the rate of return on an investment is generally dependent upon the length of time for which it captures the money invested and the risk attaching to the purchase of the investment product. In this case, the product in question is a series of three perpetual bonds, details of which I shall shortly give.

6. A perpetual bond is a financial instrument that may be purchased from a financial institution. The investor pays a sum of money and the conditions of the bond are set as a matter of contract. Unlike ordinary bonds, perpetual bonds have no maturity date, as I would ordinarily understand that term. Once they are purchased, the funds of the investor are tied up in perpetuity with the issuer of the perpetual bond. The issuer need never redeem the bond by buying it back from the investor. As a financial instrument, however, it has a value on the open market, apart from the existing relationship of issuer and investor because, due to its rate of return, other investors may want to purchase it from either the investor or the issuing financial institution. The financial institution can only buy back a bond from the investor on the open market, and it is therefore in exactly the same position as any other purchaser, unless the bond has a callable date. This provision determines that some years after purchase, specified in the bond instrument, the financial institution may buy back the bond at its face value from the investor. If the bonds are not purchased back by the financial institution on any of the dates specified as callable dates, then sometimes the bond instrument specifies that there should be a stepping up in the interest rate that is payable by the financial institution to the investor. Everyone who buys these bonds purchases on the basis

that they pay the investor a rate of interest which, in financial jargon, is referred to as a coupon. Fixed coupon bonds pay a fixed rate of interest on the money invested in the instrument, for example 3%. Variable coupon bonds pay a variable rate of interest, often fixing a minimum rate of interest that is payable together with additional percentage points, that can vary depending upon a recognised rate of interest, such as that of the European Central Bank. The value to the investor is that the rate of interest payable on perpetual bonds generally exceeds that of other bonds. In bonds that are not perpetual, the investor can often, after a fixed period of time, call for the return of the invested money, sometimes at the cost of a penalty in terms of the rate of interest paid if that option is taken up before a particular time has elapsed. In a perpetual bond, the right to call back the investment is vested exclusively in the financial institution issuing the bonds and is exercisable, at par, on any callable date, where these are specified in the instrument. The disadvantage, from the point of view of investors, is that once the bonds are purchased, they might never be called back by the financial institution issuing them. Instead, an investor may wait from callable date to callable date, hoping for his investment to be purchased back from him at par by the financial institution, and wait in vain and without recourse. If the investor wants to recover the capital invested in a perpetual bond, there are two avenues open. The investor can wait for a callable date, and hope for a call, or the investor can place the perpetual bond on the open market prior to the callable date, or after having been disappointed on a callable date in the expectation that the instrument might be bought back by the issuing financial institution. On the open market the value of the bonds can fluctuate several percentage points above and below par, depending on the state of the markets.

7. Over the course of the last year or so, the international financial markets have been beset by turmoil. That turbulence has shattered a long period of stability. Many commentators ascribe it to the rising price of commodities, particularly oil; the stretched nature of lending on house purchases to those who are unable to afford to redeem their mortgages; and to the banks and financial institutions engaging in collateralised debt obligations through issuing and purchasing investment instruments that are dependant upon multiple, and not readily identifiable, factors linked to the house purchase problem in North America. Whatever the reason, the consequences of the fall in the markets has meant that the perpetual bonds purchased by Enfield Credit Union, through J. & E. Davy, are now worth about 60% of par. Perhaps they are worth less. With the markets falling, it is unlikely that the issuing financial institution will exercise its right to recall the perpetual bonds at par. The reality is that if the market situation continues, they could purchase back their own bonds on the open market at a discount of over a third of their face value rather than calling back the bonds to the investors to whom they are issued on the call dates at 100% value.

### **These Bonds**

8. There were three bonds at issue before the Financial Services Ombudsman. Through J. & E. Davy, and acting on their advice, Enfield credit union had purchased perpetual bonds issued by Nordia Bank, Jyske Bank and Oko Bank. All were perpetual bonds, all had a variably coupon and all had call dates which have not yet arrived. The Nordia Bank perpetual bond was purchased at a cost of €3,000 on 17th September, 2004. It pays a variable rate of interest tied to a particularly market value subject to a maximum of 8%. Its first call date is in September, 2009. The Jyske Bank perpetual bond was bought on the 16th March, 2005, for €100,000. It pays a rate of interest of 6.5% as a basic return, together with a further return above that which can increase depending upon international market rates, subject to a maximum of 8%. The first call date for this bond is in April, 2010. The Oko Bank perpetual bond was bought on 11th April, 2005, for €100,000. It pays a rate of interest at 6% together with additional returns above that to a maximum of 8% depending upon the performance of certain market indicators. The first call on this bond is in September, 2010. These bonds are now worth much less on the open market than their par value.

9. I now wish to refer briefly to the specific circumstances leading up to this series of investments. A perpetual bond had, in fact, been bought by Enfield Credit Union prior to the three investments in question. Partially to fund these purchases, Enfield Credit Union had sold a perpetual bond in Credit Agricole. J. & E. Davy claimed that by reason of this investment experience, and what had been explained face to face at the time to Enfield Credit Union, that they, as investors, were well aware of the conditions attaching to such bond and, in particular, its perpetual nature. In advising on the Jyske Bank perpetual bond, they claim that, in addition to the documentation that has been exhibited before me, that face to face meetings between their representatives and the relevant parties on the investment committee of Enfield Credit Union left them in no doubt as to the nature of the risk involved in purchasing such an instrument. A similar case is made in relation to the Oko Bank and the Nordia Bank investments. J. & E. Davy contend by reason of a specific mention of the word perpetual in the relevant documents, the fact that it is stated that no step up terms are available, and by making a specific reference to a callable date, that the nature of their discussions, as contended, may be inferred or supported. When the Credit Agricole bond was sold, as all the parties are agreed for sound financial reasons, a meeting was held at Enfield Credit Union between Mr. Morgan Walsh on behalf of J. & E. Davy and Ms. Eileen Grifferty and Ms. Blathín Bailey of Enfield Credit Union. It is contended that Enfield Credit Union wished to replace the 6% rate of return on the Credit Agricole perpetual bond with a similar level of income. Among the factors noted on the stockbroker's side of this meeting was the following:-

"We went through the information sheet and the term 'first call date' was explained as the first opportunity that the issuer could redeem the bond. I explained that the issuer can extend this date and this will depend largely on future interest rate levels. I also pointed out that there was no 'step up', which is an additional piece of income if the bond was not redeemed on the first callable date by the issuer."

10. On an earlier date, 16th February, 2005, the J. & E. Davy side told Enfield Credit Union that they were advised to sell the Credit Agricole bond which had given over 10% in return since December, 2003. The risk in not selling the bond was explained as follows:-

"Most commentators agree on marginal increases if any, in late 2005, but we will see continued gradual increases over the coming years. Such rate hikes will see depreciation in the value of corporate bonds on a fixed coupon whose term can be extended by the issuer. The risk is that you could be left holding a corporate bond that is valued below power on the open market, and earning a rate of return that is less than prevailing interest rates."

11. All the parties are agreed that the three perpetual bonds in question continue to pay the rate of interest contracted for and that the banks in question have as high an international stability rating as any Irish bank. When, however, the general financial market began to feel the first shock to its stability, Enfield Credit Union became worried about the fall in the open market value of these investments. Initially they wrote, on 20th June, 2007, to J. & E. Davy claiming that there had been inadequate disclosure of relevant material. They contended that the bonds were never explained to be perpetual and therefore had "the capacity to run for ever i.e. that they have no contractually fixed maturity date". That letter begins:-

"As you the know the Board of Enfield Credit Union is very concerned about the Jyske, Oko Bank and Nordia Bank perpetual bonds which Davy advised us to buy. The key concern is based on the fact that when recommending them to us, you never made it clear that they do not have a contractually fixed maturity, something which fundamental to way we manage our investments."

