

# THE HIGH COURT

[2022] IEHC 290

[Record No. 2020/188 MCA]

## IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

**BETWEEN:**

**LLOYD'S INSURANCE COMPANY SA**

**PROVIDER**

**AND**

**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**RESPONDENT**

**AND**

**JOANNA DONNELLY AND HARM LUIJKX**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 19<sup>th</sup> day of May, 2022**

### **INTRODUCTION**

1. This matter comes before the High Court by way of a statutory appeal taken by an Insurer (hereinafter “the Provider”) against a decision of the Financial Services and Pensions Ombudsman (“the Ombudsman”). The decision under appeal was made in respect of a complaint concerning an insurance policy provided by a housing developer to the Complainants/Notice Parties (hereinafter “the Complainants”) who had purchased a house from the developer in or about 2006. The insurance policy (hereinafter “the Policy”) provides cover against structural defects in the property.

2. When defects came to light in the property, a claim was made but there was a question as to whether aspects of the claim were recoverable under the Policy. Two separate issues were identified, namely pyrite related property damage and damage to the structure of the roof

connected with deflecting trusses in the roof associated with cracking on ceilings and walls. Ultimately, the Provider gave cover in respect of the pyrite damage that was caused to the property but did not accept that the damage related to the deflecting roof trusses was covered by the Policy.

3. In summary, the basis for the Provider's refusal was rooted in its view that the roof trusses themselves, which it was accepted were structural and therefore covered by the Policy, were not inherently defective. It was maintained by and on behalf of the Insurer that the deflection to the roof trusses arose from the manner in which a water tank had been positioned in the attic area without adequate or properly placed load spreading supports which in turn caused an unintended load to be applied to the trusses. The Provider maintained that it was this unintended load which caused pressure on the trusses and led to cracking on ceilings and walls. They maintained that this constituted damage "caused to the structure" which was outside the Policy rather than damage inherent "in the structure" which was covered.

4. The Notice Parties made a complaint (hereinafter "the Complaint") to the Ombudsman in respect of the Provider's declinature. In the final decision of the Ombudsman dated the 24<sup>th</sup> of July, 2020 ("The Decision") the Ombudsman upheld their complaint on the grounds that it was unreasonable, unjust and improper for the Provider not to remediate the damage which is the subject-matter of the Complaint. The Provider was also ordered to compensate the Complainants for inconvenience in the sum of €20,000.

5. In summary, the complaint centred on the question of whether cover was properly declined having regard to the terms of the contract of insurance and the evidence as to the cause of the damage.

## **ISSUES ON APPEAL**

6. In this appeal the Provider maintains that the Ombudsman was guilty of serious and significant error in construing the definitions of "Structure" in the Policy ("*Policy Defined Structure*") in such a manner as to include the Complainant's claim. The Provider distinguishes between damage caused to a part of the Policy Defined Structure (not covered) as opposed to a defect in part of the Policy Defined Structure (covered). The Provider maintains that cover was correctly declined on the grounds that while the trusses form part of the Policy Defined

Structure of the building, the water tanks (not one of the insured elements of the Policy Defined Structure) and their incorrect positioning in the attic was not a defect in the trusses themselves but was a workmanship defect in the installation of the uninsured water tanks and supports, which in turn caused damage to the trusses (in the form of excessive deflection) and were outside the terms of cover provided under the Policy. The Provider maintains that insofar as the Ombudsman concluded that the defect was in the Policy Defined Structure, such a finding was in the face of agreed evidence as to the cause of the damage and is therefore the result of a serious and significant error.

**7.** The Provider's position is that the declinature was grounded on the proper construction and application of the terms of the Policy and the definitions contained therein. Accordingly, the Provider contends that the Ombudsman fell into serious and significant error in directing insurance cover where there was no breach of contract in the Provider's declinature of the Notice Parties' claim.

**8.** Separately, the Provider further contends that in making findings pursuant to s. 60(2), in particular pursuant to s. 60(2)(b), (c) & (g) of the FSPO Act 2017 and specifically in directing relief on the basis that the conduct complained of was in accordance with law but nonetheless unreasonable, unjust and improper conduct, the Ombudsman exceeded his jurisdiction by treating a refusal of cover which was permitted under the terms of the Policy as unjust or unreasonable or improper. Issue was also taken with both the entitlement to compensation and quantum of compensation which it was contended was disproportionate to any inconvenience suffered by the Complainants and having regard to engagement by the Provider.

**9.**

**10.** The Ombudsman stands over the Decision as one which flows from a proper interpretation of the Policy and is supported by evidence before the Respondent. The Ombudsman further maintains, in the alternative, that even where the Complainant might not be entitled to a remedy as a matter of civil law deriving from the terms of the contract, the Ombudsman's jurisdiction under the Financial Services and Pensions Ombudsman Act 2017 [hereinafter "the FSPO Act 2017"] is wider than that of the Court and is not tied to the strict contractual rights of the Complainants. The Ombudsman contends that the Court has no jurisdiction to intervene in this case as no serious and significant error in construing the Policy or in the exercise of the Ombudsman's jurisdiction under the 2017 Act has been demonstrated.

## THE CONTRACT OF INSURANCE: RELEVANT PROVISIONS

11. The Policy document sets out the insurance cover provided for by the Premier Guarantee for Ireland, a structural indemnity scheme of insurance offered by builders for new homes.

12. Section 3.3 of the Policy, which contains the material coverage provision in this Appeal, provides as follows:-

*“Section 3.3 – Structural Insurance Period*

*The Underwriter will indemnify the Policyholder against all claims discovered and notified to the Underwriter during the Structural Insurance Period in respect of:*

1. *The cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage provided always that the liability of the Underwriter does not exceed the reasonable cost of rebuilding each Housing Unit to its original specification ...”*

13. “Major Damage” is defined in Section 2 of the Policy as follows:-

*“L. – MAJOR DAMAGE*

*a) Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter;*

*b) a condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter*

*In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period. For the purpose of this Policy the definition of Major Damage is deemed to include any physical loss, destruction or damage caused by contamination or pollution as a direct consequence of a defect in the design, workmanship materials or components of the Structure of the Housing Unit.”*

14. The Respondent observed in his Decision by reference to the definition of “*Major Damage*” that there is no specific definition in the policy document of what constitutes an absence of something necessary for completeness.

15. The range of reference of the term “*Structure*” is also defined by the Policy:-

*“R. STRUCTURE*

*The following elements shall comprise the Structure of a Housing Unit:*

- *foundations;*
- *load bearing parts of floors, staircases and associated-guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- *roof covering;*
- *any external finishing surface (including rendering) necessary for the water-tightness of the external envelope;*
- *floor decking and screeds, where these fail to support normal loads.*

16. Counsel for the Provider in argument maintains that in combination, these provisions of the Policy have the effect that for Section 3.3 of the Policy to be triggered, and the damage in question to be therefore insured, the damage must arise from a defect in one of the elements listed in the preceding paragraph.

17. Counsel for the Ombudsman does not demur from this construction of the Policy but contends that there was evidence before the Ombudsman upon which a decision that the damage arose from a defect in the trusses of the roof which were not fit to support the load of the water tanks placed in the attic space could be taken. The Ombudsman’s position is that a defect in the trusses, a load bearing part of the roof, comes within the policy definition of structure and is properly covered under the Policy.

**EVENTS LEADING TO SUBMISSION OF THE COMPLAINT TO THE OMBUDSMAN**

**18.** The Complainants purchased a house from the Builder in or about 2006 with the benefit of the insurance policy which covered against structural defects in the property. In or about 2010 it emerged that some of the houses in the development, including the Complainants, had sustained damage associated with pyrite in the in-fill. Further defects came to light in the Complainant's property where it was found that deflecting roof trusses in the attic were causing gaps and cracks in the ceilings and walls of the house.

**19.** A claim was made by Claim Form received by the Provider (Liberty at that time) from the Complainants on the 9<sup>th</sup> of June, 2014. The Claim Form was accompanied by a technical report of MTW Partnership, Consulting Engineers, retained by the Complainants [hereinafter "the Complainant's Engineer"]. In the report dated the 28<sup>th</sup> of May 2014 support, roof / ceiling and water, the Complainant's Engineer stated:

*"We have conducted a preliminary analysis of the roof trusses as constructed to support, roof/ceiling and water tanks. We attach the results of this analysis in Annex (C).*

*We have consulted the recommended support system for water tanks in IS 193 and the works clearly do not comply with the recommendations....*

*We are of the opinion that the damage observed is a direct result of the structural inadequacies of the in situ trusses.*

*Recommendations*

*The current support method should be replaced with a suitable system and needs to be installed as a matter of urgency."*

**20.** Notably, the report does not conclude that the problem with the roof trusses has been caused by the manner in which the water tank was installed. Attached to the report are photographs which show cracking to the wall and ceiling at the Complainant's property. A copy of the "*Declaration of Specification entitled Timber Trusses for Roofs as the Irish Standard Specification for Timber Trusses for Roofs*", IS 193 (given under seal of the National

Standards Authority of Ireland) referred to in the report, is also appended as an annex to report. No particular part of this Standard was identified by the Complainant's Engineer in the report but several aspects appear potentially relevant.

