THE HIGH COURT

Record No. 2013 19 MCA

IN THE MATTER OF THE CENTRAL BANK ACT 1942 (AS AMENDED) AND IN THE MATTER OF PART VIIB THEREOF AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57CL

BETWEEN/

MARTIN O'BRIEN

Appellant

-and-

THE FINANCIAL SERVICES OMBUDSMAN

Respondent

-and-

NEW IRELAND ASSURANCE COMPANY PLC TRADING AS BANK OF IRELAND LIFE

Notice Party

Judgment of Ms. Justice Iseult O'Malley delivered the 28th February, 2014

Introduction

1. This is an appeal pursuant to the provisions of s.57CL of the Central Bank Act, 1942 as amended, against a finding of the respondent on foot of a complaint by the appellant against the notice party (hereafter "the company"). The complaint arose from an investment of €45,000 in a property fund by the appellant in 2006, made on the advice of the company. At the time of consideration of the

complaint by the respondent, in 2012, the investment had declined to a value of approximately €29,000. The respondent found the complaint to be partially substantiated and directed the company to pay compensation in the sum of €5,000. In making his complaint the appellant had sought the return of his lump sum in its entirety, compensation for distress and legal costs.

2. The issues in the appeal concern the decision of the respondent not to hold an oral hearing; the drawing of inferences from a document not relied upon by either party which, according to the appellant but unbeknownst to the respondent, was inaccurate, and the method of assessment of compensation.

The complaint

3. The complaint was made on behalf of the appellant by his solicitors on the 25th April, 2012. By way of background it was explained that he was "a man with a simple life-style who [was] in no way familiar with financial matters". He was in the habit of simply lodging his money in a current account. His sister attended the bank on a weekly basis to make lodgements and otherwise look after his banking affairs. At the material time, in 2006, there was some €68,000 in the account.

4. In July, 2006 a bank teller remarked to Ms. O'Brien that the money was not earning interest in the current account and suggested a meeting with Mr. Sean Walsh, the insurance and investments manager of the branch. The appellant and his sister duly met with Mr. Walsh on the 13th July, 2006. It was claimed on behalf of the appellant that at this meeting Mr. Walsh had access to the details of his bank account and carried out a review of his financial affairs.

5. It was a key part of the appellant's case that at the meeting he and his sister stressed that any investment to be made on his behalf must be safe and secure and that he was not a gambling man. According to them, Mr. Walsh stated that he understood this and that it would not be an issue. The appellant says that he expressed an interest in investing the sum of €25,000 but was persuaded to raise this to €45,000. The appellant said that he believed that this sum would be split between two funds on a €40,000/€5,000 basis, but in the event the entire sum was put into one fund.

6. It was stated that at the end of the meeting the appellant and his sister understood that the worst case scenario would be that there would be no gain on the investment but they were confident that none of the sum invested could be lost.

7. Over the following years the appellant received correspondence relating to the investment which indicated that its value was falling. In July, 2010 he and his sister met again with Mr. Walsh to discuss the situation. The appellant said that he had only made the investment on the basis of Mr. Walsh's assurances that the capital amount was safe.

8. After this meeting the appellant wrote a formal letter of complaint to the bank. It was stated that the responses received were unsatisfactory and the complaint to the respondent (in April 2012) was therefore necessary.

9. The complaint claimed that the company had erred in selling the product in question to the appellant in two respects. Firstly, it had carried out an incorrect analysis of the appellant's attitude to risk in a manner that contravened the Interim Code of Practice for Insurance Undertakings that was in place at the relevant time. Clause 5.2 of the Interim Code provided that

> *"before a non-life assurance undertaking enters into a relationship with a client, it must establish relevant facts to determine the client's requirements so that a product appropriate to the client's needs is presented for the client's consideration."*

10. The Policy Application form signed by the appellant had a section dealing with "Attitude to Risk" which contained the statement

> *"I confirm that my chosen attitude to investment risk is 100% Active Growth Investor as stated in my financial review."*

The appellant's solicitor argued that a layperson would have no idea what this meant unless the significance of the term was explained. It was also contended that this characterisation of the appellant represented a fundamental mistake on the part of the company, as his history, his obvious lack of "financial know-how" and his reluctance to invest in any product wherein his investment could drop in value all demonstrated that he was completely risk-averse.