12. To this complaint, J. & E. Davy replied in a detailed letter. The thrust of their case was, specifically, that the complaint was

incorrect because the advisors to Enfield Credit Union from J. & E. Davy had specifically explained the perpetual nature and other features of the bonds in question. They also pointed out that the relevant banks were well rated and had a negligible chance of collapse and default. Interest rate cycles could account for both the fall in the bond value and an increase. The return of the bonds was secure as to coupon. The letter concedes that Enfield Credit Union are not investment experts. No concession is made on the core point, however, that in making the investment, Enfield Credit Union knew precisely what they were doing.

### **The Complaint**

13. Following on a number of meetings with J. & E. Davy that were unsuccessful, in terms of resolving this matter, Enfield Credit Union determined to make a complaint to the Financial Services Ombudsman. Before this, a Mr. Robert T. Moynihan wrote to many of the credit unions in Ireland, in this instance on the 1st October, 2006, giving them his unsolicited opinion that the conduct of J. & E. Davy in advising on these investments was wrong. That letter was sent with the complaint. The complaint to the Financial Services Ombudsman was made on 22nd August, 2007, and recites capital losses to that date of €77,041. In concise terms, the nature of the complaint is stated as follows:-

"Our complaint is that, when selling these bonds to us, Davy never explained adequately:-

- that the bonds were perpetual, rather than having a fixed maturity date,
- that they were not protected by a step up clause...
- that they were subordinated and,
- the factors that would influence whether we would ever get our members money back."

14. Attached to the letter of complaint were 12 appendices, including the letter from Mr. Moynihan, who is described as "an external professional advisor". The Deputy Financial Services Ombudsman was assigned the case. He dealt with the complaint by summarising it in writing and asking a series of questions of J. & E. Davy. I am satisfied that these questions were to the point. As I understand it, however, the original letter of complaint and the supporting documentation was not made available to J. & E. Davy and this was in accordance with the standard procedure of the Financial Services Ombudsman. In its reply, J. & E. Davy explained that Ms. Marion O'Driscoll, Head of their Credit Union Advisory Service, had spent a good portion of any meeting where perpetual bonds were being discussed, carefully explaining the features of these investment instruments. Attached to this reply were a series of relevant documents that were described as a "schedule of evidence". The Enfield Credit Union got these documents because J. & E. Davy copied same to them. They knew the case that J. & E. Davy were making. When they came to reply to it, they added in some further evidence of their own.

15. The case was considered by the Deputy Ombudsman, who issued a concise report dated the 5th November, 2007. He concluded that the bonds were unsuitable investments for a credit union and that the bonds had not been explained properly to the credit union and that if they had, it would not have purchased them. J. & E. Davy expressed dissatisfaction with this decision and asked for it to be reviewed by the Financial Services Ombudsman.

16. Thereupon, the procedural wrangling that is at the heart of this case commenced. J. & E. Davy asked what procedures were to be followed. The Financial Services Ombudsman replied that his procedure for dealing with complaints was available on his website. On 4th December, 2007, J. & E. Davy sought voluntary discovery of whatever documentation might exist in Enfield Credit Union concerning what may have been explained about perpetual bonds during the meetings leading up to the purchase of the relevant bonds, and relevant to the purchase of the earlier Credit Agricole bond. The Ombudsman refused this request on the basis that it was more properly one that might be made in the context of "litigation in the Courts." An oral hearing was also requested. This was, ultimately, declined. On the 11th December, 2007, J. & E. Davy made a submission which complained that the Financial Services Ombudsman Council had not made regulations for the conduct of the hearing; that his Deputy Ombudsman had not been properly authorised to act; that the matter should have been dealt with by mediation prior to investigation and adjudication; that they were entitled to know what procedures were going to be followed in the adjudication; that they were entitled to a mutuality of exchange of documentation and that there should be an oral hearing. The merits of the complaint were also traversed.

17. It is important to note that J. & E. Davy, throughout the entire of this debate, copied all of the documentation which it was sending to the Ombudsman to Enfield Credit Union. Enfield Credit Union sent J. & E. Davy nothing. By letter dated the 14th December, 2007, the Financial Services Ombudsman sought further information from the parties through two letters. On 7th January, 2008, the credit union replied to the questions raised by the Ombudsman by including witness statements from three members of the credit union and a further statement of Mr. Robert T. Moynihan dated 6th January, 2008. I have examined the material that is before the Financial Services Ombudsman by way of the final reply of Enfield Credit Union. Three witness statements clearly join issue with the contention of J. & E. Davy that a proper explanation of the nature of perpetual bonds had been made. The statement by letter of Mr. Robert T. Moynihan is one that adopts an expert tone and is condemnatory of every involvement by J. & E. Davy with Enfield Credit Union concerning perpetual bonds. J. & E. Davy got none of this material. The Ombudsman was then happy to proceed to a decision. This was made on 21st January, 2008.

### **The decision**

18. The direction of the Ombudsman was that J. & E. Davy pay the credit union the sum of €500,000 in exchange for the three bonds; that J. & E. Davy refund to the credit union all fees and commissions paid by it in relation to the purchase of the three bonds; and that these transactions should be completed on or before the 22nd February, 2008. The interest earned by the credit union was not discounted.

### **The Grounds for the Decision**

19. In his decision of 21st January, 2008, the Financial Services Ombudsman does not indicate on which statutory ground he is holding against J. & E. Davy. The core of his decision is contended to have been made on a basis which was capable of being decided on the papers before him, and without any oral hearing. At page 73 of his decision he states:-

"Having reviewed all the papers, I note that there is conflict at the recall of what was said at the meetings and what Enfield Credit Union perceived they were told and what Davy feel, they told Enfield Credit Union. Having reviewed the documentation that was given to Enfield Credit Union by Davy, I have come to the conclusion that Davy did not exercise its proper duty of care when advising Enfield Credit Union."

20. The reasons which he gave were that the nature of a perpetual bond should have been spelled out in writing in far greater detail; that maturity date and callable date might have been thought by Enfield Credit Union officials to have been interchangeable terms;

that in referring to the bond as guaranteeing capital there was a failure to explain that the purchase of the bonds by the issuer was entirely at his discretion; that this not having been exercised, a realistic market for the purchase of the bonds did not exist as of the date of his decision; and that the documents failed to contain appropriate warnings.

21. The decision is a careful one that is well reasoned and conscientiously arrived at. No matter how I read it, however, I cannot fail to come to the conclusion that the case of J. & E. Davy that they had carefully explained the nature of the investment being entered into by Enfield Credit Union in these perpetual bonds has been dismissed.

### **Acquiescence**

22. It is a principal of judicial review that where an applicant complaining of a procedure has knowingly acquiesced in the defect in respect of which a complaint is made, that the High Court may refuse relief, even though an apparent entitlement to redress is made out on the basis of a failure to follow constitutionally-mandated procedures. Such refusal is on the basis of the discretion of the High Court in judicial review proceedings. Where a party has notice of defective procedures, it should act to seek the relief of the court rather than engaging in apparent acquiescence, *Maguire v. Ardagh* [2002] 1 I.R. 385. In *Borges. v. Fitness to Practise Committee* [2004] 1 I.R. 103, it was argued before the Supreme Court that a doctor who had been brought before the Medical Council and who had a ground of concern as to its procedures, should engage in the hearing before seeking a judicial review. Keane C. J. at p.110 stated:-

"Either the [Committee's] decision constitutes a denial of fair procedures to which the applicant is entitled or it does not. If it does, then it would seem wrong that the applicant should be subjected to the anxiety and expense of a hearing which, on that hypothesis, does not respect his right to a fair hearing. It seems to me that the modern judicial review process should be sufficiently flexible to allow for the granting of the appropriate declaratory relief in such circumstances."

