THE HIGH COURT

[2014 No. 69 MCA.]

IN THE MATTER OF AN APPEAL PURSUANT TO PART VII(B) OF THE CENTRAL BANK ACT 1942 AND CHAPTER 6 AND SECTION 57CL THEREFORE (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN

ANDREW LAW AND JOANNA LAW

APPELLANTS

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

NEW IRELAND ASSURANCE COMPANY T/D BANK OF IRELAND LIFE

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 21st day of January, 2015

1. This is an appeal from a decision of the Financial Services Ombudsman (the "Ombudsman") given on 21st January, 2014, in which he rejected the claim of the appellants that they had been mis-sold a financial product by the notice party. The plaintiffs are a married couple, and at the date of the investment they were aged 74 and 68. They are small time farmers who live a modest life, indeed a life which was described by their counsel as a simple life in which they sought to "escape the rat race". They enjoy the address of Shankill Castle, Co. Dublin, but this in reality is a ramshackle castle building and they live in a small dwelling at the side of the castle which is in relatively poor condition. Their sole source of income was, until the matters which gave rise to the within proceedings, a rental income from a modest

office building in Dublin City Centre, and a small income from their farming activity of growing apples and saving hay.

2. The appellants had found the management of the rental office building somewhat troublesome and accordingly they sold the premises and lodged the sum of €1.1m in a Bank of Ireland deposit account in Bray, Co. Wicklow. The appellants had banked in this branch for decades and they had an identified relationship manager, one Mary McNulty, who assisted them with their day to day and long term banking needs.

3. Apart from the office building, the appellants have made no other investments and Mr. Law's affidavit suggested that he and his wife were particularly risk adverse because his parents had lost money in the Great Depression.

4. In October 2007, and arising from what they say was persistent and significant pressure from their bank, the appellants invested a sum of €800,000 in a investment product fund called the Evergreen Fund, sold by the bank's tied agent, the notice party. The fund did not prosper and the appellants encashed their investment in October 2010 and in the process lost the sum of €192,000. It is in respect of that loss, and the purchase by them of what they say was a wholly unsuitable product for their needs, and which did not reflect their express instructions, that they brought the complaint to the Ombudsman pursuant to the statutory scheme. They now bring this appeal from his determination under the provisions of s. 57CI of the Central Bank Act 1942 (the "Act"), as inserted by s. 16 of the Central Bank and Financial Services Authority Act 2004.

Statutory Scheme

5. Section 57CI of the Act provides for the bringing of complaints before the respondent. It is common case that the jurisdiction of the Ombudsman permits him to

go outside what might be described as the ordinary common law principles of contract law or the law of negligence, and he is entitled to find a claim substantiated or partly substantiated, *inter alia*, if he finds that the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory. In addition, he has a power to find a complaint to be substantiated or partly substantiated, if he finds that the application of a practice, law, or regulatory standard was unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant, or if the conduct complained was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration. He also has a power to look to the conduct complained of and to consider if it was "otherwise improper".

6. The Ombudsman is required under the statutory regime to give reasons for his finding and any directions given following from and as a result of the finding. The range of remedies available to the Ombudsman includes the power to direct a financial service provider to review, rectify, mitigate or change the conduct, to provide reasons, change a practice or pay an amount of compensation to a complainant.

7. It is not doubted that the purpose of the establishment of the statutory complaints procedure was to afford complainants an informal, expeditious and independent mechanism for the resolution of complaints against a financial service or product provider, and that the complaint does not have to be confined to matters which would fall within the realm of contract law, the law of negligence or other defined legal rights or principles.

8. Chapter 6 of Part VIIB of the Act inserts a new s. 57CL (1) and provides that any person dissatisfied with the findings of the Ombudsman may appeal to the

High Court against the finding. The High Court is given wide powers to make such order as it thinks appropriate in the light of its determination on appeal.

The test on appeal

9. Counsel agreed that the applicable test for an appeal to the High Court is that set out by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323:-

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

10. This statement identifies a number of matters familiar in the realm of judicial review, namely that the court will give due deference to the specialist expertise of the Ombudsman, that the adjudicative process as a whole must be considered, and that a decision will be vitiated where there was a serious and significant error or a series of errors. It has been accepted and identified in subsequent case law that the appeal to the High Court, not being a *de novo* hearing, falls somewhere between a judicial review and full appeal, the test being one which bears many of the features of a judicial review, but not all of them. It is accepted by counsel for both parties that the exercise in which the High Court engages is far closer to judicial review than to appeal, but that an error, even one within jurisdiction, provided it is a significant and serious error, can vitiate a decision.