11. The second error alleged was the failure to sell to the appellant a guaranteed product. The appellant's case was that only capital guaranteed products had been discussed at the meeting with Mr. Walsh and he considered that he had been sold such a product. It was noted that he had signed a document headed "Understanding Your Investment", paragraph 6 of which read as follows:-

> *"Your original investment is not guaranteed and you may get back less than you invested. If you have chosen to invest in a guaranteed option, provided no encashment, income payment or fund switches take place before the 5th anniversary of your policy Bank of Ireland Life guarantees that the value payable on full encashment on that date will be at least equal to the initial amount of your investment."*

12. It was argued that this paragraph suggested that a guaranteed option was available and that it was consistent with the appellant's understanding that that was what he had.

13. On receipt of the complaint the respondent indicated to the appellant's solicitor that it was necessary to go through the company's internal complaints procedures and obtain a "final response" before the respondent's office could

enter into consideration of the matter. This process was followed but as it did not produce a satisfactory result from the point of view of the appellant, and as the company did not take up an offer of mediation, the respondent embarked on a formal investigation. The company was sent a summary of the complaint and a list of questions to be answered and documentation to be forwarded.

The company's response

14. In its response the company made the case that the policy was sold to the appellant in good faith. It was not accepted that it had been mis-sold or that the appellant had believed that it was capital guaranteed.

15. It was agreed that the appellant had met with Mr. Walsh on the 13th July, 2006 and that the latter had carried out a Personal Financial Review. This, it was stated, had been based on information given by the appellant and it was denied that Mr. Walsh had access to the bank account details. In answer to a specific question from the respondent on this issue, the company stressed that Bank of Ireland Life was a separate and distinct entity from Bank of Ireland and that Mr. Walsh, as an Insurance and Investment Advisor, did not have access to the appellant's banking records. This was confirmed by Mr. Walsh in an e-mail dated the 12th October, 2012 in which he stated that he had no such access and that all information had come from the client and his sister. It was also stated by Mr. Walsh that he was certain that he did not say that the capital was guaranteed.

16. The Review indicated that the appellant had €76,000 in "investments and cash" and of this €63,000 was said to have been available for investment. The appellant was recorded as having decided to invest €45,000 and to keep €18,000 on deposit for emergencies.

17. It should be noted here that the review indicated that the appellant had at the time €8,000 in Long Term investments. The appellant did not comment on this in his complaint and the company did not specifically mention in its response. In this appeal the appellant has said that there was no such investment and that this was an error in the bank records.

18. It was stated that Mr. Walsh, having conducted the Review, took the appellant through the company's Lump Sum Investment Advice process, which involved:

    a) Defining and prioritising investment goals – security, access and growth
    b) Explaining the asset choice
    c) Explaining the different investment management styles of the managers of the funds available
    d) Determining "*whether the customer is totally risk averse or is prepared to accept an element of risk in order to categorise their risk category whether that be as a Capital Secure Investor, a Growth Investor, an Active Growth Investor or a Geared Investor*" (Emphasis added.)

19. The choice of a Guaranteed Fund was open to customers who required the maturity value of their investment to be not less than the original investment. However, in this instance, it was said, the appellant's attitude to risk required the allocation of 100% of his investment on an Active Growth Investor basis as opposed to a Capital Secure Investor basis.

20. The report provided to the appellant on foot of the personal financial review described the characteristics of an Active Growth Investor as including the following:

> *"You understand that the value of your investment may fluctuate and at times may be worth considerably less than your original investment. If your investment does not perform as intended you may not receive back all of your capital."*

21. According to the company, the next step was to provide the appellant with the Quotation document. It was asserted that this addressed the salient features of the policy in accordance with the Life Assurance Disclosure Regulations, 2001. A quotation would only describe a policy as guaranteed if the customer had already chosen a Guaranteed Fund as a Capital Secure Investor. In this case, the quotation made no reference to a guarantee in respect of the original capital and specifically warned that returns were not guaranteed.

22. The company sent the appellant a "Reasons Why" letter, explaining the reason for the recommendation for the particular policy, on the 18th July, 2006. The letter stated that unit prices could fall as well as rise and that "your investment is not guaranteed". The brochures relating to Smart Funds policies contained similar warnings. The appellant was also informed about the "cooling off" period. This letter was signed by the appellant, confirming that he had read it and wished to take out the policy recommended.