23. The plea of acquiescence by the respondent is that I should exercise my discretion, in the event of finding procedural defects, to refuse judicial review because J. & E. Davy participated in the process, which is now complained of. That process, it should be noted, was entirely the creation of the respondent. It was not something in respect of which the applicant had any choice. Furthermore, the process was one which the applicant, laudably, sought to move along with efficiency and concision. These are appropriate guiding principles for the exercise of any *quasi* judicial function. However, they left little time during which an application might be made to a court. More fundamentally, however, the applicant did not know, until discovery was made in this case, what the nature of the appendices were that had been attached to the original complaint of Enfield Credit Union and nor did the applicant know that witness statements had been appended by way of a final reply to queries of the respondent by Enfield Credit Union. Not knowing of this material it is difficult to see how the applicant could protest about it. Furthermore, the applicant sought an oral hearing and sought a limited form of discovery for the purpose of advancing its case. Both of these were declined. These are the core points of review. They were not ones, in any sense, in which the applicant acquiesced.

### **Oral Hearing**

24. The Financial Services Ombudsman's powers are provided for in Part VIIB of the Central Bank Act 1942 as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004. There is a want of mutuality in the powers for dealing with the complainant and the financial service provider that are conferred on the Financial Services Ombudsman by the Act. This is explicable, perhaps, on the basis that the Act requires that the proceedings before the Ombudsman should be investigative and informal. The Financial Services Ombudsman is also required to be accessible in relation to complaints. Probably for that reason, the Financial Services Ombudsman has been reluctant to embark on any oral hearing, involving as it must the right to be represented, with the financial services provider likely to be able to bear the cost of legal representation, unlike the complainant in most instances, and the right, in some circumstances, to cross-examine witnesses. Under s. 57BB of the Act the objects of the creation of the office of the Financial Services Ombudsman are explained as being, firstly, to establish the Financial Services Ombudsman "to investigate, mediate and adjudicate complaints" made by consumers about the provision of a financial service; secondly, it is provided that the Financial Services Ombudsman and his staff should be "accessible and that complaints about the conduct of regulated financial service providers are dealt with efficiently and effectively and are adjudicated fairly"; thirdly, complaints are to be dealt with in "in an informal and expeditious manner"; and, fourthly, public understanding of issues relating to complaints against financial service providers are to be improved. The want of mutuality of the powers conferred by the Act on the Financial Services Ombudsman is to be seen in three areas: discovery, searches and compulsion to give evidence on oath. Under s. 57CE the Financial Service Ombudsman may require a financial service provider to provide information, to produce a document or to provide a copy of a document; subject to legal professional privilege. There is no such power apparently exercisable against the complainant. Under s. 57CF of the Act, the Financial Services Ombudsman may enter and inspect the business premises of the financial services provider and inspect any document or thing on the premises, which power includes the power to require an electronic file to be reproduced in legible form. Finally, the staff of the financial service provider may be summoned for the purpose of being examined on oath. I will return to the power of discovery later in this judgment.

25. The applicant argues that the resolution of the issues between the parties could not have been fairly adjudicated upon, save by an oral hearing. The respondent does not dispute that an oral hearing is possible. It is argued that it was unnecessary.

26. Section 57BK of the Act provides:-

"1. The principal function of the Financial Services Ombudsman is to deal with complaints made under this Part by mediation and, where necessary, by investigation and adjudication.

2. Subject to this Part, the Financial Services Ombudsman has such powers as are necessary to enable that Ombudsman to perform the principal function referred to in subsection (1).

3. The Financial Services Ombudsman may authorise any Deputy Financial Services Ombudsman or any other Bureau staff member, by name, office or appointment, to perform any of the functions, or exercise any of the powers, imposed or conferred on the Financial Services Ombudsman by this or any other Act.

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."

27. Whereas s. 57CB specifically provides that the parties are to be provided with an opportunity to make submissions "with respect to the conduct complained of", the power to examine witnesses appears to be one sided. Section 57CE provides, at subs. 4 and 5:-

"(4) For the purpose of obtaining information relevant to investigating or adjudicating a complaint about the conduct of a regulated financial service provider, the Financial Services Ombudsman may –

(a) Summon any officer, member, agent or employee of the financial services provider to attend before that Ombudsman, and

(b) examine on oath any such officer, member, agent or employee in relation to any matter that appears to that Ombudsman to be relevant to the investigation or adjudication.

(5) Without limiting subsection (4), the Financial Services Ombudsman has the same powers that a judge of the High Court has when hearing civil proceedings that are before that Court with respect to the examination of witnesses (including witnesses who are outside the State)."

28. Does s. 57CE(5) confer the power to mutually examine witnesses, on each side, on the Financial Services Ombudsman? Whereas the power of compulsion, by application to the Circuit Court, exists in s. 57CG of the Act on a basis that a power has already been conferred, and which is defined only as quoted, I note that under s. 57BZ(3) the Financial Services Ombudsman can discontinue a complaint because of want of co-operation:-

"The Financial Services Ombudsman may decide not to continue to investigate a complaint if the complainant fails within a reasonable period to comply with a request for further written particulars".

29. Furthermore under s. 57BZ (1) the Financial Services Ombudsman can decide to decline to investigate a complaint, or to discontinue an investigation of a complaint, where it is made frivolously or vexatiously or in bad faith; where the subject matter of the complaint is trivial; where the conduct occurred at a remote time; where there is available an alternative means of redress; or, where the complainant has no sufficient interest in the conduct complained of. Assuming, with considerable misgivings, given the deliberate want of mutuality in the powers conferred on the Ombudsman in terms of investigating a complaint, that there is power to require the relevant members of Enfield Credit Union to make themselves available to be cross-examined, I turn now to whether that was necessary. I conclude, at the least, that if an oral examination is demanded, that a refusal by a complainant to co-operate may end in the dismissal of a complaint.

30. The power to order procedures is expressly conferred upon the Financial Services Ombudsman by the Act. It is within his decision as to whether an oral hearing is necessary; as to whether there should be discovery; as to whether there should be a search; and as to whether a complaint should be dismissed because of a lack of co-operation from a complainant. All of these matters are decisions which he can make within his jurisdiction. In reviewing those decisions, therefore, judicial review is available only if there is such a want of fairness in the procedures adopted as to amount to a denial of constitutional justice. In that regard, the Act contains a definite emphasis in the favour of the Financial Services Ombudsman not being set up as a kind of *quasi* court or as a tribunal, with the inevitable result of voluminous discovery, widespread disclosure and lengthy hearings.

31. As quoted s. 57BK (4) provides that the Financial Services Ombudsman is entitled to perform the functions imposed, and to exercise the powers conferred by the 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.

Section 57CC provides that the "Financial Services Ombudsman shall ensure that investigations are conducted in private".

32. One of the objects of the Act, as stated by s. 57BB(c) is to enable complaints against financial services providers to be dealt with "in an informal and expeditious manner". There are many issues which can be decided on an examination of documents. It is clear that the statutory provisions referred to require the Financial Services Ombudsman to take control of his own procedures. Specifically, the Act enjoins that he not proceed down the path of formality and mutuality associated with plenary hearings. Be that as it may, there are circumstances where an oral hearing is necessary for the purpose of resolving a dispute of fact. Central to the complaint, and central to the response, is whether a limited number of people at Enfield Credit Union had explained to them by a limited number staff that J. & E. Davy what the nature of a perpetual bond is in terms of the return on the investment, the rigidity of the capital being tied up and the risks associated with the market. No matter how I look at the decision of the Financial Services Ombudsman, I cannot avoid thinking that even though he expresses his decision in terms of what was, or what was not, in the documents emanating from J. & E. Davy, that an underlying reality was there to be explored by an oral hearing as to whether an explanation had been provided, as to whether there was a sufficient understanding of that explanation, and as to whether fault might be found with Enfield Credit Union and not J. & E. Davy, in the conduct of this matter. It is not unknown that a person to whom a financial misfortune has occurred, will wrongly blame their advisor. Nor is it impossible that a person complaining about their financial advisor will pretend to ignorance of, or an inability to grasp, simple facts. I do not know what happened here.