This Appeal

11. The appellants lodged a complaint with the respondent on 16th July, 2012. The respondent accepted the complaint and after an oral hearing on 7th January, 2014 issued his decision two weeks later on 21st January, 2014 in which he found the complaint to not be substantiated. The complaint, in short, was that the product was unsuitable, they were vulnerable customers and the investment was neither accurately nor comprehensively explained. The appellants have appealed to this Court on all of the findings.

12. The grounds of appeal to the High Court are set out in the grounding affidavit of the first appellant and run to nine grounds. In summary, the grounds are procedural, that the Ombudsman failed to follow the requirements of natural and constitutional justice and fair procedure in the manner in which the oral hearing was conducted; substantive, that the Ombudsman in his findings failed to properly identify the requirements and standards imposed on the notice party and the financial service provider by the Consumer Protection Code, the Financial Regulators Minimum Competence for Financial Advisors, the Life Assurance (Provision of Information) Regulation 2011 and related legal instruments. Finally, the appellants identify a number of what they describe as serious and significant errors in the decision of the Ombudsman, namely that the Ombudsman failed to make sustainable findings of fact, having regard to the evidence adduced before him, and failed in particular to find that the Evergreen Fund, a long term, unsecured, open ended medium to high risk fund, was a wholly unsuitable investment product for the appellants given their age, investment inexperience, significant health concerns, risk aversion and stated investment preferences.

13. The Ombudsman delivered a long and detailed finding on the 21st January, 2014 running to 19 pages. I will consider first the ground of appeal that he failed to afford the appellants fair procedure in the course of his investigation, and then consider the findings and his approach to the Codes.

Procedure before the Ombudsman

14. The appellants argue that they were denied fair procedures in the conduct of the inquiry, and in particular that they were denied the opportunity to fully explore through cross examination the evidence adduced on behalf of the notice party. Certain interjections and comments made by the Ombudsman during the oral hearing were noted and the Ombudsman did not permit detailed submissions of the alleged breaches of the Codes in the course of the hearing. It is argued that these failures prevented the appellants from fully detailing their complaints and denied them fair process. The appellants rely on the judgement of Hogan J in *Lyons v Financial Services Ombudsman* 2011 IEHC 454 where the court indentified the requirement of fair procedures as arising once the Ombudsman enters upon an adjudication process, upon which "*a legal Rubicon*" is crossed.

15. The respondent argues that the appellants made an informed decision to make a complaint through the procedure available under the legislation, and that this had advantages and disadvantages, the disadvantage primarily being that a full robust court process was not available. He submits that were Mr. and Mrs. Law to have commenced litigation in the courts, they would not have had the right to run the case exactly as they wished, and they would be confined to the rules of evidence, and indeed to principles of law much narrower than those articulated in the legislation and to which the Ombudsman may have regard. Counsel points out that the appellants were legally represented, and indeed represented by very competent solicitors, and by

a financial advisor. He also made the point that the Ombudsman was well familiar with the various Codes which govern financial institutions and it could not be required of him that he would recite in detail how each of them was dealt with by him in the decision making process.

16. I cannot accept the argument by the appellants that the process of the Ombudsman was flawed. The appellants were very well and comprehensively represented in the entire process, commencing with the initial form of complaint lodged on their behalf, the detailed and analytical correspondence and submissions made on their behalf by their solicitors, and I note in passing that this correspondence was neither formulaque nor overly generalised and contained very detailed and case-specific evidence and legal and factual arguments,

17. Further the appellants were ably represented by a financial advisor during the oral hearing and I accept that the Ombudsman is entitled to control and manage his own process, and that to require him to hear repetition of matters of which he has already had adequate and fulsome argument and evidence, or to require him to hear detailed submissions on the tools of his trade, the Codes and their implementation, would unduly burden him with procedures more akin to those in a High Court case. It is appropriate to look to the process as a whole, and the process differs from that before a court hearing a case in an adversarial context, in that the Ombudsman is entitled to and does regard the oral hearing a being only part of his investigation, and one which is sometimes necessary for him to determine matters of fact. It has not been shown to my satisfaction that the Ombudsman failed to accord due process and give the appellants a fair opportunity to make their case in the complaints process taken as a whole and I reject this ground of appeal.