**21.** The Standard provides at para. 12.6.1 under the sub-heading "General", as follows:

*"Where loadings exceed those given in Table 2, the roof and/or building designer's instructions for the support of water cisterns and other fixed plant shall be followed. The system of support must ensure adequate distribution of load over the supporting trusses and shall be designed by the building designer in consultation with the truss designer."*

**22.** Further, para. 12.6.2 provides for "*minimum support*" for water cisterns and requires that they be placed on two primary and two secondary bearers, resting on spreader beams, which in turn are supported as closely as possible to the node points of at least four trusses as indicated in the figures. Para. 12.8.6. provides for truss alignment and requires that prior to the fixing of tiling battens all trusses shall be erected vertical and parallel to the tolerances given at the specified centres and when the tiling battens and bracing has been fixed in position there shall be no bow evident in the length of the truss. Figure 7 of the Standard provides a diagrammatic representation of a typical water tank support which shows the trusses connecting with the bottom chord and a water tank supported on bearers positioned close to node points to spread the weight over a number of trusses.

**23.** The preliminary analysis of the roof trusses as constructed referred to in the report as attached was not furnished with the report, a matter to which some significance was attached by and on behalf of the Provider. It quickly became apparent that there was a question in the Provider's mind as to whether aspects of the claim were recoverable under the Policy. Thus, on the 20<sup>th</sup> of June, 2014 OSG Vericclaim (now Sedgwick) (hereinafter "the Loss Adjusters") contacted the Complainant enquiring about the nature of the defect. On the 30<sup>th</sup> of June, 2014 the Complainant's Engineer refused to share its truss analysis with the said Loss Adjusters. Between the 1<sup>st</sup> of July 2014 to the 7<sup>th</sup> of July, 2014 the Loss Adjusters made further requests for sight of the Complainant Engineer's truss analysis, which requests were ignored by the Complainant's Engineer who replied variously as follows:

*“Our report I hope you will note provides clear evidence of structural damage to the property. We have carried out a preliminary structural analysis of the trusses to confirm our concerns about the capacity of the trusses to safely carry the loads of both water tanks. On the basis of both our visual inspection of the property and this preliminary assessment we have provided our client with what we believe is sufficient evidence of a defect in the structure covered by the insurance policy. As you point out in your email costs to establish the claim are to be borne by the householder and we believe that they have achieved this threshold both in the physical manifestation of the problem and our proffered professional opinion. Should OSG wish to commission us for a full detailed analysis of the structure we are more than happy to accept subject to our client’s approval.”*

**24.** The Complainant’s Engineer’s consistent position for the duration of its involvement in 2014 was that its structural evaluation of the trusses found them “*deficient*” and the Complainants had provided sufficient evidence of a defect in the structure covered by the Policy. The Provider at no point appears to have agreed to underwrite the cost of carrying out the further analysis of the structure suggested by the Complainants’ Engineer nor to have commissioned this analysis themselves.

**25.** On the 7<sup>th</sup> of July, 2014 the Provider’s Loss Adjusters briefed engineers, AOCA, on behalf of the Underwriter [hereinafter “the Provider’s Engineers”]. On the 9<sup>th</sup> of July, 2014, Provider’s Engineers reported to the Provider’s Loss Adjusters stating:

*“I have discussed this matter generally with ...and he has suggested that he would have concerns also with some roof spread arising from this deflection. On the face of it there appears to be a structural problem here with the trusses and you might wish us to inspect and investigate.”*

**26.** It was agreed in late July, 2014 that the damage to the upstairs of the Housing Unit would not be addressed until pyrite damage had been resolved.

**27.** Ultimately, the Provider gave cover in respect of the pyrite damage that was caused to the property (cover for pyrite damage was finally confirmed on the 16<sup>th</sup> of February, 2016 by



letter from the Provider's Loss Adjusters with pyrite remediation works commencing on the 20<sup>th</sup> of October, 2016) but did not accept that the damage caused by the deflecting roof trusses was covered by the policy. The issue with cover in respect of the truss deflection was red flagged by the Provider's Loss Adjuster who indicated on the 25<sup>th</sup> of February, 2016 during the course of a site visit that it was unlikely the issue with the water tank in the attic was as a result of a cause that would fall for consideration under the policy. Thereafter, there was a protracted exchange of correspondence between the parties.

**28.** In correspondence dated the 27<sup>th</sup> of September, 2016 (as referred to in the Decision) the Complainants points out:

*“significant damage was first apparent on the third floor guest bedroom where significant cracking and lifting tiles first started to appear. Stud popping appears on the third floor landing and also on the third floor in both bedrooms. Clearly a knock on from the heave as has happened on the ground floor two floors below.”*

**29.** Also on the 27<sup>th</sup> of September, 2016 the Provider's Loss Adjuster stated:

*“Regarding the upstairs scope, this will not be confirmed until the stairs go back in, around 9/10 weeks into the project. At that time [Engineer] will inspect and instruct [Repairers] on any pyrite damage to be rectified. Conversely if any damage is considered non pyrite on the upper floors we would not include it in the scope of works.”*

**30.** On the 2<sup>nd</sup> of January, 2017, the Complainants wrote:

*“Now that the stairs are back in it is time to discuss the redecoration work that needs to be done on the upper floors of our house. There is cracking, nail pops and loose tiles on both upper floors, the worst of the damage done by the pyrite is evidenced in the top floor bedroom where the wall cracked in the en suite behind the tiles. There's also significant cracking on the second floor in the living room and bedrooms and tiles lifted in the family bathroom.”*

**31.** On the 20<sup>th</sup> of January, 2017 the Provider's Engineer reported to the Provider's Loss Adjuster stating that the cracking to the second floor of the housing unit was most likely related to a roof issue or poor workmanship at the time of construction:

*"The cracking on second floor is most likely related to a roof issue or poor workmanship at the time of construction."*

**32.** The Provider's Loss Adjuster wrote to the Complainant with regard to cracking on second floor stating:

*"As it is not pyrite related, no repairs will be included in the works at this time. However, if it is found to be a defect that falls under the scope of the policy we can consider it under a separate heading and organise to remediate it also, without the need for any further investigations by your engineer."*

**33.** On the 30<sup>th</sup> of January, 2017 the Provider's Engineer wrote:

*"the damage to the top floor is spread across the rooms. Whilst some cracks above doors are located approx. below the water tanks, there are other areas of cracking remote from the water tanks in other top floor rooms. Therefore, it is only surmised by association that issues with the water tank support are the cause of the cracks. As discussed these are typical of issues seen elsewhere in [locality] where non-loadbearing partitions in the upper floor rooms are not fitted tight to the underside of the roof structure. Instead the wall plasterboard is stopped short and the ceiling plasterboard is continuous across the head of the partition. The top of the partition is finished with a single 'taped joint' to the ceiling and this joint is showing signs of failure....The insured also identified issues with the water tank support that are not in accordance with design recommendations in IS 193. These relate to the timber bearers / spreaders and how these are positioned on the trusses. However, it cannot be guaranteed that cracking in the top floor rooms will not reoccur, especially those remote from the location of the tanks".*

**34.** On the 2<sup>nd</sup> of February, 2017 the Provider's Loss Adjuster advised the Complainants by email that clarification was awaited from them in order for the coverage position to be formally advised. Two potential issues were referred to as causing the cracking in this email namely (i) water tanks and (ii) the construction of the partitions. On that same date the Provider's Engineer wrote:

*“So from the below it can be taken that there may be two separate issues causing the cracking upstairs, the water tank and the non-load bearing partition construction. In relation to the latter, as you know we have offered to cover up this problem with coving previously, on a without prejudice basis. But I understand from recent conversations that this will not help in this case as a) the cracks extend down to door head and b) some are at junctions with a sloping roof. I have advice from our claims team that the issue with the water tank is not covered. Therefore in your opinion are we in a position to offer any kind of without prejudice, gesture of goodwill repairs in relation to the other issue?”*

**35.** On the 6<sup>th</sup> of February, 2017 the Loss Adjuster emailed (copied to the Complainants) setting out the position from the Loss Adjuster's perspective and the requirements for coverage under the Policy. The Builder's Engineer wrote also by letter dated the 6<sup>th</sup> of February, 2017 in the following terms:

*“It is our opinion that the cause of the cracking in the walls is because of inadequate support of the water tank.*

*The policy under the Definitions' Section defined Major Damage (in Clause L) as follows:*

- (a) Destruction or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.*
- (b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.*

*In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period”.*

*It is our opinion that both defects described above come within the terms of this policy and therefore should be addressed as part of the remedial works”.*

**36.** On the 9<sup>th</sup> of February, 2017, a joint inspection of the upper floor by the Provider’s Engineer and the Builder’s Engineer (on behalf of the original builder of the Housing Unit and the residential development) took place. A Provider’s file note on the 25<sup>th</sup> of February, 2017 states:

*“the claimant also had a structural clam notified for problems with the roof trusses but her engineer was reluctant to provide a part of the report which was supposed to evidence the cause of damage. It appears the two water tanks in the attic are not sitting on adequate brackets. Advised the claimant that in my opinion this cause would not fall for consideration under the policy but if she wanted to get an engineer to present his own views we would be happy to consider same.”*

**37.** On the 28<sup>th</sup> of February, 2017, the Complainants moved back to the Housing Unit following the completion of pyrite remedial works.