33. The ultimate test as to whether any portion of an investigation and adjudication should involve an oral hearing with cross-examination is as to whether that process is necessary for a fair adjudication of the issue in question. The Financial Services Ombudsman being required to order his own procedures and, in terms of the imperatives contained in the Act, to divert them as far as possible away from the plenary hearing model, it was within his competence to decide that only a few witnesses on each side would be cross-examined. But, was cross-examination required here as the only fair procedure suitable for resolving this central issue?

34. There is no absolute right to an oral hearing at which evidence is adduced and cross-examination is permitted; *The State (Williams) v. Army Pensions Board* [1983] I.R. 308.

35. The circumstances under which an oral hearing in respect of a particular issue might be required were explained by Costello P in *Doupe v. Limerick* [1981] I.L.R.M. 456 at 463 where he stated:-

"As to the extent of the duty to disclose, in some cases natural justice may require that disclosure of all relevant documents be made prior to an oral hearing (*Nolan v. Land Commission*, SC, 9 May, 1980, 1979 No. 64/5 unrep.) in others an indication of the evidence against an applicant for a licence but not its source or details, may suffice (*Reg. v. Gaming Board of Great Britain* [1970] 2 WLR 1009). In the application of the same statutory provisions a decision-making body must, in some cases, give an opportunity to make written representations whilst, in others, no such obligation may arise (*Irish Family Planning Association v. Judge Ryan* [1979] I.R. 295). As to the nature of the opportunity to present a case to which an applicant for a licence is entitled, this too varies. The rule does not require that every administrative order which may adversely affect rights must be preceded by a judicial-type hearing involving the examination and cross-

examination of witnesses. It requires that adequate notice of the case which an applicant has to meet be given to him and that an adequate opportunity be afforded to answer any objections which may be taken to his application. And it is clear that the requirement of the rule may be fully satisfied by the adoption of quite informal procedures. In some cases an applicant may be entitled to make his submissions orally, in others a written submission will meet the requirements of the rule."

36. In *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, the applicant sought judicial review on the basis that he had been deprived of an oral hearing in applying for a contributory old age pension. The grounds for refusal were that he had not commenced paying the relevant social insurance contributions before reaching his fifty-sixth birthday and that his earnings for the relevant period exceeded the insurable limit. The records retained by the Department of Social Welfare showed discrepancies in the relevant records. Furthermore, the applicant was adamant that the grounds on which he had been refused were factually in error. In granting judicial review, and in deciding that an oral hearing should be held, Costello P. made it clear that this aspect of the decision making process should be confined to that small portion of oral evidence which it was necessary to explore for the purpose of making a fair decision. At p. 251 of the report, he said:

"There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. The General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer."

37. In that case, Costello P. decided that an oral hearing with examination and cross-examination of only a limited number of witnesses should take place. Among the reasons this was needed was to assess the strength of the case adduced on behalf of the applicant. At p. 253 he stated:

"The conclusion which I have reached is that the conflict between the parties cannot be properly resolved in the absence of oral testimony. I conclude that the appeals officer should have conducted an oral hearing, that he should have heard the evidence under oath of the applicant and, if available, Mr. Higgins, and that he should have heard the evidence from the officer in the Department responsible for searching the departmental records who should have been available to cross-examination . . . It follows, therefore, that the first respondent erred in holding that no error of law had occurred on the hearing of the appeal and that I should quash the order which he made. The proper determination was that the applicant's appeal should be re-heard by an oral hearing."

38. Where there is a requirement that an oral hearing should take place then, in the context of the statute requiring informality and expedition, that oral hearing must be expressly limited to the examination of those witnesses whose testimony is inescapably necessary for the purpose of resolving a disputed issue of fact which cannot otherwise be fairly decided. Some guidance, in that regard, is provided by the judgment of the Court of Appeal in England and Wales in *Heather, Moor and Edgecomb Ltd. v. Financial Ombudsman Service and Simon Lodge* [2008] EWCA Civ 642. The relevant English Act is the Financial Services and Markets Act 2000. This contains similar provisions allowing for a ruling to be made against a financial service provider on the basis of a breach of the law, or on what might loosely be termed a fairness basis. That Act also requires the Ombudsman to pursue a complaint with expedition and with a lack of formality. Article 6 of the European Convention on Human Rights provides for an oral and public hearing of civil and criminal cases. However, there may be proceedings at which no oral hearing is required as, for instance, where there are no issues of credibility or no contested facts which necessitate a hearing. In those instances, a tribunal may fairly and reasonably decide a case on a review of the written materials and on hearing oral submissions, or by receiving written submissions; *Jussila v. Finland* (2007) 45 E.H.R.R.39. At para. 65 of his judgment in the *Simon Lodge* case, Lord Justice Burnton stated:

"There are a number of similarities between *Jussila v. Finland* and the present case. As in that case, the purpose of the request for an oral hearing was cross-examination, which in that case and in this the tribunal reasonably found to be unnecessary. The Court accepted that 'demands of efficiency and economy' may justify a lack of a public hearing; in the present case, the Court is concerned with a scheme 'under which . . . disputes may be resolved quickly and with minimum formality', a consideration that justifies holding a public oral hearing only when that is necessary fairly to determine the dispute in question."

39. In my judgment, it is inescapable that a fair determination of the dispute as to what explanation, if any, was given by J. & E. Davy to the relevant officers in Enfield Credit Union, requires that there should be an oral hearing limited to those officers of J. & E. Davy who claim to have given the explanation, and limited to those to whom the explanation was said to have been given.

40. A further dispute has arisen as to whether there should be an oral hearing on the issue as to whether investment in perpetual bonds is a suitable investment for a credit union. People are at liberty to make any investment they wish. Where they retain an advisor, they are entitled to be fairly advised as to the nature of the investment and the risks attendant upon it. As to whether such an investment is suitable or unsuitable for a credit union, may be regarded as the foundation upon which a decision could be made as to whether a reasonable level of expert advice was proffered by J. & E. Davy to Enfield Credit Union. The calling of experts on each side is an undesirable feature of a proceeding which is designed by an Act of the Oireachtas to be informal and expeditious. At times, however, it may be inescapable and it seems to me that this may be one of them. That, however, was not a matter on which the Financial Services Ombudsman ruled. When he does consider it, that decision is subject to the principles just set out.

## Discovery

41. In dealing with the issue of discovery, I return to the provisions of the Act. Section 57 BK (2), which is quoted above, provides that the Financial Services Ombudsman has such powers as are necessary to perform the function of mediation, investigation and adjudication conferred upon him by the Act. Section 57 BX (8), provides:

"As soon as practicable after receiving a complaint about the conduct of a regulated financial service provider, the Financial Services Ombudsman shall provide the financial services provider with a copy of the complaint."

42. Section 57 BZ provides:

“(1) Without limiting section 57BY, the Financial Services Ombudsman can decide not to investigate a complaint, or to discontinue an investigation of a complaint, on the ground that-

- (a) the complaint is frivolous or vexatious or was not made in good faith, or
- (b) the subject-matter of the complaint is trivial, or
- (c) the conduct complained of occurred at too remote a time to justify investigation, or
- (d) there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of, or
- (e) the complainant has no interest or an insufficient interest in the conduct complained of.