The findings of the Ombudsman: general

18. I turn now to consider the Ombudsman's findings and to analyse these within the framework of my jurisdiction. Having regard to the jurisprudence which identifies the role of the High Court on an appeal from a decision of the Ombudsman, it seems to me convenient that I would look to the elements of the decision and analyse those in the context of each of the arguments made, rather than giving a summary of the grounds, the reasons, and the flaws identified by the appellant and the respondent.

19. The Ombudsman took the view that it was "ultimately the process, company's procedures and regulatory requirements" that were at issue before him, and in my view he was incorrect in identifying these as the issues or as the "ultimate issues". He was not confined to reviewing the process and procedures or whether there were sufficient regulatory procedures in place in New Ireland Assurance, but whether the sale process that actually occurred in this case was sufficient in all of the circumstances, whether the process and procedures were actually met, and whether the appellants had made out a case that the product bought by them was in fact unsuitable for their needs. However, notwithstanding his description of the issues, he did not I believe confine himself to matters of procedure and regulatory compliance, and did make certain findings including a finding on the substantive matter before him, namely that the product was not mis-sold.

20. There is repetition of certain matters both in the findings and analysis of the Ombudsman and in the arguments made by counsel for both parties, and some findings and argument may be relevant under a number of headings. I have endeavoured to extract the main findings and arguments as follows:

The first finding: no lack of expertise

21. The first plaintiff argues that Mr. O'Brien, a representative of the notice party, who was directly involved in selling the investment product to the appellants was not suitably qualified and that he was at best a trainee investment intermediary and that he did not have either the qualifications or the experience to advise Mr. and Mrs. Law, or to explain the product which they purchased. The Ombudsman found that the notice party had "adequately dealt" with the arguments in this regard and took particular note of the Central Bank's provision of a lead-in time for a staff member to obtain necessary qualifications. No link is made by the appellants between the alleged qualifications of Mr. O'Brien and his *de facto* performance of the duties imposed upon him, and I can find no error in the finding of the Ombudsman that Mr. O'Brien did not lack expertise, and his reasons for this finding are explained by him and reasonable.

The second finding: the suitability of the product

22. The Ombudsman found that, as a matter of fact, the financial review documentation executed as part of the investment process did not "record full details as to the complainants' assets" and in particular did not record the source of the invested funds, a deposit account with funds of €1.1m from the sale of the office investment property. The Ombudsman described himself as "cognisant of the source of funds" and that these were not the result of long term savings, and took the view for that reason that the notice party had to "put forward a very clear evidential basis linking the product sold with a clear and detailed assessment of the complainants' risk attitude and product suitability and to show that its procedures took account of the particular circumstances". He also in that context noted the regulatory requirements

including the requirements that a product be suitable and the "knowing the customer" provisions of the Consumer Protection Code.

23. Having identified an obligation on the notice party to show a "very clear evidential basis" linking the suitability of the actual product sold with the risk attitude and actual circumstances of the complainants, the Ombudsman found that the review process "clearly documented the stages of the sale and prices". He placed particular emphasis on the fact that the complainants had signed declarations attesting to the process and assessment of risk, and found that by so doing they certified their agreement with the process and that this included a confirmation of what he identified as their attitude to risk, and confirmation that they had engaged in what he described as "comprehensive advice process".

24. I consider that the Ombudsman was correct in the evidential requirement that he imposed upon the notice party, whether this came from the particular requirement of the Consumer Protection Code, or from the general regulatory schemes with regard to financial intermediaries and the sale of financial products, as being to establish a "very clear evidential basis" which linked the products sold with the requirements and risk attitude of the appellants. His imposition of a high level of compliance in this case was correctly linked to the age and financial acumen of the appellants. What is much less clear from the findings of the Ombudsman is how he came to the conclusion that the notice party had in fact met this significant hurdle, and I consider that, once the Ombudsman identified the requirement to establish a very clear link between the products sold and the needs of the appellants, the evidence should have been tested by him with the weight of that burden in mind.