**38.** On the 13<sup>th</sup> of March, 2017 the Complainants forwarded the Provider’s Loss Adjuster a letter from the Builder’s Engineer to the Builder setting out its position on coverage stating:

*“Martin Bennett had previously noted that the water tanks in the attic were insufficiently supported and that the condition of cracking at the junction of the Master bedroom/en suite wall and ceiling wall was most likely due to movement within the structure of the roof. I agreed with those observations during my own inspection....*

*Major Damage, as defined under the policy, requires*

*Physical damage to any portion of the Housing Unit – four instances of damage meeting this requirement are set out above;*

*And/or a condition to exist which requires immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit – such immediate remedial action is certainly required in order to prevent further damage occurring due to the insufficient support of the water tanks and roof structure movement;*

*In either of the above cases the policy requires that the cause must be attributable to a defect in the design, workmanship, materials or components of the Structure the inadequacy of the structural supports to the watertanks and movement within the roof structure are clear defects in the design, workmanship, materials and components of the structure.*

*Accordingly, I confirm that Major Damage, as defined under the terms of the .... Policy, is present in the house. It is noteworthy that the Insurer's Consulting Engineers ... also accept that the damage listed above has occurred as a result of structural inadequacies in this house.*

*Therefore, I also confirm that it is my opinion that the supports to the water tanks should be upgraded, the adequacy of the strapping of the roof be checked and the damage listed above should then be repaired under the provisions of the...policy."*

**39.** On the 15<sup>th</sup> of March, 2017 the Provider's Loss Adjuster replied setting out in detail why coverage was not available stating:

*"The policy requires that the cause must be attributable to 'a defect in the design, workmanship, materials or components of the Structure' .....However we note there is no reference to the policy definition of Structure in [Consultant Engineer's Letter].... This definition in the policy is key in our opinion on the matter...he needs to identify where under the ... policy definition of Structure, he feels 'supports to the water tanks' fall for consideration."*

**40.** On the 21<sup>st</sup> of March, 2017 the Complainants forwarded the Provider's Loss Adjuster's correspondence from the Builder's Engineer to the Builder advising that the bottom chords of the roof trusses were inadequate to support the loading from the water tanks as follows:

*"The water tanks are directly supported by timber spreaders which in turn bear onto the bottom chords of the roof trusses. The bottom chords of the roof trusses are inadequate to support the loading from the water tanks which is being transferred to them. This has resulted in the downward deflection of the bottom chords of the trusses*

*and this has caused the damage below. The roof trusses are clearly a fundamental load-bearing part of the roof structure.*

*The ... policy definition of Structure clearly includes the roof trusses which are essential load bearing parts of the roof structure. The inadequacy of the bottom chords of these roof trusses fulfils the requirement of the policy that the damage has been caused by a defect in the design, workmanship, materials or components of the Structure.”*

**41.** On the 24<sup>th</sup> of March, 2017, Provider’s Loss Adjuster responded by noting that the roof trusses are not defective from the Builder’s Engineer’s version of events.

**42.** On the 27<sup>th</sup> of March, 2017 the Loss Adjuster advised the Complainants of its opinion that the defect was with the spreaders and not the timber trusses themselves as follows:

*“We would be of the opinion that the proximate cause of the damage reported is a defect in the timber spreader supporting the water tank, which is not a load bearing part of the roof, rather than the roof trusses, which are and which would seem entirely fit for purpose...”*

*In this regard we understand from discussions with our Engineers that the correct design would have been to transfer the load of the tanks onto the external walls of the building and not to simply place them on supports, directly onto the roof trusses. As a consequence, it would appear to us that the physical damage reported is attributable to the incorrect placing of these elements....”*

**43.** Also, on the 27<sup>th</sup> of March, 2017 the Complainants wrote to the Provider’s Loss Adjuster expressing frustration at the coverage position and the process of discussing it:

*“There is evidently structural damage, this is what the insurance policy is for. When we were communicating regarding the issue of pyrite, you informed me that the insurance policy is not to cover pyrite but rather the damage caused by the pyrite. In this instance you are taking another track and referring to the causation of the structural damage rather than the damage itself.”*

**44.** On the 29<sup>th</sup> of March 2019 the Provider's Loss Adjuster responded to the Complainants reiterating the grounds on which coverage is not available under the Policy. Specifically, it is stated that the damage was caused by the timber spreader installed to accommodate the water tank. It was stated that the timber spreader:

*“is not a load bearing part of the roof and we are not aware of any defect in the design, construction, material or components of the actual trusses themselves, which we accept are load bearing part of the roof, causing the physical damage reported”.*

**45.** On the 31<sup>st</sup> of March, 2017 the Builder's Engineer emailed the Builder reiterating a view that the roof trusses were defective, specifically that the bottom chords of the trusses had resulted in their deflection, causing damage to the walls below. The Builder's Engineer rejected the Loss Adjuster's stated position that the “*proximate cause*” of the damage was a defect in the timber spreader supporting the water tank.

**46.** On the 5<sup>th</sup> of April, 2017 the Provider's Engineer advise the Provider's Loss Adjuster on the Builder's Engineer's argument to the effect that the proximate cause was structural. On the 10<sup>th</sup> of April, 2017 the Provider's Engineer's advice was furnished to the Complainant by the Provider's Loss Adjuster in the following terms:

*“Water tank installation requires that the loading from the spreaders is imposed on the roof truss at the node points. In this case the tank is not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss away from the node points. In this regard [Consultant Engineer] is correct in saying that the chords are deflecting excessively as they are generally not designed to accommodate this unintentional loading. However, [Consultant Engineer] has provided no commentary or calculations to show that if the tank was positioned correctly the chords would be OK. Therefore he has not demonstrated that the truss is under designed based on the intended loading only that the truss is deflecting due to the unintended loading. The question now is whether the ... policy is triggered by a badly installed water tank, even if this does not cause primary structure to deflect extensively.”*

**47.** On the 11<sup>th</sup> of April, 2017, the Builder's Consultant Engineer wrote:

*“As previously advised the ... policy which applies to this house under the Definitions’ Sections defines “Major Damage” [Clause 1] as follows:*

- a) Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.*
- b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriters.*

*In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period.*

*The recent OSG/AOCA emails indicate that they have now accepted that physical damage to a portion of this house has occurred and that immediate remedial action is required to prevent further physical damage being caused.*

*The AOCA extract contained in .... e-mail dated 10th inst. constitutes an acceptance that the physical damage i.e. the cracking present at the upper floor levels, is the result of a defect in workmanship by virtue of the water tanks being “not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss” and that this has resulted in the fact that “the chords are deflecting excessively.” This is the cause of the damage referred to above.*

*It is clear from the above that the relevant requirements under the ... policy in respect of “Major Damage” as defined in that policy have been met. Furthermore, the recent OSG/AOCA correspondence confirms this fact. Accordingly, OSG should now proceed to honour the obligations under the policy and instruct that the required remedial work be carried out. The actual nature of this remedial work is a matter for OSG with the advice of their technical advisers AOCA. There is no role in the matter for DBGL, either in providing calculations or in demonstrating that the truss is under designed.”*

**48.** On the 12<sup>th</sup> of April, 2017 the Complainants forwarded a letter from the Builder’s Engineer to the Builder recording that damage to the trusses had been caused by the incorrect position of the water tanks. On the same date the Provider wrote to the Complainants stating:



*“if [Complainant’s engineer] would like to provide evidence that he considers will show that a defect has occurred in the Structure that has caused the physical damage you have reported we will be happy to look at this on your behalf.”*

- 49.** On the 18<sup>th</sup> of April, 2017 the Loss Adjuster emailed the Complainants again setting out in detail why coverage is not available for this defect.

*“We are satisfied that we have made our position clear on this matter at this stage, and it is noted... has omitted the specific reason we do not consider cover to be available under the ....Policy, Section 3.3. despite previous advice.*

*For Major Damage (which we accept has occurred) to be considered, there must be a defect in the Structure, as defined in the policy. In his latest correspondence and to date this has not been evidenced. To clarify, we do not believe the defect to be in the structure of the roof, but to be in the inadequate design of the supports for the water tank. If Mr. ...would like to provide evidence that he considers will show that a defect has occurred in the Structure that has caused the physical damage you have reported we will be happy to look at this on your behalf. If not, we confirm our Final Response has issued.”*

- 50.** The Complainants responded by email on the same date expressing her opinion that the defect at issue is subject to coverage as follows:

*“[the Loss Adjuster] has agreed there is major structural damage. I cannot see where in the insurance policy I have before me that requires further evidence beyond your acceptance that there is a major structural damage and that the cause has been identified. Our engineers have stated very clearly that damage has been inflicted on the trusses causing the damage to the structure”.*

- 51.** On the 21<sup>st</sup> of April, 2017 the Provider’s Loss Adjuster responded to the Complainants’ email stating:

*“the issue causing confusion and what the Engineers are missing, is that despite the obvious damage, the cause (or Defect) has been identified, and is agreed as inadequate supports to the water tanks, as per letter of the 21/03/17..... However, they (the*

*inadequate supports, the Defect) do not fall under the policy definition of structure.” Foundations Load-bearing parts of floors, staircases and associated guardrails, walls....As previously advised, Underwriters retained Engineers have reviewed your Engineers advice and have advised the following:*

*Water tank installation requires that the loading from the spreaders is imposed on the roof truss at the node points. In this case the tank is not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss away from the node points. In this regard [Consultant Engineer] is correct in saying that the chords are deflecting excessively as they are generally not designed to accommodate this unintentional loading. However, [Consultant Engineer] has provided no commentary or calculations to show that if the tank were positioned correctly the chords would be ok. Therefore he has not demonstrated that the truss is under designed based on the intended loading - only that the truss is deflecting due to the unintended loading. So, the defect is not in the structure; but for the unintended loading of the trusses, there would be no defect and no damage.”*

**52.** On the 21<sup>st</sup> of April 2017 the Complainants indicated an intention to make a complaint to the Ombudsman. On the 26<sup>th</sup> of April 2017, the Complainants requested the Ombudsman to adjudicate on the difference on interpretation of the policy and whether cover was properly available in respect of the damage caused by deflecting roof trusses. The complaint referred to the Ombudsman was that the Provider’s Loss Adjuster did not correctly or reasonably deal with the Complainants’ claim in respect of the damage to their house.