23. The company also referred to notes made by Mr. Walsh after the meeting which recorded, *inter alia*, the view that

> *[the appellant] feels stocks and shares are too volatile for him and likes the idea of a shared ownership of quality retail and commercial properties. He is aware that his capital is not guaranteed and 5/7 year term is not an issue. [He] is an active growth investor and wants to outperform deposits and inflation. I recommended the property fund and [he] agreed to invest 45K."*

24. It was denied that the appellant had been persuaded to invest €45,000 rather than €25,000, or that it had been proposed that the €45,000 be invested in two separate tranches.

25. It was further noted by the company that over the following years the appellant received correspondence at regular intervals enclosing statements relating to his investment. In 2007 it appreciated in value. By November, 2008 it had fallen to

€33,760. In August, 2009 it was €26,712. In June, 2010 it was up slightly to €28,088.50. Each statement carried the warning

> *"Unit prices may fall as well as rise and you may get back less than you originally invested."*

26. In the circumstances the company refused to accept the assertion that the appellant was under the impression that he had invested in a Guaranteed Fund or that the policy had been mis-sold to him.

The respondent's finding

27. On the 10th October, 2012 the respondent wrote to the appellant's solicitor, enclosing a copy of the company's response to the complaint. The letter stipulated then stipulated as follows:

> *"If you wish to make a submission to this office in respect of the contents of these documents, then you must do so in writing or by email within a period of 10 working days from today. It is not necessary to repeat details of the complaint which you have previously sent to this office but, if you wish, you can submit any additional information which arises from your consideration of the attached documents. Please note that if you make a submission, details will be furnished to [the company] and [the company] will be given an opportunity to respond.*
>
> *If we fail to hear from you within a period of 10 working days from today, the matter will proceed to be adjudicated upon and a Finding will issue from this office in due course."*

28. The appellant's solicitor did not respond to this letter.

29. The respondent issued his finding on the 9th January, 2013.

30. In the finding the respondent refers to the fact that questions had been put to and answers received from the company. The responses and the schedule of evidence were sent to the appellant. An exchange of submissions had taken place. He then goes on: -

> *"I am very conscious of both parties' arguments as to the sale and the nature of meeting/s, discussions, requests and assurances at the time. The Complainant has set out his account of the matter. The Company has sought to refute same and put forward submissions from Mr. Walsh.*
>
> *In relation to the above, in some cases I consider holding an Oral Hearing in order to obtain evidence. It is acknowledged that the Ombudsman has a broad discretion as to whether or not to hold an Oral Hearing in considering a complaint. I refer in particular to the High Court judgment in Caffrey v FSO (High Court, 12 July 2011, Hedigan J.). Having considered the matter at length, I am satisfied that an Oral Hearing would not lend*

anything further to this investigation. Neither party has requested an Oral Hearing. I also refer to the entirety of the documentation (including that issued at sale of the investment), the aforementioned submissions by both parties and time that elapsed since the conduct [complained of] in this case."

31. The respondent made substantive findings as follows:

- The claim that the investment was to have been split €40,000/€5,000 was not substantiated. The signed documentation made it clear that the appellant was purchasing a €45,000 product, invested 100% in a single fund. It was open to him to raise any concerns about this during the "cooling off" period.

- The allegation that the appellant had intended to invest €25,000 but was persuaded to invest €45,000 was not a matter warranting compensation or further direction. The documentation was clear as to the amount and if he had concerns about the total he could, again, have used the "cooling off" period.

- There was merit in the company's argument that it was a separate entity from Bank of Ireland and that Mr. Walsh did not have access to the appellant's bank records. It was therefore reasonable to conclude that the personal and financial information came from the appellant at the review meeting. It was open to the appellant to refuse to attend such a meeting and to decline to accept products put forward at such meetings. On balance, there was no evidence of duress.

- The company's cover letter for the August 2006 documentation, which stated "Your capital and return are not guaranteed", was not unclear.

- The entirety of the documentation put the appellant on notice of risk attaching to the capital and that the product was not capital secure.

32. There is then a statement which has attracted criticism from the appellant:

"I also note that while the Complainant did have a considerable sum in his current account the Review also recorded €8,000 in some form of "Investments – Long Term".

33. In the circumstances the respondent felt that, on balance, the conduct of the company did not warrant the level of compensation sought by the appellant. He reached this conclusion on the basis that he could not ignore

"the entirety of the documentation, the signed and issued documents and Mr. Walsh's account of the matter."