(2) The Financial Services Ombudsman may make preliminary inquiries for the purpose of deciding whether a complaint should be investigated under this Part and may request the complainant to provide further written particulars of the complaint within a period specified by that Ombudsman.

(3) The Financial Services Ombudsman may decide not to continue to investigate a complaint if the complainant fails within a reasonable period to comply with a request for further written particulars.”

43. The final provision relevant to discovery is contained in s. 57 CE of the Act and this provides:-

(1) To enable a complaint to be investigated, the Financial Services Ombudsman may require the regulated financial service provider concerned and any associated entity of that financial service provider: -

- (a) to provide information either orally or in writing, or
- (b) to produce any document or other thing, or
- (c) to provide a copy of any document,

that appears to that Ombudsman to be relevant to the investigation. However, this sub-section does not authorise the Financial Services Ombudsman to require the provision of information, or the production of a document or copy of a document, the communication of which is subject to legal professional privilege.”

44. Section 57 CB provides:

“When investigating a complaint, the Financial Services Ombudsman shall provide the parties with an opportunity to make submissions with respect to the conduct complained of.”

45. As previously noted, s. 57 CC provides that the investigations of the Financial Services Ombudsman are to be conducted in private. However, this has not been relied upon, nor could it be relied upon, for the purposes of arguing that the case made by each party should not be disclosed to the other.

46. Three matters are complained of, in terms of the procedures of the Financial Services Ombudsman, under the heading of discovery. Firstly, given that J. & E. Davy were at all times contending that the relevant officials in Enfield Credit Union had received a detailed explanation as to the nature of perpetual bonds, and the risks and advantages of investing in them, discovery was sought, for the purposes of submission and potentially for cross-examination, of any records that may have been held by Enfield Credit Union concerning this issue. Secondly, and in accordance with the statutory provision, J. & E. Davy did receive a copy of the complaint of Enfield Credit Union. Appended to it, however, were a number of letters, including an expert report from Mr. Robert T. Moynihan. While these were sought, they were never disclosed to J. & E. Davy. Thirdly, upon seeking final clarifications in writing from each party, Enfield Credit Union had replied by enclosing yet a further report from Mr. Robert T. Moynihan and three short witness statements from the individuals in Enfield Credit Union to whom, it was alleged, the specific explanation contended for by J. & E. Davy, had been given. They were saying that, as a matter of fact, they had been left in the dark as to the nature of perpetual bonds.

47. A procedure cannot be fair if the party against whom a complaint is made is not enabled to make a response. Central to the ability to make a response is that a party should have reasonable notice of the nature of the complaint. In providing for the right to make submissions, and in providing for the financial service provider to be given a copy of the complaint, the Act upholds the principle of fairness of procedure. It is argued, however, that these provisions should be taken literally and not construed beyond the express words of the statute so as to imply any further need for additional exchanges of documents. I take it as a basic principle, however, that where an Act indicates that a copy of a complaint ought to be furnished to a party statutorily required to answer it, that it is unfair that the letter of complaint is singled out as an indication of what has to be responded to and that the appendices, or exhibits in support, to that letter are excluded. What would be the situation if merely the letter of complaint had to be furnished to a financial service provider? The answer would be that in setting out the complaint a complainant could choose those portions of conduct, or those sections of correspondence, which assist in making a case against a financial service provider, excluding the rest. Anything favourable might be hidden, or put in an appendix to the complaint, and this in following such a procedure might amount to the same thing. Certainly, the Financial Services Ombudsman would see it, but is there any reason why the financial service provider must not? In the vast majority of cases before the Financial Services Ombudsman, the discovery that is to be made under the Act is that exclusively to be made by the financial service provider. This is because the financial service provider is usually the custodian of the relevant documents. Under the Act, however, Enfield Credit Union could also be a financial service provider, though it was not in this case, and if it were the subject of a complaint, an order could be made by the Financial Services Ombudsman that it should disclose documentation. Furthermore, the true nature of the case being made by Enfield Credit Union is apparently strengthened by the appendices to the letter of complaint and, thereby, the true nature of that complaint is elucidated. It was therefore a mistake for the Financial Services Ombudsman not to provide the documentation appended to the letter of complaint from Enfield Credit Union since this constituted, as a whole, the complaint within the meaning of the Act.

48. In *Royal Dublin Society v. Yates* (Unreported, High Court, Shanley J., 31st July, 1997), the defendant had behaved in an

extraordinary way, as the judge found on plenary hearing, towards one of the officers of the plaintiff. He was enjoined against the repetition of that behaviour. In the course of the proceedings, however, he had also sought to overturn a decision of the Royal Dublin Society to expel him as a member. In the long history of the Society, very few members, if any, had ever been expelled. The procedure adopted was to convene a meeting of the members to debate a motion of expulsion and to allow each side to present its case orally. This was done by the relevant documentation concerning the behaviour of the defendant being presented to the meeting, and by the defendant being given a chance to reply, if he wished. As a matter of fact, he stormed out of the meeting. In his absence, and as the procedures had contemplated, a right of reply to his response was to be exercised. This should have been by argument only. This right was taken up but, in the course of it, further material as to the behaviour of the defendant, was put before the meeting which had not previously been presented and in respect of which, therefore, the defendant had no chance to reply. Shanley J. held this to be an unfair procedure. The unfairness in the procedure arose not because of the absence of the defendant, but because factual material had been put before the meeting to which he had no chance to reply.

49. A fundamental distinction is to be drawn between submissions on material and the proffering of new material in respect of which a party does not have a chance to make submissions. In my view, the right to make submissions under the Act implies the right to have a view of the material that the Financial Services Ombudsman may rely upon, in factual terms, in grounding his decision. In *National Maternity Hospital v. Information Commissioner* [2007] 3 I.R. 643, it was contended that there was a failure by the Information Commissioner to provide fair procedures because she had considered and relied upon submissions made to her by two parties without giving the National Maternity Hospital the opportunity to consider and comment upon those submissions. Quirke J. held that it was incorrect to contend, in the context of the procedures under the Freedom of Information Act 1997, that the decision was made in an adversarial context. At p.669 he stated:

"The review required by the revisions of s. 34 of the Act of 1997 was intended to be inquisitorial rather than adversarial in nature. The procedures to be adopted by the Commissioner in respect of such reviews are entirely within her discretion provided that they do not offend recognised principles of natural and constitutional justice. The procedures which she adopted in the review under appeal permitted all of the parties with an interest in the review to make full and detailed written submissions on every relevant aspect which affected their respective interests. Each of the parties who participated in the review was provided with full and equal access to the Commissioner and to her officials.

I know of no principle of natural or constitutional law or justice which confers upon parties who make submissions to a decision making body the right to respond to the submissions made by every other party who participates in the process. The review undertaken by the Commissioner was a statutory process which expressly envisaged and permitted the adoption of informal procedures.

The Commissioner provided the Hospital with extensive opportunities to be heard. It made submissions to the Commissioner on five separate occasions . . . It is argued that the Hospital should be entitled to respond to any submissions made by any other party. Should these parties then be entitled to respond to the Hospital's response and where would all of this end?"

50. Were submissions requested of argument as to right and wrong, there is no need to exchange such arguments. The parties can make whatever arguments they wish. Where any factual material is presented that may fairly be said to be of influence to adjudication, the respondent to a complaint must be able to reply. That is why an investigation should just gather and exchange factual material and then seek submissions on it.

