

**APPROVED**

**[2022] IEHC 133**



**THE HIGH COURT**

2021 No. 1 MCA

**IN THE MATTER OF THE FINANCIAL SERVICES AND PENSIONS  
OMBUDSMAN ACT 2017**

**BETWEEN**

**FLAVIO JR SUAREZ**

**APPLICANT**

**AND**

**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**RESPONDENT**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 29 March 2022**

**INTRODUCTION**

1. The principal judgment in these proceedings was delivered on 8 February 2022 and bears the neutral citation [2022] IEHC 46. This supplementary judgment addresses the allocation of the costs of the proceedings.

**NO REDACTION REQUIRED**

## SUBMISSIONS

2. Following upon the delivery of the principal judgment, the parties exchanged written submissions in respect of costs. These written submissions were supplemented at a short oral hearing on 15 March 2022.
3. The position of the Ombudsman is that costs should follow the event, and that, accordingly, the Ombudsman should recover his costs as against the Applicant in circumstances where the proceedings have been dismissed. The Ombudsman submits that the procedural irregularity, on the basis of which the proceedings were ultimately dismissed, had been expressly pleaded in the statement of opposition. Even before that, the Ombudsman had by letter dated 12 January 2021 put the Applicant on notice of the fact that the Ombudsman would seek his costs were the proceedings to be unsuccessful. It is submitted that, notwithstanding his having been given fair warning, the Applicant nevertheless pursued the proceedings to full hearing.
4. The Applicant, in reply, submits that the Ombudsman cannot be entitled to his costs in circumstances where there has been no adjudication by the High Court on the underlying merits of the proceedings. It is further submitted that the Ombudsman should now agree to the High Court determining the substantive issues raised in the proceedings, in particular, the correct interpretation of the provisions governing the Ombudsman's jurisdiction to entertain a complaint. The Applicant further submits that the Ombudsman did not inform him that "*the default position or exclusive or mandatory procedure*" to challenge the decision of a public authority is that provided for under Order 84 of the Rules of the Superior Courts.

5. Much of the Applicant's submissions on costs were taken up with a detailed criticism of the principal judgment. The making of such submissions was misplaced: the only matter outstanding before the High Court is the issue of costs. If the Applicant wishes to challenge the principal judgment, then he has a right of appeal to the Court of Appeal.

## DISCUSSION

6. Having regard to the nature of the submissions made in respect of costs, it is necessary to rehearse, briefly, the basis upon which the principal judgment was decided. The within proceedings raised a number of legal issues in respect of the Ombudsman's jurisdiction to entertain a complaint in circumstances where there had been parallel legal proceedings before the Circuit Court between the same parties. These issues are significant and would have necessitated this court ruling upon the correct interpretation of a number of sections of the Financial Services and Pensions Ombudsman Act 2017 which have not yet been the subject of judicial consideration. In the event, however, the within proceedings were ultimately resolved on a narrow procedural ground as follows. This court held that the form of the proceedings was irregular in that an application under Order 84B of the Rules of the Superior Courts was not authorised.
7. Order 84B allows for a "*relevant application*", as defined, to be made by way of an originating notice of motion. The Applicant had sought to rely on the following limb of the definition of "*relevant application*" as allowing him to invoke Order 84B:

“an application (otherwise than by way of appeal) to the [High] Court by a person authorised by any enactment so to apply, to

annul or set aside a decision of a relevant authority or remit the decision to the relevant authority concerned”

8. There is nothing in the Financial Services and Pensions Ombudsman Act 2017 which *authorises* a person, such as the Applicant, to apply to the High Court to annul or set aside a decision of the Ombudsman on a question of jurisdiction. A decision on a question of jurisdiction is treated differently from other types of decision by the Ombudsman. As explained at paragraphs 24 to 29 of the principal judgment, the statutory right of appeal under Part 7 of the Financial Services and Pensions Ombudsman Act 2017 does not extend to a decision by the Ombudsman to the effect that he does not have jurisdiction to investigate a complaint. Such a threshold decision does not come within the meaning of “*decision*” for the purposes of Part 7 of the Act.
9. In the absence of a statutory right of appeal against same, the proper procedure for bringing a challenge to the validity of a decision by the Ombudsman on a question of jurisdiction is by way of judicial review pursuant to Order 84 of the Rules of the Superior Courts.
10. The Applicant’s reliance upon Order 84B is misplaced. The Financial Services and Pensions Ombudsman Act 2017 does not *authorise* the bringing of an application to the High Court to annul or set aside a decision of the Ombudsman on a question of jurisdiction. Indeed, far from authorising such an application, section 50(2) of the 2017 Act provides that the decision of the Ombudsman on a question of jurisdiction is to be “*final*”. On a literal interpretation, this might suggest that such a decision is not amenable to review by the High Court in any circumstances. The Ombudsman does not, however, contend that the section constitutes an ouster clause, but rather accepts that the legality of a decision on

a question of jurisdiction can be challenged in judicial review proceedings under Order 84. For present purposes, the point is that the 2017 Act does not authorise the making of an application to annul or set aside a decision of the Ombudsman on a question of jurisdiction, such as to attract the provisions of Order 84B.