34. However, the respondent did consider that there was some merit in the complaint, particularly in relation to the assessment of the appellant's attitude to

risk. The product concerned represented a "considerable shift in the risk profile", since it involved moving funds from a current account to an investment carrying significant risk. Even allowing for the fact that the appellant was retaining the sum of €18,000 "for emergencies", and noting the reference to a long-term investment of €8,000, the amount of money in the account did indicate "at least some level of caution and risk-aversion". In those circumstances, there was insufficient explanation in the documentation as to how the company came to classify him as an Active Growth Investor. The respondent was "somewhat persuaded" by the argument that this phrase was not self-explanatory, carrying as it did positive connotations with little reference to risk. It was also considered that "at least some level of confusion about risk could be created from inserting the sentence *'If you have chosen to invest in a Guaranteed option...'* after a sentence which stated *'Your original investment is not guaranteed...'*".

35. Furthermore, the documentation did not provide sufficient information to show what other options were discussed with the appellant.

36. The respondent did not, however, doubt that the product was sold in good faith.

37. In conclusion, the respondent reiterated that there were sufficient grounds to partly substantiate the complaint, but insufficient grounds for the extent of rectification sought. He noted that he had not been told whether or not the appellant had cashed in the investment, and thus did not know whether the losses, if any, had crystallised. He assessed compensation in the sum of €5,000.

The appeal

38. The appellant initiated this appeal on the 31st January, 2013. In summary, his main complaint relates to the alleged failure to hold an oral hearing in circumstances where there was a "fundamental conflict of fact" as to whether he had been given an assurance by Mr. Walsh that the capital sum was guaranteed. It is also contended that in the absence of such a hearing, the respondent fell into other errors including the finding that the appellant had invested another €8,000 in other investments. It is also argued that the award of €5,000 "bears no logical relationship" to the finding that the bank had not either properly explained the level of risk or properly assessed the link between the appellant's previous history and the product sold.

39. The appellant is adamant that if he had been aware of the risk he would not have made the investment and would not have suffered the resulting loss. The compensation awarded should, he says, have reflected this fact.

40. The respondent stands over his decision not to hold an oral hearing and his assessment of compensation for the reasons set out in his finding. He makes the point that the appellant, who was at all times legally represented, did not make any suggestion that a hearing was necessary.

41. It is further averred that the reference to the €8,000 investment came from a document included by the appellant with his original complaint. At no stage was

it indicated to the respondent that the reference was inaccurate, and the respondent cannot at this stage be criticised for citing it in his finding.

42. In a replying affidavit, the appellant says that he was never informed that it was necessary to request an oral hearing or that the respondent was going to adjudicate on the matter without one.

43. As far as the €8,000 is concerned, the appellant says that since neither he nor the company referred to it in their submissions, the respondent should not have placed reliance upon it without making further inquiries as to its accuracy.

Submissions

44. On behalf of the appellant, Mr. Dowling BL says that there was a clear and material conflict of fact as to what was said at the meeting on the 13th July, 2006; that resolution of the conflict was central to the issues between the parties and that it could only be resolved by an oral hearing. He relies upon the judgments in *J&E Davy (T/a Davy) v. Financial Services Ombudsman* [2010] 3 I.R. 324, *Murphy v. Financial Services Ombudsman* [2012] IEHC 92, *Hyde v. Financial Services Ombudsman* [2011] IEHC 422 and *Lyons v. Financial Services Ombudsman* [2011] IEHC 454 for the proposition that the respondent is obliged to hold an oral hearing where this is necessary and that the power to do so is not dependent upon a request being made by either party to the complaint.

45. Mr. Dowling contrasts the facts of this case with those in *Caffrey v. Financial Services Ombudsman* [2011] IEHC 285 and *Carr v. Financial Services Ombudsman* [2013] IEHC 182, both cases relied upon by the respondent, in which it was held that a hearing was not necessary. In *Caffrey*, the disputed conversation had taken place five years earlier and the parties were not considered to have been in a position to give an accurate description of it. In *Carr*, this court held that the issue for determination by the respondent was, on the facts of that case, to be decided on the correspondence. In the instant case, it is argued, there is no suggestion of any lack of recollection.

46. In this case, it was submitted, the respondent should have told the parties that he was intending to proceed to a decision. Not having done so, he cannot now rely upon a failure by the parties to make a request.