51. The final issue complained of concerning disclosure is that, when requested, the Financial Services Ombudsman did not require Enfield Credit Union to disclose to him, and through him to J. & E. Davy, the documents which were relevant to the advice that had been received as to the nature of perpetual bonds. As I have previously indicated, the Act gives a power of disclosure as against the financial service provider. There is no power under the Act to order disclosure from a complainant. However, a complainant must cooperate with the Financial Services Ombudsman. Before the complaint can proceed, and at every stage while it is proceeding, the Financial Services Ombudsman must be satisfied that the complainant is acting in good faith. Hence, any letter requesting relevant documents from the Financial Services Ombudsman would ordinarily require to be replied to. Whereas there is a specific power to seek further particulars in relation to a complaint from the complainant, it may be argued that this does not extend to the discovery of relevant documents. It seems to me that both of these powers should be interpreted so as to allow, in an appropriate case, disclosure to be made to the Ombudsman and, thence, for those documents to be discovered to the respondent to a complaint. That should be done where the documents are relevant, on a fair assessment, to the resolution of any issue. Where the documents are such as to potentially influence the Financial Services Ombudsman in the decision which he might make as to the complaint, then the financial service provider has an entitlement to see them. Submissions can then be sought from each side.

### **Consequences and Fair Procedures**

52. It is argued that the limited requirement of fair procedures contended for implies into the Act a wide meaning as to procedures which is not mandated. It is argued that this entitlement can only arise where a party to a *quasi* judicial hearing is in the position, in effect, of an accused or of being a party charged with such wrongdoing as to potentially undermine his constitutional right to protect his good name. In that regard, however, I note that the decision on this matter was published on the World Wide Web by the Financial Services Ombudsman. I can also not fail to ignore the consequences of a finding being made against a financial service provider. Under the Act, these consequences can be drastic. If it were merely that the adjudication on a claim would lead, for instance, to an admonition or a recommendation that a brochure as to investments would be redrafted, no one could assert that the full panoply of fair procedures was mandated. The result for the party ruled against, and the nature of any conflict in evidence leading to the result are what determines what level of procedure is necessary. In this instance, it was the repayment of the full sum of the bond, as a repurchase by the agent advising on same, with no allowance made in relation to the substantial interest earned by Enfield Credit Union together with the repayment of commission earned. The powers of the Financial Services Ombudsman to set the terms of redress if a complaint is adjudicated on as correct are set out in s. 57CI as follows:-

"(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.
- (3) The Financial Services Ombudsman shall include in a finding:-
- (a) reasons for the finding, and
  - (b) any direction given under subsection (4) as a result of the finding.
- (4) If a complaint is found to be wholly or partly substantiated, the Financial Services Ombudsman may direct the financial service provider to do one or more of the following:
- (a) to review, rectify, mitigate or change the conduct complained of or its consequences;
  - (b) to provide reasons or explanations for that conduct;
  - (c) to change a practice relating to that conduct;
  - (d) to 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) to take any other lawful action.
- (5) The Financial Services Ombudsman may not direct the payment of an amount of compensation exceeding an amount (if any) prescribed by Council Regulations.
- (6) A direction requiring a regulated financial service provider to pay an amount of compensation may provide for interest to be paid at a specified rate if the amount is not paid by a date specified in the direction."

53. As I understand it, from what counsel have told me, the amount of compensation that has been prescribed by regulations passed by the Financial Services Ombudsman Council is the sum of €250,000.

54. All administrative tribunals are required to act fairly and in accordance with the requirements of constitutional justice. They are entitled to latitude as to how they order their procedures but they may not imperil a fair resolution of a conflict in consequence of adopting a procedure which infringes fundamental principles of constitutional fairness; *Gallagher v. The Revenue Commissioners (No. 2)* [1995] 1 I.R. 55 at p.76. Tribunals are entitled to depart from the rules of evidence, they are entitled to receive unsworn evidence, they are entitled to act on hearsay and they are entitled to ensure that procedures, unlike court procedures, are informal. The guiding principle is evenness of treatment towards each side. That principle of evenness of treatment would arguably seem, on the basis of the analysis of the Act that I have conducted, to be absent from the intention of the legislature. However, the legislature cannot, as a matter of constitutional law, have intended unfair procedures and I must not presume that unless no constitutional interpretation of an Act is possible. A balance has to be maintained. If, for instance, submissions are allowed by one side, they have to be allowed by both. If oral evidence is heard from one side then both sides must be entitled to make such submissions. If one party is allowed to call and cross-examine a witness, then the other party should have the same facility. It is impermissible, for instance, to hear oral submissions from one party but to confine the other to written submissions; *Kiely v. Minister for Social Welfare (No. 2)* [1977] I.R. 267 at p. 281. As to what is required in terms of the procedures will vary with the particular circumstances. In the interpretation of this Act there is a clear legislative bias towards minimal formality, subject to fairness of procedures. Barron J. put the matter of what procedures are required for a fair resolution of an issue in this way in *Flanagan v. University College Dublin* [1988] I.R. 724 at p.730 to 731:

"[P]rocedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case ... matters to be considered are the form in which the complaint should be made, the time to be allowed to the person concerned to prepare a defence, and the nature of the hearing at which that defence may be presented. In addition depending upon the gravity of the matter, the person concerned may be entitled to be represented and may also be entitled to be informed of their rights.

Clearly, matters of a criminal nature must be treated more seriously than matters of a civil nature, but ultimately the criterion must be the consequences for the person concerned of an adverse verdict."

55. Once it is necessary, as I have ruled it is, for witnesses from Enfield Credit Union to be called for the purpose of cross examination as to their relationship with J. & E. Davy concerning perpetual bonds, it follows that the statements furnished by those witnesses, as

an aid to the Financial Services Ombudsman, and any documents of a contemporaneous or later kind that concern that relationship which are in the possession of Enfield Credit Union must be made available to J. & E. Davy.

56. Having decided the two main issues in this Judicial Review, it seems to me that I can proceed to concisely consider the other points that were raised on behalf of the applicant. I will then make a final comment as to the correct process.

### **Mediation**

57. It is argued that the Financial Services Ombudsman should not have proceeded to investigate and adjudicate on this case without first having made an attempt to engage the parties in mediation. In order to decide this issue I must turn to the wording of the Act. Section 57 CA provides:-

- "(1) On receiving a complaint, the Financial Services Ombudsman shall, as far as possible, try to resolve the complaint by mediation.
- (2) Participation in the mediation by the parties to a complaint is voluntary, and a party may withdraw at any time. The Financial Services Ombudsman may abandon an attempt to resolve a complaint by mediation on forming the view that the attempt is not likely to succeed.
- (3) Evidence of anything said or admitted during mediation, or an attempted mediation, of a complaint, and any document prepared for the purposes of the mediation, are not admissible –
  - (a) in any subsequent investigation, under this Part, of the complaint (unless the person who made the admission, or to whom the document relates, consents to its admission), or
  - (b) in any proceedings before a court or tribunal.
- (4) If an attempt to resolve a complaint by mediation is unsuccessful, the Financial Services Ombudsman shall
  - (a) deal with the complaint by adjudication, and
  - (b) notify the parties accordingly.

58. Section 57 BK(1) provides:-

"The principal function of the Financial Services Ombudsman is to deal with complaints made under this part by mediation and, where necessary, by investigation and adjudication."

59. Section 57 BB provides:-

- "(a) to establish the Financial Services Ombudsman as an independent officer:
  - (i) to investigate, mediate and adjudicate complaints made in accordance with this Part about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service, and
  - (ii) to exercise such other jurisdiction as is conferred on the Financial Services Ombudsman by this Part;
- (b) to ensure that the Financial Services Ombudsman and the staff of the Financial Services Ombudsman's Bureau are accessible and that complaints about the conduct of regulated financial service providers are dealt with efficiently and effectively and are adjudicated fairly;
- (c) to enable such complaints to be dealt with in an informal and expeditious manner;
- (d) to improve public understanding of issues related to complaints against regulated financial service providers and related consumer protection matters."