**53.** The Complainants set out their complaint as follows:

*“When I contacted [Provider’s Loss Adjuster] about the attic problem they told me to hold off on dealing with the attic until we had figured out the pyrite problem, as it was the expensive and most invasive of the issues. They said it would be better to complete all the work at the same time when I am out of the house, rather than having to move twice or have builders in while I was there. We went through years of stress until our pyrite claim was finally processed and we moved out to have the pyrite remediation work done.*

*However, they did not do the work while we were moved out and we are now moved back in 2 months and still no sign of the problem in the attic being fixed.*

*[Consultant Engineer] has written several reports and has demonstrated that the truss in the attic is deflecting causing major damage to the structure of the housing unit. Each e-mail takes a week to respond to. I either get a response on Monday or Friday with a week in between with no communication. Dragging out each week with no help and keeping me so stressed I lose sleep.*

*I just need this problem solved as far as I'm aware all that is necessary is for the water tanks in the attic to be emptied and lifted and correct supports put in place. Followed by the repair of the damage to the floor beneath – doors don't close, tiles are lifted, walls are cracked etc. In the meantime my daughter cannot close her bedroom door for the past three months and we are still faced with having builders back in our home again”.*

**54.** The Complainants elaborated in their complaint that they found the entire process stressful. The failure to deal with all remediation works when they were absent from the house for the pyrite remediation works meant ongoing inconvenience and there had been issues even with the remediation works done. They also complained about the length of time the process has taken.

**55.** During the investigation of the complaint by the Ombudsman, the Provider's Loss Adjuster was requested to supply its written response to the complaint and to supply all relevant documents and information. The Loss Adjuster responded in writing to the complaint and supplied a number of items in evidence. The Loss Adjuster sought to distinguish between the pyrite claim and the second claim relating to the deflecting roof trusses. The Loss Adjuster characterized this second claim as relating to damage as a result of insufficiently supported water tanks in the attic.

**56.** Having reviewed and considered the submissions made by the parties to the Complaint, the Ombudsman expressed himself satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict.

**57.** It is apparent from the foregoing that the basis for Loss Adjuster's refusal of cover was rooted in its view that the roof trusses themselves were not defective but that the manner in which a water tank had been positioned in the attic area seemingly without adequate or properly placed load spreading supports caused an unintended load to be applied to the trusses resulting in cracking on ceilings and walls caused by the supported pressure on the trusses. On the other hand, the Complainants took the position that the structural damage complained of by reason of the deflection of the trusses resulted from a defect in the trusses which were not fit for purpose as evidenced by the deflection which arose when a water tank was positioned in the attic.

**58.** A Preliminary Decision was issued to the parties on 23<sup>rd</sup> of March 2020, outlining the preliminary determination of the Ombudsman in relation to the Complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a legally binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

**59.** The Provider made an extensive post-preliminary Decision submission under cover of its legal representative's letter dated the 15<sup>th</sup> of April, 2020, a copy of which was exchanged with the Complainants who advised the Ombudsman under cover of their e-mail dated the 15<sup>th</sup> of April, 2020 that they did not see anything new in the submissions from the Provider's Loss Adjuster. The Provider's Loss Adjuster made a submission dated the 17<sup>th</sup> of April, 2020 stating that unless the Complainants were in a position to provide additional technical information, confirming that the proximate cause of the damage complained of had arisen from a defect in the design, workmanship, materials or components of the load-bearing trusses themselves, they had no further comment to make. This submission was exchanged with the Complainants and they advised on the 6<sup>th</sup> of May, 2020 that they had nothing further to add.

**60.** On the 24<sup>th</sup> of July, 2020 the Respondent's Final Decision was delivered.

## **THE LEGISLATIVE FRAMEWORK OMBUDSMAN'S JURISDICTION**

**61.** The Ombudsman’s jurisdiction to consider and determine complaints is created by Part 5 of the Financial Services and Pensions Ombudsman Act 2017 (“the FSPO Act 2017”). The case law consistently emphasises that the complaints procedure before the Ombudsman (and his statutory predecessors) is intended to afford an informal, expeditious and inexpensive mechanism whereby complaints in respect of the provision of financial services and pensions might be resolved. The Ombudsman’s decision should, in principle, be capable of resolving the complaint without it becoming necessary for the parties to resort to court by way of appeal. Further, the range of remedies which the Ombudsman may grant is wider than those available in conventional civil litigation.

**62.** The Ombudsman’s jurisdiction to consider and determine complaints in respect of a financial service provider arises under s. 60 of the FSPO Act 2017 (as amended) as follows:

*“60. (1) On completing an investigation of a complaint relating to a financial service provider that has not been settled or withdrawn, the Ombudsman shall make a decision in writing that the complaint—*

*(a) is upheld,*

*(b) is substantially upheld,*

*(c) is partially upheld, or*

*(d) is rejected.*

*(2) A complaint may be found to be upheld, substantially upheld or partially upheld 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) A decision of the Ombudsman under this section shall be communicated to the parties by the Ombudsman and such decision shall include the following:*

*(a) the decision under subsection (1);*

*(b) the grounds for the decision under subsection (2);*

*(c) any direction given under subsection (4).*

*(4) Where a complaint is found to be upheld, substantially upheld or partially upheld, the Ombudsman may direct the financial service provider to do one or more of the following:*

*(a) review, rectify, mitigate or change the conduct complained of or its consequences;*

*(b) provide reasons or explanations for that conduct;*

*(c) change a practice relating to that conduct;*

*(d) 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) take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint.*

*(4A) (a) In paragraph (b) and subsections (4B) and (4C) “Act of 2019” means the Consumer Insurance Contracts Act 2019.*

*(b) Subsection (4B) is without prejudice to the generality of subsection (2) as it operates to enable the Ombudsman to make decisions by reference to, amongst other things, the enactments concerning the financial service concerned, including, as the case may be, the Act of 2019.*

*(4B) The provisions of section 26 of the Act of 2019 apply in relation to the power of the Ombudsman under subsection (4)(d) to direct the payment of compensation in a complaint involving a contract of insurance as they apply in relation to the power of a court of competent jurisdiction to make an award of damages in a claim under a contract of insurance.*

*(4C) The power under section 26 of the Act of 2019 shall not be exercised by the Ombudsman to an extent that such exercise would have the result that the total sum of compensation payable in respect of the complaint concerned exceeds the amount which, by way of compensation, the Ombudsman has jurisdiction to direct the payment of under this Act.*

*(5) Other than where a greater amount of compensation is prescribed by regulations made under section 4, the Ombudsman may not direct the payment of an amount of compensation exceeding—*

*(a) €26,000 per annum, where the subject of a complaint is an annuity, or*

*(b) €250,000 in respect of all other complaints.*

*(6) A direction under subsection (4) which requires a financial service provider to pay an amount of compensation may provide for interest to be paid at the rate referred to in section 22 of the Courts Act 1981 where the amount is not paid by a date specified in the direction.*

*(7) The Ombudsman shall give a copy of a decision under this section to—*

*(a) the complainant, and*

*(b) the financial service provider to which the complaint relates.*

*(8) Where a decision under this section contains a direction under subsection (4), the financial service provider concerned—*

*(a) shall comply with the direction within such period as is specified in the direction, or within such extended period as the Ombudsman allows, and*

*(b) shall, not later than 14 days after the end of that period or extended period referred to in paragraph (a), notify in writing the Ombudsman of action taken or proposed to be taken in consequence of the direction.”*

**63.** The Ombudsman enjoys what Simons J. described in *Molyneaux v. Financial Services and Pensions Ombudsman* [2021] IEHC 668 as a “*hybrid jurisdiction*”, whereby not only may he adjudicate upon alleged acts of maladministration, he may also make determinations in respect of any dispute of fact or law that arises in relation to conduct by or on behalf of the provider.