25. The Ombudsman placed emphasis on the fact that the appellants had signed declarations attesting to the process and the assessment of risk, and that they had

signed a "confirmation of the information collected". Counsel for the appellants argues that the Ombudsman placed undue weight on the fact that the appellants signed the declarations on the application forms. He refers me to a judgment of Barrett J. in *AGM Londis Public Ltd. Company v Gorman's Supermarket Ltd. and Kerrigan* [2014] IEHC 95, and where he said the following at para. 14:-

> *"However, in instances where a significant degree of uncertainty arises in the dealings between parties and that uncertainty is accentuated by the actions of a stronger party, it seems consistent with basic principles of fairness and justice, with the approach implicit in Irish cases such as Regan, O'Connor* and *Western Meats , and the broad thrust of the English case-law to which the court was referred, to acknowledge that circumstances can arise in which a less than rigorous application of the 'signature rule' is merited. This does not mean that a person must be allowed to resile from the consequences of his signature, merely that it can be argued that a signature cannot be treated ipso facto in all instances and every circumstance, and without further consideration, to bind a significantly weaker party to every detail of contractual dealings which he genuinely purports not to understand and which the stronger counterparty admits were complicated by its own actions."*

26. I consider this dictum of Barrett J. to be useful, primarily in the context of the particular regulatory regime imposed by the Central Bank on financial service providers, and in particular on the provision of services and products to consumers. It is difficult in an individual case to always reconcile the simple proposition that a party signifies by signature alone his or her approval or acknowledgement of knowledge and understanding of a purchase of a financial product, with the rigorous obligations

on the part of a financial broker imposed by this regulatory regime, and the legislature and the Central Bank in adopting the Codes must, in my view, have considered that the entirety of a transaction to be open to scrutiny notwithstanding the execution by a consumer of the relevant documentation, and even notwithstanding that signature might declare that a customer understands the complexity of the particular product acquired. It seems to me that the signature of a customer must be taken as one of a number of indices, but is not always determinative of the question of whether the product sold was suitable and fully explained or understood.

27. The appellants signed a declaration at entry 7 of the application form which declares the following:-

> *"I confirm that I have carefully considered and discussed my investment requirements and the various investment options available to me with my insurance and investments Manager ranging from a Secure investment to a geared investment. I confirm that my chosen attitude to investment risk is as stated in my financial review."*

28. I consider that in this case the Ombudsman placed unjustifiable weight on the fact of the signatures. Furthermore, the evidence did not, as he suggested, point to the fact that it was "clear that various products were discussed" and I am of the view that there was no evidence to that effect at all before him on which he could reach such a conclusion.

29. Of more significance, I conclude that the finding that there was "signed confirmation that the attitude as to risk as recorded was an accurate reflection of the Complainants' attitude to risk", is not sufficient to amount to a finding that the appellants knew what they were buying, and I find it difficult to reconcile this with later statements by the Ombudsman that he was not happy with the description of the

risk, or of the level of risk which attached to the financial product. The product was described in the documentation as "growth" and he correctly accepted that that was not in any sense a definition of risk and, as he said, all investors want growth, and "growth" as an adjective does not explain levels of risk. The Ombudsman correctly found that this is neither a description of risk nor a description of a person's attitude to risk as it could hardly be expected that any person making an investment would not have made such a statement and, what seems to me to have been envisaged by this comment and criticism is that that person would identify his or her attitude to risk by reference to the various places on a spectrum of risk between a risk where a capital was secure and a risk where a capital was geared. The difficulty I identify with his findings however is that he did not reconcile this criticism with his finding that that the appellants declared their "attitude to financial risk" in the form, and he placed too much importance on the signed acknowledgment thereby limiting the scope of his enquiry as to the state of knowledge and understanding of the persons making the investment.