60. Mediation is central to the disposal of any complaint by the Financial Services Ombudsman. That does not mean that, as of statutory necessity, mediation has to be attempted in each and every case. In this case, as it happens, Enfield Credit Union made it clear to the Financial Services Ombudsman that they had a number of meetings with J. & E. Davy and that they now wished to proceed to invoke his powers to investigate the matter and to adjudicate upon it. Upon the receipt of a complaint, the Financial Services Ombudsman should consider, as a primary function, whether mediation might usefully be pursued. A party to mediation, under that Act, may withdraw at any time. At that point, the Financial Services Ombudsman may consider that the process is exhausted. But is he entitled to reach that decision before any attempt at mediation is embarked upon? I cannot ignore the clear statutory imperative in s. 57 CA that the duty of the Financial Services Ombudsman is, on receiving a complaint, to try to resolve it by mediation. Nor can I ignore the fact that first among the principal functions conferred on the Financial Services Ombudsman by s. 57 BK is to deal with the complaint by mediation and, only where it is necessary, to proceed to investigation and adjudication. In the event that two readings are possible on the express wording of legislation, and having not been able to resolve that ambiguity by reference to the other provisions of an Act, regard must be had to its legislative purpose; s. 5 of the Interpretation Act 2005. In *Dunnes Stores Ireland Company v. Ryan*, [2002] 2 I.R. 60, the Supreme Court examined a statutory context whereby the Minister for Enterprise and Employment might appoint a statutory officer to examine the books and documents of the company if she was of the opinion that there were circumstances suggesting that "it is necessary to examine the books and documents of the body with a view to determining whether an inspector should be appointed to conduct an investigation of that body under the Companies Acts"; Herbert J, referring to that provision, at p.99 made the following illuminating comment:-

"In my judgment, 'necessary' is not used in any extreme or compelling sense in this subsection. In my judgment, it has the meaning of 'reasonably required' in contrast to merely optional."

61. It has been submitted on behalf of J. & E. Davy that every dispute is capable of being resolved by mediation and that experience has shown that parties who do not trust each other in any sense may come together by virtue of the mediation process. In my view, however, mediation need only be embarked upon where that carries a reasonable prospect of achieving results. Investigation and adjudication may be preferred as a starting point where, in the context of the dispute as a whole, that is deemed to be necessary by the Financial Services Ombudsman. In that regard, I believe a court would be reluctant to interfere with the discretion which is clearly vested in him by the Act. I would add, however, that in terms of fulfilling his responsibility, that it would be justified for him, in each case, to suggest to any party making a complaint that the option of mediation is available and to ask for their cooperation prior to investigation and adjudication in such a process.

#### **Delegation of Powers**

62. The narrative as to facts, at the start of this judgment, makes it clear that there was a delegation by the Ombudsman of his powers to investigate and adjudicate this matter to a Deputy Ombudsman. After a ruling was made against J. & E. Davy, a remedy was sought. The ordinary remedy is that provided for under s. 57 CL of the Act is an appeal in the High Court. This provides:-

"(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.

(2) The Financial Services Ombudsman can be made a party to an appeal under this section.

(3) An appeal under this section must be made:

(a) within such period and in such manner as is prescribed by rules of court of the High Court, or

(b) within such further period as that Court may allow.

63. Section 57 CM provides as follows:-.

"(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.

(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:

(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;

(b) an order setting aside that finding or any direction included in it;

(c) an order remitting that finding or any such direction to that Ombudsman for review.

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.

(4) The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts)."

64. Here, however, the remedy provided by the Ombudsman, which is not set down in any rules made by the Financial Services Ombudsman Council, was to make available to the parties an appeal from his deputy to himself. In my view that process was wrong. The relevant section is s. 57 BL, which provides:-

(1) The Financial Services Ombudsman Council shall, whenever the occasion requires, appoint one or more suitably qualified persons to be Deputy Financial Services Ombudsmen. However, if a person has been appointed as a Deputy Financial Services Ombudsman or as a Deputy Financial Services Ombudsman designate before the commencement of this section, that person is taken to have been appointed by the Council under this subsection.

(2) Subject to Schedule 7, a person appointed as a Deputy Financial Services Ombudsman holds office for such period, not exceeding 6 years, as is specified in the document of appointment.

(3) Such a person is eligible for reappointment at the end of a period of office.

(4) A person is not eligible for appointment as a Deputy Financial Services Ombudsman if the person-

(a) is a member of either House of the Oireachtas or is, with the person's consent, nominated as a candidate for election as such a member, or

(b) is a member of the European Parliament or is, with the person's consent, nominated as a candidate for election as such a member or to fill a vacancy in the membership of that Parliament, or

(c) is a member of a local authority or is, with the person's consent, nominated as a candidate for election as such a member.

(5) Within the scope of the authority conferred by the Financial Services Ombudsman, a Deputy Financial Services Ombudsman may perform any of the functions, or exercise any of the powers, of the Financial Services Ombudsman imposed or conferred on the Financial Services Ombudsman by this or any other Act.

(6) Any act done or omitted to be done in accordance with subsection (5) is taken to have been done or omitted to have been done by the Financial Services Ombudsman.

(7) A Deputy Financial Services Ombudsman is entitled to perform the functions and exercise the powers under subsection (5) free from interference by any other person, except that that Ombudsman shall-

(a) comply with directions given by the Financial Services Ombudsman, and

(b) keep the Financial Services Ombudsman informed about the progress made with respect to dealing with complaints that are assigned to the Deputy Financial Services Ombudsman."

65. It is apparent from this section that where there has been a delegation of power by the Financial Services Ombudsman that any ruling made by him is, under s. 57 BL (6), a ruling by the Financial Services Ombudsman. In effect, therefore, the Financial Services Ombudsman is seeking to allow an appeal to himself. This is impermissible. The Financial Services Ombudsman is entitled within the terms of s. 57 BL (5), to delegate the authority of investigating and adjudicating on a complaint to a Deputy Financial Services Ombudsman. That individual, I understand that there are two, is required to perform their functions in an independent manner. I construe s. 57 BL (7) as indicating that the Financial Services Ombudsman may give directions as to such general matters as the time and place of hearing, and such specific matters as the general rules as to fair procedures that are to be applied as to the investigation and adjudication of all cases.

### **The Rules**

66. Chapter 2 of VIIB of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, provides for the creation of a Financial Services Ombudsman Council. Among the functions of the council set out in s. 57 BD are "to prescribe guidelines under which the Financial Services Ombudsman is to operate". It is submitted that there are no rules dealing with stockbrokers whereby the Financial Services Ombudsman is regulated by the Financial Services Ombudsman Council in the conduct of hearings. It is further submitted that these rules are necessary under the Act. Section 57 BF provides:-

"(1) The Council shall make regulations for or with respect to matters-

(a) that are, by this Part, required or permitted to be prescribed, or

(b) that are necessary or convenient to be prescribed for the purpose of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred, on that Ombudsman by this Part.

(2) In particular, a regulation under subsection (1) may do any of the following:

(a) prescribe matters that the Financial Services Ombudsman must take into account when investigating or adjudicating a complaint;

(b) prescribe procedures to be followed in processing a complaint;

(c) specify circumstances in which the Financial Services Ombudsman can dismiss a complaint without considering its merits;

(d) specify the place or places at which the Financial Services Ombudsman is required to make available copies of any report that that Ombudsman is, by a provision of this Part, required to prepare or publish.

(3) Regulations under this section can be made either on the initiative of the Council or at the request of the Financial Services Ombudsman, but they do not take effect until the Minister has consented to them in writing.