**64.** The statutory language indicates that the Oireachtas intended that the Ombudsman should have jurisdiction to determine disputes of a type which would traditionally have been brought before the courts in plenary proceedings. The Supreme Court has commented on the breadth of the jurisdiction enjoyed by the Ombudsman’s statutory predecessor, the financial services ombudsman, in *Governey v. Financial Services Ombudsman* [2015] IESC 38; [2015] 2 I.R. 616 where para. 42 of the judgment the Court observed as follows:

*“[...] However, there are some cases where the sole, or virtually only, issue raised by the complainant may be one which is based on an assertion of legal rights. Such cases are, of course, within the jurisdiction of the F.S.O., and it is for the F.S.O. itself to decide whether to determine them. However, it is important to record that the F.S.O. does not have an obligation to determine by adjudication a complaint where the substance of the matters complained of is that a relevant financial institution has acted unlawfully in its dealing with the complainant and where, therefore, exactly the same issues of legal rights and obligations could be brought before a court. The legislation, therefore, permits, but does not require, the F.S.O. to deal with such complaints, being cases which are, in reality, matters which might otherwise be pursued by an appropriate form of court proceedings before whatever court might have jurisdiction to deal with the issues concerned.”*

**65.** The remedies available in respect of a complaint against a financial services provider are prescribed at section 60(4) of the FSPO Act 2017. The Ombudsman’s decision may contain such direction to the parties concerned as the Ombudsman considers necessary or expedient for the satisfaction or the resolution of the complaint. The Ombudsman may order such redress, including financial redress, for the complainant as he considers appropriate. Any financial redress shall be of such amount as the Ombudsman deems just and equitable having regard to all the circumstances, but shall not exceed any actual loss of benefit under the scheme concerned or the statutory cap under s. 60(5).



## THE HIGH COURT'S APPELLATE JURISDICTION

**66.** The High Court's appellate jurisdiction is provided for under s. 64 of the FSPO Act 2017 as follows:

*64.(1) A party to a complaint before the Ombudsman may appeal to the High Court against a decision or direction of the Ombudsman. [...]*

*(3) The orders that may be made by the High Court on the hearing of an appeal under this section include (but are not limited to) one or more of the following:*

*(a) an order affirming the decision or direction of the Ombudsman, subject to such modifications as it considers appropriate;*

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

*(c) an order remitting that decision or any such direction to the Ombudsman for review with its opinion on the matter;*

*(d) such other order in relation to the matter as it considers just in all the circumstances;*

*(e) such order as to costs as it thinks fit;*

*(f) an order amending the decision or direction of the Ombudsman, as the case may be.”*

**67.** Notwithstanding that the right of appeal under the current legislation, and its statutory predecessor, Part VIIB of the Central Bank Act 1942 (as introduced in 2004), is stated in general terms, the courts have consistently held that the appeal is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed against. The leading authority in this regard is the judgment of the High Court (Finnegan P.) in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323. There the former President of the High Court observed that it was desirable that there should be consistency in the standard of review on statutory appeals. The threshold for a successful appeal was then stated as follows (para 35):

*“[...] 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.”*

**68.** The passage from the judgment of the Supreme Court in *Orange Ltd v. Director of Telecoms (No 2)* [2000] IESC 22; [2000] 4 I.R 159 relied upon above reads as follows (at pages 184/85 of the reported judgment):

*“In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court 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 arriving at a conclusion on that issue, the High Court will necessarily & have regard to the degree of expertise and specialised knowledge available to the first defendant.”*

**69.** The standard of review posited in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323 has been applied consistently by the High Court to appeals in respect of both the former and the current statutory regime. The approach has also been endorsed by the Court of Appeal in *Millar v. Financial Services Ombudsman* [2015] IECA 126 and 127; [2015] 2 I.R. 456; [2015] 2 I.L.R.M. 337. As appears, the standard of review is analogous to that posited in *Orange Ltd v. Director of Telecoms (No 2)*. This means, as Simons J. put it in *Molyneaux* (at paras. 62 to 66):

*“An appeal against the Ombudsman’s decision is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from, culminating in the substitution by the High Court of its adjudication for that of the Ombudsman.*

*This limitation on the appellate jurisdiction is achieved by the court only intervening to set aside a decision where it is shown to disclose a serious and significant error of law. The decision under appeal exhibits precisely the type of error which justifies judicial intervention, for the reasons summarised at paragraphs 52 to 58 above. In such circumstances, the appropriate order is to remit the decision to the Ombudsman for review, having regard to the court’s opinion on the matter, pursuant to section 64(3)(c) of the FSPO Act 2017.*

*The court must resist the temptation to embark upon its own de novo consideration of the merits of the complaint. The identification of a serious and significant error of law in the Ombudsman’s decision at first instance does not open a gateway, whereby the statutory fetters on the High Court’s appellate jurisdiction are suddenly unlocked and the court conferred with full jurisdiction to decide the matter afresh. The legislative intent, as identified in the well established case law, is that complaints in respect of the provision of financial services and pensions will be determined by a dedicated, specialist tribunal. The existence of a right of appeal to the High Court represents an important safeguard against serious error, but it is not intended as a de novo appeal. Rather, the rights of the parties are vindicated by an order for remittal. The Ombudsman must then reconsider the matter and reach a fresh decision in accordance with the opinion of the court.*

*This rationale extends even to those cases where the issues arising on the complaint can be characterised as involving a pure question of law. The Court of Appeal in *Millar v. Financial Services Ombudsman* explained that whereas the High Court does not have to defer to the Ombudsman’s finding on a question of law, the overall approach to the appeal remains the same. The general principles set out in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* still apply to the determination of the appeal, save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding.*

66. *The Court of Appeal further held that it is not permissible for the High Court on an appeal to “examine afresh” the interpretation placed by the Ombudsman on a relevant term of a contract. Rather, the High Court should consider whether an Provider has established, on the balance of probabilities, that on the materials before it the Ombudsman’s interpretation contains a serious error. The judgment also explains that the construction of a contract is not a pure question of law but is a mixed question of law and fact. (See paragraphs 62 to 67 of the judgment of Finlay Geoghegan J. in Millar v. Financial Services Ombudsman as reported in the Irish Reports).*

*It would seem to follow that where a serious error is identified, the complaint should be remitted for reconsideration. Were it otherwise, the High Court would be carrying out precisely the type of fresh examination of the complaint disavowed by the Court of Appeal in its judgment in Millar.”*

**70.** The case law on the standard of review recognises a level of deference to be shown to a determination of the Ombudsman. The Court of Appeal confirmed in *Millar* that the High Court, in hearing an appeal, should not adopt a deferential stance to a decision or determination by the Ombudsman on a “pure” question of law. The judgment went on to hold, however, that the complaint in that case, involving the interpretation of a contract, presented a mixed question of law and fact. The position is put as follows by Finlay Geoghegan J. at paras. 15 and 16 of her judgment (p. 480 of the Irish Reports):

*“I agree with the trial judge that where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, that the court should not adopt a deferential stance to the decision or determination on the question of law. This follows from the statutory scheme applicable to the Ombudsman and the judgments in *Orange Ltd v Director of Telecoms (No.2)* [2000] 4 I.R. 159 and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 and those following. Section 57CK(1) expressly permits the Ombudsman, at his own initiative, to refer a question of law to the High Court. The relevant deferential stance on appeal as explained by Keane C.J. in *Orange* at p.185 is that ‘...the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the [Ombudsman].’ With respect to the Ombudsman he does not have expertise or specialised knowledge, certainly relative to the High*

*Court, in deciding questions of law. However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High Court is required ‘to examine afresh’ that issue in the course of the appeal. Rather the correct position is that the general principles set out in Ulster Bank Investment Funds Ltd v Financial Services Ombudsman still apply to the 10 determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding. [...]*”

**71.** The judgment in *Millar* has been interpreted as follows by the High Court (Barrett J.) in *Minister for Education and Skills v. Pensions Ombudsman* [2015] IEHC 466 (at para. 14) (cited by Simons J. in *Molyneaux*) (para. 24):

*“As most complaints to the Financial Services Ombudsman, and perhaps also the Pensions Ombudsman, seem likely to concern a difference of interpretation of contractual arrangements or documentation, the effect of Millar appears to be that unless the Financial Services Ombudsman, clothed in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final.”*

**72.** The Provider relies on the Court of Appeal in *Millar* to argue that while the authorities suggest that the Courts should take a deferential approach to determinations of the Respondent, this does not apply in relation to matters of legal interpretation as the Respondent does not have expertise or specialised knowledge in deciding questions of law and therefore no curial deference is to be shown to the Respondent in respect of purely legal questions. The Provider accepts, however, that even where a pure question of law is at issue, the general principles set out in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323 still apply, i.e. the Provider 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 series of such errors. It is accepted by the Provider that the construction of written instruments is a mixed question of law and fact. It is submitted, however, in reliance on *Stanberry Investments*

*Ltd v Commissioner of Valuation* [2018] IEHC 620 (“*Stanberry*”) that construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts. The Provider further submits, in reliance on the dicta of Kelly J. in *Premier Periclase Limited v. Commissioner of Valuation* [1999] IEHC 8 that errors of fact simpliciter do not present any issue of curial deference either:

“*[w]hen conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected*” (at para 25).

**73.** I am satisfied in reliance on authorities such as *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323 and *Stowe v. Financial Services Ombudsman* [2016] IEHC 199 that there is a high threshold to be met for the High Court to intervene to set aside decisions of the Respondent. Where the appeal is taken against a finding of the Ombudsman which involves a decision on the question of construction of an insurance policy, as here, the Court should only intervene where the Provider satisfies the Court that the decision reached was vitiated by a serious and significant error. In this case that requires the Court being satisfied as regards the substance of the complaint that the Ombudsman fell into serious and significant error in concluding that the damage complained of, namely, damage to the structure of the roof connected with deflecting trusses in the roof constitutes damage to the Structure of a Housing Unit as defined under the Policy as including load bearing parts of floors, staircases and associated-guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability both having regard to the contract terms and the evidence.