11. In the absence of an express statutory mechanism for challenging such a decision, a person seeking to impugn the validity of a decision by the Ombudsman on a question of jurisdiction is required to institute judicial review proceedings. An application for judicial review pursuant to Order 84 is the default mechanism for bringing a challenge to a decision of a public authority, including, relevantly, the Ombudsman. As discussed in detail in the principal judgment, the judicial review procedure under Order 84 contains a number of important safeguards which are intended to protect public authorities from unmeritorious proceedings and to ensure that “*all persons directly*” affected are entitled to notice of the proceedings.
12. The Applicant submitted that there is nothing within the wording of Order 84 that indicates that it is the exclusive procedure for challenging a decision of a public authority. The Applicant further submitted that if and insofar as it is said that the Financial Services and Pensions Ombudsman Act 2017 does not authorise an application under Order 84B, then it can equally be said that an application under Order 84 is not authorised: the Act does not refer explicitly to either Order.
13. With respect, these submissions are mistaken and are based on an erroneous understanding of the place that Order 84 occupies in public law. Order 84 is the default procedural mechanism for challenging any decision or act of a public authority. There is no necessity to include an express cross-reference to its

provisions in any primary legislation governing a public authority precisely because it is so well established that the judicial review procedure should be followed in any legal proceedings (unless a statutory appeal has been prescribed).

14. It is correct to say, as the Applicant does, that there is no explicit statement in Order 84 itself to the effect that it is mandatory to adopt the procedure prescribed therein when challenging an act or decision of a public authority. However, the obligation to comply with this procedure, or, at the very least, to observe a procedure with similar safeguards, is well established in the case law. The principal judgment cites two of these cases, namely *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1; [2013] 1 I.R. 247 and *Hosford v. Ireland* [2021] IEHC 133.
15. The generality of Order 84 is to be contrasted with the specific purpose of Order 84B. The types of applications which might be brought pursuant to Order 84B are narrowly defined. Moreover, the definition of “*relevant application*” expressly *excludes* an application for any order which may be made or relief which may be obtained pursuant to Order 84 or Order 84A. Here, the reliefs sought by the Applicant were precisely of the type available in judicial review proceedings under Order 84.
16. As explained in the principal judgment, one consequence of the failure to go by way of an application for judicial review in the present case had been that the financial services provider, against whom the complaint had been made, was not joined to the proceedings as a notice party. It is incorrect to suggest, as the Applicant does, that this omission cannot have caused any possible prejudice to the financial services provider. The precise purpose of the Applicant’s

proceedings had been to overturn a decision which ruled the complaint to be inadmissible. If successful in this purpose, then the financial services provider would be required to respond, at this late remove, to a complaint from September 2016 which it had been entitled to assume had been rejected. Fair procedures dictate that the financial services provider be afforded an opportunity to be heard in relation to the proceedings before a decision which directly affects it could be made by the court.

17. The non-compliance with the Rules of the Superior Courts in this case is no mere technical breach, but has caused potential prejudice to the financial services provider. As explained in the principal judgment, this breach cannot be overlooked and, instead, the within proceedings must be set aside in their entirety.

#### **DECISION ON COSTS**

18. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings is entitled to costs against the unsuccessful party. The starting position, therefore, is that the Ombudsman is *prima facie* entitled to an order for costs in his favour in that he has succeeded in having the proceedings dismissed, albeit on procedural grounds.
19. The court retains a discretion, however, to make a different form of costs order. Section 169 of the Legal Services Regulation Act 2015 provides that, in exercising its discretion, a court should have regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties.

Relevantly, the court should have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

20. Having regard to the very unusual features of the present case, the interests of justice are best served by making no order as to costs. The parties should, instead, each bear their own costs. The three distinguishing features of the present case are as follows.
21. First, the Applicant had made it known at all times that he wanted a ruling from the High Court as to the interaction between the statutory complaints mechanism provided for under the Financial Services and Pensions Ombudsman Act 2017 and legal proceedings in respect of the same subject-matter. On a number of occasions throughout the complaints process, the Applicant had requested that the Ombudsman refer questions of law to the High Court pursuant to section 66 of the 2017 Act. As it happens, the Ombudsman maintains the position that the power to refer does not arise where a complaint is rejected as inadmissible. For present purposes, however, the point is that the Ombudsman was aware that the Applicant wished to have the correct interpretation of the relevant statutory provisions brought before the High Court for adjudication. The mooted questions of law concerned the entitlement, if any, of the Ombudsman to entertain a complaint notwithstanding the existence of parallel legal proceedings between the same parties; and the correct interpretation of the transitional provisions under the Financial Services and Pensions Ombudsman Act 2017. The mooted questions of law were ones which transcended the facts of the present case. In all of the circumstances, it might have been expected that the Ombudsman would have explained, as part of his decision rejecting the complaint, that the Applicant was entitled to bring the matter before the High



Court by way of an application for judicial review pursuant to Order 84. The Ombudsman would, of course, have been entitled to reserve the right to seek costs against the Applicant if such judicial review proceedings had been unsuccessful.