(4) As soon as practicable after the Minister has consented to regulations in accordance with subsection (3), the Council shall arrange to lay them before each House of the Oireachtas.

(5) A House of the Oireachtas may pass a resolution annulling regulations laid before the House in accordance with subsection (4), but only within 21 sitting days after they are laid."

67. Here it is argued that if regulations are necessary then the Ombudsman is to have regard to the terms of reference of the Insurance Ombudsman of Ireland, in dealing with insurance matters and to the terms of reference relevant to banks and building societies.

68. Under section 57 BF the Financial Services Ombudsman Council is obliged to make regulations where they are required under the Act. It is not necessary, under the Act, in my view, to make regulations providing for the conduct of a hearing. In my view s. 57 BF is an empowering section. This is made clear by the juxtaposition of the words in s. 57 BF(1)(a) of regulations being "required or permitted to be prescribed" under the Act. This is further made clear by s. 57 BF (1) giving a choice to the council through the use of the word "or" before allowing them to make such regulations where they are "necessary or convenient...for the purposes of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred..." on him. Section 57 BF (2) makes it clear that a regulation may prescribe what procedures are to be followed when processing a complaint. The word "may" can mean "must" where an Act sets out a series of preconditions the fulfilment of which entitles, as a matter of statutory interpretation, a party to a benefit or remedy under legislation. The word "may" can mean "must", additionally, when entitlement is set up by statute and where to fail to interpret the word as imperative would mean that the legislative purpose underlying the statute is set at naught; see the judgment of Barron J. in *University of Limerick v. Ryan & Others* (Unreported, High Court, 21st February, 1999).

69. Were there be regulations here, they might provide for time limits, which would be useful, or they might provide for a brief written explanation of the rules of constitutional justice as the Ombudsman intends to interpret them. Since, however, the case law makes it plain that the rules of constitutional justice must be interpreted from case to case depending upon what is necessary to achieve a

fair result, such an exercise would not be necessary. It is not therefore necessary for there to be rules. Such rules as have been identified have been proved positively, by their terms to be of no assistance in the resolution of the issues that have been raised in this case.

### **Extent of Powers**

70. I appreciate that in this judgment I am obliged by the relevant case law to require the Financial Services Ombudsman to do a number of things which he has managed to avoid in the course of the four years in which he has held office. I am aware that by requiring an oral hearing on a limited issue, by requiring the exchange of documents that may impact on the ultimate adjudication and by requiring a mutuality of discovery where same is necessary that this judgment may be taken as requiring the Ombudsman to engage in a tribunal-like procedure. It is clear that the Financial Services Ombudsman is not to be hampered with the procedures that have been provided for in a number of cases in respect of tribunals of inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921, as amended. To force the Ombudsman to act in that way would be to set at nought the clear legislative provisions which make a requirement of both expedition and informality in the conduct of his affairs. In some instances, where a minor measure under the Act might reasonably be thought to be the consequence of an adverse finding for the financial service provider, less stringent procedures than an oral hearing or an oral hearing with cross-examination might be appropriate. But here, the finding that was actually made by the Financial Services Ombudsman mandates the fullest procedure that is consistent with the legislative requirement of accessibility, informality and expedition. As to procedures, I would suggest the following:-

- (1) Where a complaint is made the parties should be invited to consider mediation as a first step,
- (2) Where mediation is deemed to be futile, or where the parties have abandoned it, the Ombudsman should proceed to investigation
- (3) The text of any complaint together with supporting documentation, should be provided by the Financial Services Ombudsman to the financial service provider against whom the complaint is made.
- (4) Arising from the complaint the Financial Services Ombudsman may wish to ask the financial services provider a number of questions. This is the procedure that has been adopted to date and it is a good procedure. I would not interfere with it.
- (5) In providing documentation to the financial service provider and in asking questions, the Financial Services Ombudsman should invite the financial service provider to furnish any material which they see as being desirable to put before the Financial Services Ombudsman with a view to answering the complaint.
- (6) That material should be furnished to the complainant. The complainant should be given a chance to reply, in a factual sense, if they wish.
- (7) It should be made clear that if there is to be any new material then the financial service provider is entitled to see and to reply to it.
- (8) This process must, however, be brought to a close in early course. The experience of the courts has been that when affidavits are exchanged endlessly they become more and more argumentative and less and less concerned with fact. This is undesirable.
- (9) The Financial Services Ombudsman should then review the papers and decide whether any form of oral hearing is necessary. An oral hearing is only required where there is an issue of fact which cannot be fairly resolved without hearing the parties.
- (10) If an oral hearing is necessary in relation to any particular point then only those witnesses who need to be heard should be called to be heard. If cross-examination is necessary in addition, this should be as informal as possible. This case provides a good example of that process. Only the members of J. & E. Davy who had face to face dealings with, as opposed to providing documents to, Enfield Credit Union need to be heard and cross-examined, if Enfield Credit Union wish to cross-examine them. Only those members of Enfield Credit Union, who had face to face dealing with J. & E. Davy need to be called, as to their understanding, and be cross-examined as to their understanding, of what explanation was given and what advice was proffered by J. & E. Davy concerning perpetual bonds. If, in a rare case, the Financial Services Ombudsman bases his factual decision on expert opinion as to the likelihood of any situation existing in fact, it may be necessary to have a similar hearing concerning experts.
- (11) The process of examination and cross-examination should not be allowed to get out of control. In recent times, the Commercial Court has adopted a procedure of often taking the witness statement of a party as evidence in chief and of proceeding directly to cross-examination. It may be necessary in some few instances to allow the party presenting the witness for cross-examination to ask some additional questions by way of clarification. Those cross-examining can be expected to be concise, to be polite and to be professionally efficient. Cross-examination may be curtailed by reason of prolixity; it may be corrected where it oversteps the mark of a good advocate in terms of politeness and instead becomes rude; it may be restricted on matters of credit to those issues which bear a real relationship to the matter in issue; and it should be controlled so that it assists in the exercise of finding the truth.
- (12) It might be that at the end of such hearing, if there is an oral hearing, the Financial Services Ombudsman, in the presence of both parties, might invite them to make oral submissions. A reasonable, but not an unlimited, time should be allowed. Where all submissions are made then, obviously, each side hears them. Where written submissions are preferred, or are sought in addition to brief oral submissions, it is not necessary that these be exchanged between the parties. Rather, the requirement of even-handedness demands that each side be given the same opportunity.

### **Statutory Reasons**

71. Under s. 57CI (3), the Financial Services Ombudsman is obliged to give reasons for any findings. Such findings can be concise. If irrelevant grounds are raised in the course of the hearing, then the reasoning of the Financial Services Ombudsman need not deal with these. The important point is that reasons should be given in terms of every significant decision whereby he makes an adjudication. In *International Fishing Vessels Ltd v. Minister for Marine*, [1989] I.R. 149, the applicant was refused a fisheries licence through being furnished with a letter that simply turned down his application. On judicial review, the High Court held that he was entitled to reasons

because he could, by improving his equipment, or by applying in good faith on a different basis on a subsequent occasion, later establish an entitlement to a licence. In the same way, it seems to me, that in making adjudication under the Act, the Financial Services Ombudsman must have regard to s. 57CL. In making reference to "a finding of the Financial Services Ombudsman", and providing for a right of appeal to the High Court in the event that there is dissatisfaction with that finding, on the part of the complainant or the financial service provider, the Financial Services Ombudsman is, it seems to me, required to stipulate what parts of s. 57CI (2) constitutes his finding, or his findings.

#### **Result**

72. For the reasons set out in this judgment, therefore, I am quashing by order of *certiorari* the decision of the Financial Services Ombudsman made on the 21st January, 2008 and remitting the matter to him for the purposes of the complaint of Enfield Credit Union again being investigated and adjudicated upon.