**74.** It further requires that the Court be satisfied that the Ombudsman has not so erred in law in identifying the statutory parameters of his jurisdiction under s. 60(2) of the FSPO 2017 Act as to deprive himself of jurisdiction. The approach of the High Court in considering a decision of the Ombudsman on a pure question of law such as this, will not take a deferential stance to that part of the finding but will nonetheless only intervene where the error of law is material and having regard to the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors.

**75.** It is clear from all of the foregoing that the circumstances in which I am entitled to intervene to set aside the Ombudsman’s decision on this appeal are limited. The Ombudsman

has the right to get the decision wrong, by which I mean that even if I would have reached a different decision to the Ombudsman on hearing the details of the consumer's complaint, this is not grounds for the decision of the Ombudsman to be set aside, provided that the Ombudsman did not make a serious and significant error in reaching his decision.

## **THE OMBUDSMAN'S DECISION**

**76.** The Ombudsman's Decision runs to 29 pages. The Decision stated (p. 18):

*"I hold that if the roofing structure is intended to hold water tanks it should be designed and constructed to be fit for that purpose and certainly not in a way that has led to acknowledged damage to the trusses and onward damage in the form of cracking to the upper area of the property. The evidence submitted by the parties demonstrates that due to a defect in the design, workmanship, materials or components, the roof structure is not in fact fit for this purpose and damage to the Complainant's home has resulted."*

*(p.19): "... the appropriate supports were not in place for the water tanks. I consider that the defect in the workmanship, design and components which led to the absence of supports (be they brackets or otherwise) of the structure (on the walls or trusses), is a defect that any reasonable person would expect to come within the scope of the policy for cover. ..."*

**77.** The Decision continued (p. 20):

*"I believe any reasonable interpretation would consider that the Structure would have to be fit for purpose in all respects, including the ability to accommodate and support the water tanks."*

**78.** The Ombudsman added (p. 20):

*"I consider that for a proper, complete and functioning roofing structure, it is reasonable to expect that it would be able to support water tanks, in a manner which did not cause damage of the nature that was caused to the Complainant's home".*

**79.** The Ombudsman continued (at p. 21) by reference to the definition of “Major Damage”:

*“I accept the Provider’s position in this regard, but it was the absence of the components resulting from defects in the design and workmanship that caused the damage to the Complainant’s home.”*

**80.** After noting that “technical” or “counter-intuitive” interpretations were inappropriate regarding consumer insurance contracts, the Decision continued (p.21):

*“The fact that the application of the Policy has had to be the subject of expert engineering analysis further indicates the complexity of the contractual provision that we are dealing with and that the resolution involves consideration of fact and law in a sensible and reasonable manner..... I do not accept the Provider’s position. I am of the view, based on the submissions and evidence before me, that any fair and reasonable consideration of this matter would conclude that damage has resulted as a consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit as provided for in the policy”*

**81.** The Ombudsman added (at p. 22):

*“The definition of Structure could only mean a Structure that has the ability to accommodate and withstand the weight of water tanks, which is clearly not the case in the Complainant’s home...How the Provider remedies the defect causing the damage may require adjustments to the trusses, but its own experts have referred to other ways to position the tanks, so that they do not cause the damage that the defect is currently causing. This will be a matter for the experts to determine.”*

**82.** The Ombudsman’s key conclusion is recorded at p. 23 as follows:

*“I believe any reasonable examination of the circumstances of this complaint indicate that the defect was with the Structure, as, it is unable to support the weight of the water tanks, thereby causing damage.”*



**83.** The Decision continued (p.23):

*“... the approach adopted by the Provider in refusing to deal with the damage caused to the upper floors of the house has caused the Complainants great inconvenience, stress and effort for some six years in trying to secure a remedy. For this reason I believe compensation is merited.”*

**84.** The €20,000 compensation directed is supported by reasons (pp. 23 to 26 of the Decision), most specifically that the Complainants suffered very great inconvenience over a period of six years that is still ongoing in respect of Provider’s Loss Adjuster’s failure to deal with the water tank issues since the matter was first raised by the Complainants in 2014 and on an ongoing basis since then. The Ombudsman stated that the compensation directed was not intended to be punitive but was intended to compensate the Complainants for the inconvenience occasion by the years spent seeking a resolution under the Policy.

**85.** The Ombudsman stated that he was of the view that (p. 27):

*“The Provider’s conduct was unreasonable in that it failed to provide a remedy for the damage that result from the defect in the design, construction, material, components and workmanship as provided for in the Policy.*

*That the Provider acted unjustly when it refused to remediate the damage resulting from the defect in the design, construction, material, components and workmanship as provided for in the policy.*

*That the Provider’s conduct was improper in that it did not remediate the damage caused to the Complainant’s property as provided for under the policy.”*

**86.** With regard to his jurisdiction and the identified statutory grounds for the Decision, the Ombudsman referred to s. 11 of the FSPO Act, 2017 which provides that the Ombudsman should deal with complaints in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form.

**87.** The Ombudsman concluded that it was fully appropriate that the Complaint was (substantially) upheld under the broad provisions of s. 60(2)(b), (c) and (g) of the FSPO 2017 Act. The Ombudsman directed the Provider to repair the damage that resulted as a consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit (including the correct positioning of the water tanks) and to pay compensation to the Complainants in the sum of €20,000 for the inconvenience caused.

## **DISCUSSION AND DECISION**

**88.** The Provider contends for several serious and significant errors which might be summarised as follows:

- A. The Respondent erred in interpreting the scope of the cover provided under the Policy and specifically erred in concluding that the proximate cause of the damage to the trusses in the form of excessive deflection was not captured by the definitions of Structure and Major Damage under the Policy;
- B. The Respondent erred on the evidence in concluding that the damage was caused by a defect in the trusses themselves rather than by a workmanship defect in the installation of the uninsured water tanks and supports, which in turn caused damage to the trusses in the form of excessive deflection;
- C. The Respondent exceeded his jurisdiction in upholding the complaint in reliance on s. 60(2)(b), (c) and (g) in circumstances where the Policy, properly construed, does not require insurance cover for the damage complained of;
- D. The Respondent erred in ordering compensation either in the sum of €20,000 or at all.

**89.** I must determine firstly, whether I am satisfied that the Ombudsman fell into serious and significant error in concluding that the damage complained of, namely, damage to the structure of the roof connected with deflecting trusses in the roof constitutes damage to the Structure of a Housing Unit as defined under the Policy as including load bearing parts of floors, staircases and associated-guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability having regard to the evidence and the proper construction of the contract. I must then decide whether the Ombudsman has exceeded his jurisdiction in

upholding a complaint under s. 60(2) insofar his Decision requires the Provider to extend cover beyond the strict terms of the Policy. Finally, I must consider the lawfulness of the compensation ordered.

**90.** Addressing each of these appeal issues in turn, I propose to consider first the question of whether there was a serious and significant error of law and/or fact in the interpretation of the Policy terms favoured by the Respondent. Thereafter, I propose to consider whether the Decision was vitiated by reason of a serious and significant error arising from an evidential deficit of the type contended for by the Provider. Then I will consider whether the Respondent seriously erred as to his jurisdiction under the FSPO 2017 Act and was wrong in directing the payment of compensation.

***Is the Decision vitiated by Error of Law as to the Proper Interpretation of the Contract?***

**91.** The matter of contractual interpretation is not a pure question of law, but rather a mixed question of both law and fact. It is not permissible for the High Court to ‘*examine afresh*’ a construction placed by the Ombudsman on a relevant term of a contract. I cannot and must not engage in a re-examination from the beginning of all the merits of the decision or seek to step into the shoes of the Ombudsman or arrogate to myself the decision-making process (as per MacMenamin J. in *Ryan v Financial Services Ombudsman* (23 September 2011)(para. 68). Rather I am confined to considering whether the Provider has established on the balance of probabilities that on the materials before him the Ombudsman’s construction contains a serious error. I am not so satisfied.

**92.** The proper interpretation of the contract requires the Court to consider what damage is covered by the contract properly construed. A limit on the scope of cover provided under the contract is referable to the cause of the damage. As emphasised by the Provider this is not a builder’s contract of insurance, this is a structural insurance policy. Cover under the policy is limited to major damage, as defined, to the structure as further defined under the Policy.

**93.** In this case, contrary to what is contended on behalf of the Provider, there are conflicting opinions as to the cause of the damage. While there is evidence that damage might not have occurred had the water tanks been correctly installed, there is also evidence to support

a conclusion that the roof trusses were not constructed in a manner which allowed them to support a load without causing deflection. Indeed, the argument was made on behalf of the Ombudsman that the fact that another course of action could have been taken which might have avoided damage - e.g. different tank placing or transferring their load to walls - does not mean that the lack of support in the trusses was not causative.