47. It is also contended that there was a failure by the respondent to draw any link between the conduct complained of and the proper level of compensation payable as a result. This is described as "a significant and serious error". It is linked to the oral hearing issue in that, it is argued, a proper analysis could not take place in the absence of a hearing. In the event, the award of €5,000 bore no relationship to the loss suffered by the appellant.

48. It was accepted by Mr. Dowling that the appellant did not give the respondent any statement or figures in relation to loss. However, the submission was made that the latter should have asked for such material.

49. On the issue relating to the necessity of an oral hearing Mr. Paul Anthony McDermott B.L, on behalf of the respondent, cites a series of cases in which complaints about a failure to hold a hearing were rejected – *Molloy v. Financial Services Ombudsman* (unreported, MacMenamin J., 15th April 2011), *Cagney v. Financial Services Ombudsman* (unreported, Hedigan J., 25th February 2011), *Star Homes (Middleton) Ltd. v. The Pensions Ombudsman* [2010] IEHC 463 and *Caffrey* and *Carr*, cited above. Reference is also made to the judgment of the European Court of Human Rights in *Heather Moor and Edgecomb Ltd v. United Kingdom* (2011) 53 EHRR SE18.

50. Mr. McDermott makes the case that the equivalent office in the UK holds very few oral hearings. It is contended that if the Irish courts take the view that the respondent should hold such hearings in a large number of cases

> *"he will end up operating in a manner that is far removed from how ombudsman schemes normally work."*

51. On the facts of the instant case, it was submitted that this was not a case where any person was necessarily disbelieved. Mr. McDermott points to the lapse in time before the complaint was made – from July 2006 to April 2012 – as one of the factors to be taken into consideration in determining the desirability of an oral hearing. He contrasts this with the fact that the documentation in the case was signed, after the mandatory cooling-off period but close to the relevant time. There was no evidence that the appellant had not understood the purpose of the cooling off period.

52. It is argued that the participants at the meeting may honestly hold different opinions as to what was said, but that the respondent ultimately decided the case on the documents. Reference is made to the judgment of this court in *Carr* as an example of a case where the issues were appropriately determined on the correspondence. The respondent was entitled, in the circumstances, to take the appellant's signature on the documentation as meaning that he had read and understood it and there was no express assertion that he did not. Overall, the documentation made it clear that there was no guarantee.

53. It was pointed out that the respondent had sent to the appellant the response of the company. Having had an opportunity to consider that response and the documents associated with it, there had been no further submissions and no request for an oral hearing by the appellant's solicitor. It must have been obvious that the respondent intended to proceed to adjudication if the appellant did not request otherwise.

54. It was further submitted that the respondent was entitled to rely on the reference to the €8,000 in circumstances where no-one had suggested to him that it was an error.

55. On the issue of compensation, it was submitted that the respondent had never been told whether the loss had crystallised or not. This appellant's investment in property had in fact been performing better than many such investments at the

time and it was a matter for himself to decide whether to leave his money where it was or crystallise any loss by encashment. The respondent was not, therefore, attempting to measure loss. It was submitted that in assessing compensation under the Act, the respondent does not apply the same criteria as to loss and causation as would a court but rather that he has a discretion to select the most appropriate remedy in the circumstances as he sees them. In this case, he did not accept the contention that the investment should never have been made at all but awarded a sum of compensation to reflect the fact that the documentation could have been clearer and did not show properly how the appellant's attitude to risk had been categorised.

56. Reliance was place upon the judgments of the High Court in *Square Capital v Financial Services Ombudsman* [2010] 2 I.R. 514, *De Paor v Financial Services Ombudsman* [2011] IEHC 483 and *Walsh v Financial Services Ombudsman* (unreported, Hedigan J., 27th June 2012) for the proposition that the Ombudsman's statutory powers permit him to select remedies not available to a court (such as directing a financial institution to take specified measures) and, by the same token, to award compensation on criteria other than those utilised in a court for the measuring of damages.