Second finding: no evidence of flaws

30. The Ombudsman said that he could see "no evidence" to indicate that the sales process was flawed or that flaws existed in the product. He asked the correct question identified by O'Malley J. in *Carr v. Financial Services Ombudsman* [2013] IEHC 182, namely whether the absence of a particular line of inquiry or a particular finding would have changed or would likely have changed the conclusion that it came to. He took the view that there was no flaw in the process, and that there had been a "comprehensive engagement" over two meetings and that clear declarations as to the process and recording of information was put in place. But he was incorrect to ask, as he did, whether there was "objective evidence" that the product was mis–sold, and the

imposition of a requirement that there be "objective evidence" is not appropriate when the matters before him related to the actual and subjective state of understanding of the investors, and the actual information and knowledge imparted to them and whether this was sufficient for their subjective understanding. In my view the Ombudsman applied the incorrect test of the nature and strength of evidence that was required to be shown by a complainant to substantiate a claim, and whilst he did take the facts as a whole, as he was entitled to do, he failed to correctly test the evidence and applied an objective test where a subjective or fact-specific test was more apposite.

Third finding: the regulatory regime

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

The fourth finding: the documentation was adequate

32. It was asserted by the appellants and accepted by the Ombudsman that part 1 of the form quotation incorporating client specific details of the policy was not furnished to the appellants at the time of the investment, and it was accepted by the Ombudsman, that they did not receive these details at the time. This came to light

after the complaint was made and the missing information related to the management structures of the investment and the cost of the service to the investor. The Regulations of 2011 specifically mandate the furnishing of such information prior to an investment but the Ombudsman took the broad view that the documentation was sufficient to comply with the statutory requirements In doing so he failed to take into account the mandatory nature of the Regulations and the absence of information at the time of the investment as to what the investment services were to cost the appellants in fees to the intermediary is in my view an important gap not adequately dealt with by him.

33. The Ombudsman also identified that the financial review did not record the entirety of the assets available to the appellants but he went on to hold that the documentation sufficiently assessed and recorded their financial circumstances and in this I believe he also fell into error. The critical factors in the circumstances of the appellants which were not adequately addressed by the Ombudsman are that they had no income other than the non-contributory old age pension; their income was incorrectly described as an income of €2,500 per month, leaving, after their identified main regular expenses, a surplus income of €1,500. What was not identified by Mr. O'Brien, the intermediary and was not clear from the form, is that their income was not a pension income or a secure and regular income from any other investment, and derived, or was hoped to derive, from the sum of €800,000 invested in the Evergreen Fund.

34. The investment of monies in the Evergreen Fund had the direct consequences that the regular income identified in the income profile of the appellants would thereupon cease but under the heading "retirement planning" there is the statement "already have pension" and no further details identified. A person looking

at this page of the form could easily believe or understand that the regular monthly income of €2,500 came from a pension, and not from the deposit account which was to be the source of the investment fund itself.

35. More worryingly, under the heading "investment planning other than retirement planning" the purpose of the investment is described as being "general capital growth". It is difficult to reconcile this description of the purpose of the investment with the description given by the appellants, namely that in the light of advice that their deposit account was not keeping up with inflation, their concern was that their income needs might not be met were inflation to become a feature in the economy. This concern was identified by the Ombudsman but he failed to draw a reasonable conclusion from his finding and identification of that need or to explain how in those circumstances that the Evergreen Fund was suitable for the needs of the appellants.

36. I consider the finding of the Ombudsman that the appellants received and signed "an abundance of documentation" which set out the nature of the investment, the charges involved and the risk, and that this documentation was "comprehensive and clear in its wording" somewhat difficult to understand, particularly as he had analysed the use of the expression "growth" and found it wanting and as connoting overly positive returns, and as he found as a fact that the management charges were not explained before the investment was made.

37. I am of the opinion that he did not fully engage with and did not weigh the evidence. I accept that his judgment was not intended to be a legal judgment such as would result from a reserved judgment by a court. Nonetheless, it seems to me there was evidence before him, and it was for him to explain how he weighed that evidence and how that supports his conclusion. This is an error in his reasoning process, and I

make a distinction between his reasoning process and his ultimate decision because it seems to me that part of my function is to assess the validity of the reasoning process as a whole and that on a number of occasions the Ombudsman said that he saw no evidence of certain factors or there was nothing before him when he himself identified evidence but failed to weigh it and explain how he had done so.

38. I consider that the Ombudsman is required in order to fully adjudicate to weigh the evidence before him and explain his conclusions in the light of that evidence. He did make findings of fact as identified by me here, but his analysis of these facts was overly generalized and not easy to reconcile with these findings. This is so in particular in the case of his findings with regard to the adequacy of the documentation available to Mr and Mrs Law at the time they invested.