**94.** In *Hyper Trust Ltd. (trading as the Leopardstown Inn) v. FBD Insurance plc* [2021] IEHC 78 McDonald J. stated (para. 211):

*“... in cases such as Silversea where it is not possible to determine whether a loss sustained by the plaintiff was caused but for the occurrence of the insured peril, on the one hand, or some other interdependent or interrelated non-insured (but not excluded) cause, on the other, it seems to me that the insured peril should be regarded as a sufficient cause for the purposes of the ‘but for’ test. This seems to me to be the only fair and reasonable approach to take in the circumstances. If this approach is not taken, the application of the ‘but for’ test could lead to recovery being denied to an insured under a policy notwithstanding that the insured peril was an effective cause of the loss sustained by the insured. That result would seem to be inconsistent with the approach taken in the concurrent cause cases where it was recognised as early as 1877 in a case cited by Slade L.J. in Miss Jay Jay that ‘any loss caused immediately by the perils ... is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it’ (per Lord Penzance in Dudgeon v. Pembroke (1877) 2 App. Cas. 284 at p. 297).”*

**95.** Accordingly, it suffices in insurance law, if the insured peril is “*an effective cause*” of the damage arising, even if not the only one. Given that there was evidence that the damage was caused by deflecting trusses which were not fit for purpose in that the location of water tanks in the attic caused movement in the roof, it seems to me that it was open to the Respondent to construe the damage as caused by an insurable event, namely a defect in the structure of the roof.

**96.** In reaching this conclusion I have had regard to the fact that ‘*Defect*’ is not defined in the Policy, and therefore requires to be interpreted. The policy covers a defect in the design,

workmanship, materials or components of the Structure. To my mind, it is difficult to see why, if the cause of damage is the load resulting from the location of water tanks, this is not covered under the policy as a defect in the design, workmanship, materials or components of the Structure. This definition is capable of a more expansive definition than that urged by the Provider and a common-sense interpretation would certainly support a finding that where the roof trusses, which are accepted to be part of the roof structure and within cover, are deflecting due to their inability to hold a load, then the roof structure itself is structurally unsound. It is recalled that the definition of Structure expressly references the load bearing parts of the Structure and the capacity to bear a load is envisaged as integral to the soundness of the Structure for the purposes of the Policy.

**97.** The Provider is critical of an interpretative approach avoiding technical construction and favouring common sense. However, in the insurance context it is perfectly permissible to have regard to common sense in interpreting a contract of insurance. In *Rohan Construction v. ICI* [1986] ILRM 4198 Keane J. stated (pp. 423 to 424):

*“It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance”.*

**98.** On appeal in *Rohan Construction Ltd v Insurance Corporation of Ireland Plc* ([1988] ILRM 373), Griffin J., for the Supreme Court, asked (p. 381):

*“In the case of what is entitled a Public Liability Policy, would reasonable persons, in the situation of the parties, have in mind that under that Policy the parties would expect that the events which took place in this case would be covered.”*

**99.** In *Hyper Trust* McDonald J. stated (para. 6):

*“The Court seeks to put itself in the position of the parties at the time the contract was made and to interpret the contract by reference to the meaning it would convey to*

*reasonable persons having all the background knowledge that would have been reasonably available to the parties at that time”.*

**100.** From the perspective of the reasonable person interpreting this contract, it is my view that such a person would expect the roof trusses to have been designed and constructed in a manner which rendered them fit to bear a water tank load or at least that the Ombudsman was entitled to take this view.

**101.** I am satisfied that the definition of structure is sufficiently widely drawn as to encompass a defect in the load bearing structures of the roof whether caused by a defect in the materials used or the workmanship in carrying out the structural works or the design of the roof trusses themselves as part of the overall load bearing structure of the house with the result that insufficient support was provided. In my view there was ample evidence to come to a conclusion that the identified defect came within the terms of the policy cover.

**102.** Further, even if the language of the policy did not provide for a construction which covers the cause of damage in this case, which I consider it does, it is common knowledge that water tanks often go in roofs, and most people would expect load-bearing parts of a roof to be able to support a water tank. If it is not able to support a water tank then on a common-sense approach, this is because of a defect in the structure of the roof. Or, at the very least, I agree that the Ombudsman was entitled to so find. It seems to me that the defects established on the evidence arising from a lack of load bearing support in the roof trusses is a defect that any reasonable person would expect to come within the scope of the policy.

**103.** From a careful reading of the Decision, I note that nowhere does the Decision find that mere damage to the Structure suffices to trigger cover, such that a defect in the Structure need not be shown. The Decision’s whole thrust is that there was indeed a defect in the Structure. It states that on any reasonable analysis “... *the defect was with the Structure as it is unable to support the weight of the water tanks, thereby causing damage*” (p. 23) and that “... *damage has resulted as a consequence of a defect ...*” (p. 21). The Provider has not established that the Decision was based on an erroneous construction of the Policy as covering damage to the structure rather than in the structure as this was not the basis for the Ombudsman’s Decision.

**104.** I am satisfied that the Respondent did not err in a serious or significant manner when construing the meaning of ‘*defect*’ and deciding that damage caused by deflecting trusses came within the definition of “*Major Damage*” and “*Structure*” as defined under the contract of insurance.

**105.** On established interpretative principles, I also agree with the submissions made on behalf of the Ombudsman that the substantive result reached before the Ombudsman is one which would likely also have been reached had the Complainants litigated instead.

**106.** Bearing in mind the Ombudsman’s “*much wider ... remit*” than the courts (per Clarke J. in *Irish Life and Permanent v. Dunne* [2016] 1 I.R. 92, para. 68), it is my view that the Provider’s arguments fall well short of establishing a serious and significant error of law such as would vitiate the Respondent’s decision.

***Is the Decision supported by the Evidence?***

**107.** The Provider’s claim in this appeal is predicated in large part on what it contends is “*agreed evidence between experienced consulting engineers*” which it suggests has been ignored by the Ombudsman in a manner which vitiated the Decision. The Provider contends that in the materials submitted to the Ombudsman there was evidence of agreement by the parties that the damage, the subject-matter of the complaint, was caused not by a defect in the roof structure including the trusses but by the incorrect positioning of water tanks on spreaders in the attic, which spreaders rested inappropriately on trusses in the roof causing them to deflect, resulting in cracking in ceilings and internal walls rather than an inherent structural defect in the roof.

**108.** While the Ombudsman’s Decision properly reflects that the Provider’s evidence was to the effect that the damage was not caused by a defect in the trusses, it does not reflect that this was the agreed evidence and the Ombudsman points to the material submitted to the effect that the trusses were not fit for purpose. The Provider maintains that this position was not sustainable on the evidence before the Ombudsman.

**109.** I have reviewed the materials before the Ombudsman and I do not accept that the evidence is as clear cut as the Provider contends. While it was certainly the Provider's consistent position that the damage complained of resulted from the positioning of the water tanks which created an unintended load to the trusses and causing them to deflect (and therefore outside the terms of cover), there was other evidence before the Ombudsman to the effect that the damage was caused by the trusses not being fit for purpose and inadequate to support the load. To the extent that the Complainants submitted evidence which attributed damage to the lack of weight bearing supports on the roof trusses or chords (and this was certainly acknowledged as a factor in some correspondence), this has to be seen in the context of the overall evidence which they submitted from which it was clear that their position, supported by their expert evidence, was that there was a structural defect in the roof trusses which meant that they were not properly fit to weight bear.

**110.** The Provider's core criticism of the Decision is that it should not have held that a defect in the trusses or roofing structure caused the damage. In my view there is ample evidential support for this finding in the Decision including:-

- i. On the 28<sup>th</sup> of May 2014, the Complainants' Engineer prepared a report at the Complainants' request which concluded: "*We are of the opinion that the damage observed is a direct result of the structural inadequacies of the in situ trusses.*" (p.4 of the Decision)
- ii. On the 9<sup>th</sup> of July 2014, the Provider's engineer stated: "*On the face of it there appears to be a structural problem here with the trusses and you might wish to inspect and investigate*" (p.19 of the Decision)
- iii. On the 13<sup>th</sup> of March 2017, the Builder's Consulting Engineers, stated that "... *the inadequacy of the structural supports to the water tanks and movement within the roof Structure are clear defects in the design, workmanship, materials and components of the Structure*". (p.8, of the Decision)
- iv. On the 21<sup>st</sup> of March 2017, the Builder's Engineer stated: "*The water tanks are directly supported by timber spreaders which in turn bear onto the bottom chords of the roof trusses. The bottom chords of the roof trusses are inadequate to support the loading from the water tanks which is being transferred to them. This has resulted in the downward deflection of the bottom chords of the trusses*



*and this has caused the damage below. The roof trusses are clearly a fundamental load-bearing part of the roof Structure.” (p.8 of the Decision)*

**111.** This, and other material, amply illustrates that the Decision’s conclusions were reasonably open on the evidence.

**112.** The Provider submits that the tenor of the parties’ evidence was “*that the water tanks were incorrectly positioned*”. While the Provider’s submissions repeatedly assert an alleged agreement to this effect, I do not find that agreement of the nature contended on behalf of the Provider is established on the evidence. While there is a reference in some of the materials to physical damage resulting from a defect in the workmanship by virtue of the water tanks being ‘*not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss*’ and that this has resulted in the fact that the ‘*chords are deflecting excessively*’ it should not be ignored that this statement was made in a context where it appeared to be understood that the Loss Adjuster had accepted that cover was triggered in such circumstances.