Discussion and conclusions

57. The starting point in appeals of this nature is to recall the scope of the jurisdiction being exercised by this court as set out in *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323 and consistently followed since. To succeed in an appeal, the appellant

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

58. As described by MacMenamin J. in *Hayes v Financial Services Ombudsman* (unreported, High Court, 3rd November, 2008)

> *"What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issues.*
>
> *The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria that would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was*

not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57 CL(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices into the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

59. The point, which by now does not really require repetition, is that the Financial Services Ombudsman is mandated to operate in a different way to courts (in an informal way, without regard to technicality or form); to pursue his investigations in a different manner (with, for example, a discretion as to the holding of oral hearings); to make findings not open to the courts (such as findings of impropriety or lack of clarity not amounting to breaches of legal rights) and to fashion remedies not available in court (such as directing a financial services provider to change its practice, or to pay compensation not related to loss). He is not obliged to provide the type of analysis expected in court, but merely to give the broad gist of his reasons.

60. This is not to suggest that the Ombudsman is entirely free from the constraints of the principles of fair procedures but simply to point out that what is offered by his service is not to be seen as the administration of justice but, as MacMenamin J. said an informal, expeditious and independent mechanism for the resolution of complaints.

61. In the instant case the appellant has argued that there was a material conflict as to the account of what transpired at the meeting, that this could only be resolved in an oral hearing and that therefore the respondent was obliged to hold such a hearing without being requested so to do. It has also been contended that the respondent proceeded to adjudication without informing the parties that it was not his intention to hold a hearing or that it was incumbent on them to request one.

62. Taking the latter point first, it is my view that the letter to the appellant's solicitor quoted at paragraph 27 above could hardly be clearer – unless further submissions were to be made, the respondent was proceeding to adjudication. No submission was made, by way of either comment on or answer to the company's representations. No suggestion was made as to the desirability of a hearing. While it is true that there will be cases where the necessity to have oral evidence will render unnecessary a request in that regard, the respondent is in my view entitled to have regard to the fact that a legally represented complainant has not sought one. I do not consider that the failure of the respondent to tell a legal representative that he or she should request an oral hearing if one is thought necessary, and that otherwise the respondent would move to adjudication, can possibly amount to an error capable of vitiating the decision.

63. I consider that somewhat similar considerations apply in relation to the alleged error in the bank records as to the long-term investment of €8,000. The appellant and his representative had the opportunity to point out that this was not accepted. It cannot be the case that this respondent, or indeed any similarly placed decision-maker, is under an obligation to check with the parties, particularly if legally represented, as to each piece of relevant material in circumstances where no suggestion has been made as to inaccuracy. To hold otherwise would make a process, intended to be expeditious, impossibly cumbersome.

64. The question whether an oral hearing should be held in any particular case is generally likely to depend on the materiality of any conflict of evidence to the decision that the respondent has to make. In this case, the appellant has at all times made the case that he would not have made the investment but for the assurances he says were given to him at the meeting. That is the basis for the complaint and the basis for seeking the return of this money.

65. It is clear from the passages quoted at paragraph 30 above that the respondent was fully aware of the conflict as to what had happened at the meeting and gave consideration to the exercise of his discretion to hold a hearing. He decided that to do so would not be likely to assist the investigation. This was in part because neither party had requested one and in part because of the lapse in time. However, importantly, it was also because he had had regard to the documentation in its entirety. His conclusion that he could not simply disregard the documents signed by the appellant after the meeting demonstrates that, for him, what was said at the meeting was not going to be the decisive issue. In other words, because of the content of those documents, he was not going to accept that the appellant did not appreciate *when he signed them* that there was an element of risk. Had an oral hearing been held, it would have been entirely open to the respondent to reach this conclusion even if he fully accepted the appellant's evidence as to the meeting. That is a matter within his jurisdiction. In those circumstances he was entitled to exercise his discretion not to hold an oral hearing.

66. Finally, there is the issue relating to the assessment of compensation. The appellant has argued that the figure determined by the respondent does not bear a logical relationship to the loss suffered by him.

67. It seems to me that this argument to some extent misses the point of the respondent's finding. He was not awarding compensation for loss. There are two reasons for this, one of which is the fact that no crystallised statement of loss was put before him. The other is that, as he made clear in his decision, he did not accept that any loss sustained was necessarily due to improper conduct on the part of the company. What he did find was that the documentation lacked sufficient clarity as to the process by which the appellant came to be classified as an Active Growth Investor, and what other options, if any, had been discussed with him. It was for these reasons that he considered an award of compensation to be appropriate. Again, this is a conclusion that would not be open to a court

and is not amenable to comparison with the manner in which a court would assess damages.

68. In the circumstances I find that the appellant has not established that the findings of the respondent were vitiated by serious or significant error.