The fifth finding: vulnerability

39. The Ombudsman made the finding that there was "no evidence" that the appellants were vulnerable and took the view that "nothing had been presented" to him that suggested that the notice party overlooked its duties or requirements in regard to "vulnerability issues". It is not clear to me from the paragraph at p. 17 of the finding whether the Ombudsman took the view that the appellants could be characterised as vulnerable, but he did take the view that even had this been shown, that nothing had been presented to suggest that the issue of vulnerability would have been central to his finding, as he held that the notice party did not overlook its duties or requirements to vulnerable persons, such as the requirement that a third party family member attend meetings.

40. He makes the point that no medical evidence was adduced at the hearing, or in the fairly voluminous documentation and exchange of correspondence that occurred prior to and after the hearing, to support an argument that either or both of

the appellants were vulnerable or in particular that Mrs. Law suffered from a psychologically disabling condition. It is pointed out by his Counsel that nowhere in the documentation can it be identified that the Ombudsman was made aware of the precise condition or class of condition of which Mrs. Law complains, nor that she suffered from a condition which would have made her decision-making capacity frail.

41. I accept that the appellants were expected to know what their own complaint was and to articulate it, and the suggestion that the Ombudsman ought to have enquired in particular as to the health of Mrs. Law is incorrect. In particular, it was suggested for the first time at the hearing before this Court that Mrs. Law had a long standing, and on the face of it, very serious psychiatric illness which might have interfered with her decision making capacity. No medical evidence was available before the Ombudsman, whether at the hearing or by way of the submission of a written medical report. The precise condition to which Mrs. Law suffers was not identified to him, and was identified before me but through counsel, and not by medical evidence. The fact that Mr. and Mrs. Law did not press upon the Ombudsman the question of capacity gave the Ombudsman no inkling that the psychiatric illness that Mrs. Law is stated to suffer from was such that it might significantly impair her decision making ability.

42. The age of the appellants is not to my mind a matter which gives rise to any frailty in the placement of the product or the attitude of the Ombudsman to that placement. The age of the investors is not to be taken in isolation from other factors relevant to their financial profile and I find no error in the fact he held that the categorisation of a customer as an older adult did not preclude that person buying risky investments or buying one for a term in excess of five years. This echoes the judgment of Kearns P. in *Dwyer v. Financial Services Ombudsman* [2014] IEHC 6,

where he said that there is no presumption that an elderly person even might require additional support to understand financial documentation and "*it cannot be said that just because someone is of a certain age that they are thereby rendered incapable of making any investment decision.*"

The sixth finding: not compelled to invest

43. The Ombudsman said that there was nothing before him to suggest that the complainants were forced or compelled to meet with the sales adviser or to purchase product. He noted that there had been a meeting in May 2007 and then two meetings in October 2007 and a cooling-off period which is required by the legislation. I can find nothing incorrect in his analysis of the information and evidence that he had, and he fully considered the evidence and fully identified his conclusions and reasoning.

Conclusion

44. I conclude then that the Ombudsman did not err in his procedural approach to the complaint or in his views on the way the notice party dealt with the appellants as potentially vulnerable investors. He did however fall into serious error in his reasoning process and in the manner in which he tested and analysed the evidence he heard and noted in his conclusions. I find it difficult to reconcile his comments on factual matters with the conclusions he drew from those facts. The adjudicative process he employed seems to me to have involved the application of objective tests. The correct approach to the process is a focus on the particular documents and factual matrix, and the question whether there was adequate documentation, explanation or an adequate sale process, and whether the investment product was suitable to the needs of the investors are questions of fact answerable only by reference to the particular and unique facts before the decision maker and not by a search for what he described as "objective evidence" or by the application of principles such as the importance of a

signature, or the taking of a broad view that the documentation was adequate and clear.

45. Having regard to the legal consequence that his findings raise a *res judicata,* as explained by Kelly J in *Murray v. The Trustees and Administrators of the Irish Airlines Superannuation Scheme* [2007] I.E.H.C. 27, I consider that his decision was vitiated by serious error and accordingly, I allow the appeal against the finding and will hear counsel on the form of the order.