22. Secondly, the fact that the Applicant moved with such alacrity to institute these proceedings meant that—had the procedural irregularity been brought to his attention—it would have been possible for him to correct the procedural irregularity and institute fresh proceedings in proper form within the three month time-limit prescribed under Order 84. Crucially, the Ombudsman had been served with these proceedings within four weeks of the date of the impugned decision.
23. On receipt of the proceedings, the head of legal services in the Ombudsman’s office had written to the Applicant on 12 January 2021 warning him of the potential costs consequences of his proceedings as follows:

“I must also advise you that in 2011, a Judge of the High Court directed the Financial Services Ombudsman to very clearly confirm its position, as regards legal costs, to any potential Appellant. For that reason, I must advise you that in any litigation involving the Financial Services and Pensions Ombudsman, it is the general policy of the FSPO in all appropriate cases to seek recovery of its legal costs by applying to the Court for an Order for costs against such parties to the litigation, as it may be advised.”

24. The letter made no reference to the defect in the form of the proceedings, notwithstanding that it would have been obvious to a lawyer from a perusal even of the title page that the proceedings had not been brought pursuant to Order 84.
25. Had the Ombudsman's office raised, in that letter, the procedural objection subsequently relied upon to have these proceedings dismissed, the Applicant would have had an opportunity, over the next two months, to change course and institute judicial review proceedings within the three-month period prescribed under Order 84.
26. (The terseness of the letter in the present case can be contrasted with the approach adopted in another case which came before this court recently: *Trustees of the Vodafone Ireland Pension Plan v. Financial Services and Pensions Ombudsman* [2022] IEHC 47. In that case, the Ombudsman expressly canvassed in correspondence the possibility of the disappointed party seeking judicial review of an interim decision in respect of the admissibility of a complaint).
27. The procedural objection was subsequently pleaded as part of the statement of opposition filed on 15 March 2021. As of that date, however, the three-month time-limit had almost expired: the impugned decision is dated 18 December 2020.
28. Thirdly, the precise basis upon which the proceedings were ultimately dismissed was slightly different from that agitated for on behalf of the Ombudsman. The submissions on his behalf had focussed upon the prejudice supposedly caused to the Ombudsman by the failure to go by way of judicial review. As appears from the principal judgment, however, this court was not persuaded that any actual prejudice had been caused to the Ombudsman. Rather, it was the prejudice

caused to the financial services provider, by the failure to join it as a notice party, that ultimately informed the decision to dismiss the proceedings.

29. Having regard to these three peculiarities, it would not be appropriate to require the Applicant to pay the Ombudsman's legal costs. The procedure to be invoked by a person aggrieved by a decision of the Ombudsman on a question of jurisdiction is not readily apparent from the Financial Services and Pensions Ombudsman Act 2017. Certainly, it would not be immediately apparent to a lay person that judicial review is the appropriate procedure. Indeed, on a literal reading of section 50(3), it might be thought that judicial review is excluded. The Ombudsman would have had to have been more forthright in his correspondence of January 2021 before it would be fair to fix the Applicant with legal costs on the basis of an error as to the form of proceedings.
30. This costs judgment should not be understood as imposing an obligation, in all cases, upon the Ombudsman to notify the parties to a complaint of the procedures to be followed in any legal proceedings. Rather, the exercise of my discretion on costs has been informed by the unusual confluence of events in this case.
31. Finally, for completeness, it should be explained that the circumstances of the present case are distinguishable from those informing the costs decision in *Hosford v. Ireland* [2021] IEHC 173. There, the procedural irregularity in the proceedings had been incapable of remedy: leave to apply for judicial review would inevitably have been refused had the correct procedure been employed. Moreover, the respondents in *Hosford* had pursued the procedural objection by way of a *preliminary motion* to strike out the proceedings. This meant that the costs were limited to the costs of the procedural issue and the hearing was dealt with on a Monday listing.

32. The fact that the Ombudsman chose to roll up his procedural objection as part of his overall opposition to the within proceedings, and did not pursue a preliminary motion, had the consequence that the costs of a two-day hearing were incurred. There had been a belated attempt to run the procedural objection as a threshold issue *within* the substantive hearing, but this is not as satisfactory as pursuing a preliminary issue based on a focussed set of papers which could have been read in advance by the court. The papers ultimately put before the court ran to hundreds of pages, and it would not have been fair to the Applicant, who does not have legal representation, for the court to have made a decision dismissing his proceedings *ex tempore*, that is, without having had an opportunity to identify the relevant materials from that welter of paper. It would not be appropriate to visit the costs incurred on the Applicant.

### **CONCLUSION AND FORM OF ORDER**

33. For the reasons set out in the principal judgment, and in this supplemental judgment, the following orders will be made. An order, pursuant to Order 124 of the Rules of the Superior Courts and/or the inherent jurisdiction setting aside the within proceedings as irregular in form.
34. Having regard to the very unusual features of the present case, the interests of justice are best served by making no order as to costs. The parties should, instead, each bear their own costs.

#### *Appearances*

The Applicant represented himself  
Mark William Murphy for the Ombudsman instructed by Eversheds Sutherland

Approved  
Gemma S. Mans