**113.** There is no clear or unequivocal statement to the effect that all of the experts were agreed that the cause of the damage was incorrect positioning of the water tanks. I accept the submission that it was open to the Ombudsman to read the statement ‘*This is the cause ...*’ in context – as referring to Loss Adjuster’s position, as quoted in the sentence immediately beforehand and also not to read this sentence in isolation but to have regard to the other evidence which had been submitted. The Provider’s approach to the evidence is based on a narrow focus which excludes the totality of the evidence. The Provider’s assertion of an agreed position on the evidence is overstated and selective.

When regard is had to the totality of the evidence it is clear that there was evidence before the Ombudsman that damage arose from the trusses’ inadequacy and that this was the Complainants’ position.

**114.** I am satisfied that there was evidence before the Ombudsman upon which he was entitled to rely to arrive at the Decision he did as to the cause of the damage. As Kelly J. stated in *Millar* (para. 44):

*“It was for him [the FSO] to then consider the factual material placed before him and he is entitled to curial defence in that regard.”*

**115.** This position is further supported by the decision of Noonan J. in *Verschoyle-Greene v Bank of Ireland Private Banking and FSO* [2016] IEHC 236 where he stated (para. 37):

*“That the standard of review on appeal from the FSO is not dissimilar from that arising in judicial review is illustrated by the dicta of Hedigan J. in Smartt v. FSO [2013] IEHC 518 where he said: ‘... in my view, the FSO had before him and relied upon relevant evidence upon which he could rely in coming to the decision he did. That is the test. It is not for this Court to either agree or disagree with his finding as long as it is one reasonably based upon the evidence before him.’ (at para. 12).”*

**116.** Noonan J. continued (para. 39):

*“It is thus immaterial that the court would have come to a different conclusion on the evidence once the conclusion actually arrived at by the FSO was one reasonably open on that evidence.”*

**117.** In my view, the Respondent’s decision that the absence of supports of the structure on the walls or trusses was the defect causing damage is one that was open to him on the evidence. Given the consistent volume of case-law concerning the Respondent, which envisages judicial intervention only where factual findings are “*unsustainable*”, it is clear that where a finding is supported by evidence it should not be treated as unsustainable by me. I see no proper basis for interfering with the Decision of the Ombudsman having regard to his finding on the evidence.

**Jurisdiction under Section 60(2)(b), (c) and (g) of the FSO 2017 Act**

**118.** In deciding to grant relief under s. 60(2)(b), (c) and (g), it seems to me that the Ombudsman failed to properly have regard to the different circumstances in which its jurisdiction under those sub-sections arise. As set out above, under s. 60(2), a complaint may

be found to be upheld on “one or more of the following grounds”. In material parts the grounds are stated as:

*“(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;*

...

*(g) the conduct complained of was otherwise improper.*

**119.** When one considers the Ombudsman’s Decision, however, it is manifestly clear that he considered that the Policy, properly construed, covered the damage in question. It was no part of the Ombudsman’s Decision that the damage fell outside the terms of the Policy but the Provider should provide cover notwithstanding. I place particular emphasis on p. 27 of the Decision where the Ombudsman addresses a complaint from the Provider in response to the Preliminary Decision whereby the Provider points out that the Ombudsman had failed to identify which of the provisions of s. 60(2)(b)(c) and (g) has been found to apply. In response to this criticism, the Decision recites:

*“I do not accept the Provider’s assertion in this regard, having considered the matter in detail I am of the view that:*

*The Provider’s conduct was unreasonable, in that it failed to provide a remedy for the damage that resulted from the defect in the design, construction, material, components and workmanship as provided for in the policy;*

*That the Provider acted unjustly, when it refused to remediate the damage resulting from the defect in the design, construction, material, components and workmanship as provided for in the policy;*

*That the Provider’s conduct was improper in that it did not remediate the damage caused to the Complainant’s property as provided for under the policy.”*

**120.** In the face of this very clear explanation of the rationale for invoking jurisdiction under s. 60(4) one can be left in no doubt as to the basis for the Ombudsman's Decision. It is clear, however, that the Ombudsman did not appreciate that s. 60(2)(c) would not apply where it had been concluded, as it clearly had, that the contract provided for cover.

**121.** I am of the view that all three of s. 60(2)(b), (c) or (g) were not properly engaged.

**122.** Having regard to the terms of the Ombudsman's Decision, it seems to me that the Ombudsman was quite entitled to conclude that s. 60(2)(b) and 60(2)(g) provided a basis for the exercise of jurisdiction as it flows from the terms of the Decision that the Ombudsman considered the conduct unreasonable and unjust and also that the delays and refusal of cover were considered improper. However, it was not part of the Ombudsman's decision that the conduct was lawful but the Complainant is entitled to redress notwithstanding this. On the contrary, the Ombudsman clearly found that cover had been wrongly refused because the contract covered the damage in question. Accordingly, the findings made in the Decision do not support reliance on s. 60(2)(c) in circumstances where reliance on this provision requires a finding of no breach of a legal requirement by the Ombudsman. Where no such finding was made in this case and where it is quite clear from the terms of the Ombudsman's Decision that it found that the damage was covered under the policy of insurance on a proper interpretation of the policy, it follows that the Ombudsman improperly relies on a jurisdiction under s. 60(2)(c).

**123.** It seems to me on the basis of his findings that the only basis for the Ombudsman invoking s. 60(2)(c) would be on the alternative basis that if he were wrong in his construction of the contract, then he nonetheless considered the conduct improper. While the Ombudsman has been vested with such a jurisdiction, nothing in the terms of the Decision provides a basis for invoking this jurisdiction. I can only conclude that the Ombudsman did not properly determine which of the provisions of s. 60(2) gave him power to intervene.

**124.** I am satisfied that the Ombudsman erred in relying on s. 60(2)(c) as this provision only arises to ground jurisdiction in circumstances where there has been no breach of a legal requirement by the provider. It remains to consider the consequences of this error on the

sustainability of the Decision. I do not consider this error to be fatal to the Decision for several reasons.

**125.** Firstly, I have regard to the nature of the decision-making process. In *Millar*, Kelly J. stated (para. 31):

*“Nor is it to be expected that a decision of the respondent should be as detailed or formal as a court judgment. As O’Flaherty J. observed in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 at 111.: - ‘We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to a minute analysis.’”*

**126.** In *Jackson Way v. Information Commissioner* [2020] IEHC 73 (appeal judgment awaited), Hyland J. stated (para. 82):

*“... The use of a form of shorthand to identify a section of the Act cannot be considered to be determinative of the Commissioner’s interpretation of any given section. ... Decisions of the Commissioner should not be construed as if they were a statute.”*

**127.** In *Westwood*, Cross J. stated (para. 86):

*“It is not for the court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it.”*

**128.** Secondly, I am mindful of the nature of the Ombudsman’s role. Under statute the Ombudsman is mandated, to approach adjudication differently from the Courts. As noted by the Ombudsman, s. 12(11) of the Act provides that the Ombudsman:

*“... when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form.”*

**129.** In my view once the Ombudsman was properly satisfied that it had jurisdiction to make directions on foot of the Complaint and the findings which justify the exercise of that jurisdiction are properly recorded, the failure to specifically identify the basis for this jurisdiction in the terms of the Decision is not fatal as this would be to require a degree of technicality or legal form which is expressly disavowed under the Act.

**130.** Thirdly, it seems to me that the basis for the Ombudsman’s jurisdiction in this case is clear and flows from the terms of the Decision itself and the reasoning advanced. The Ombudsman did not decide that cover was outside the terms of the Policy. On the contrary, it is very clear from the Decision that the Ombudsman determined that cover should not have been declined because the damage complained of came within the terms the Policy. Furthermore, the Ombudsman properly identifies a jurisdiction under s. 60(2)(b) and (g) which accords with the findings of law and fact contained in the Decision. It is clear under the terms of s. 60(2) that the Ombudsman’s jurisdiction to grant redress is dependent on one of the grounds there set out being applicable. Here the Ombudsman identifies two grounds which flow from the premise of his decision and a third which does not but to order redress it suffices that he establishes jurisdiction under one ground only.

**131.** In proceeding on the basis of an asserted jurisdiction which was inaccurate, the Ombudsman is not deprived of jurisdiction which was otherwise properly asserted. By reason of the correct invocation of jurisdiction, the error in invoking an additional jurisdiction is not material. In this regard, I note the reasoning of Hogan J. in his decision in *In Irish Life and Permanent v. FSO* [2012] IEHC 367 (hereinafter ‘ILP’) where he refused to overturn a decision despite finding an aspect thereof to be in error, stating (para. 64):

“... *these observations are not central to the conclusions ...*”

**132.** In *Westwood v Information Commissioner* [2015] 1 I.R. 489, Judge Cross similarly found that a mistake or error of law in the decision will not itself result in that decision being quashed unless the mistake is material to the decision made. Given that the Ombudsman’s jurisdiction flows clearly from the terms of its substantive findings, there is no “*material*” error of law where in addition to a proper basis for exercising jurisdiction, the Ombudsman errs in identifying a further provision which does not apply. The position might be otherwise had the

Ombudsman failed to identify a proper basis for the exercise of jurisdiction, but that is not the case here.

**133.** Accordingly, while I agree with the Provider that the Ombudsman has erred in law insofar as he invokes a jurisdiction under s. 60(2)(c), it seems to me that the true meaning of the Ombudsman is abundantly clear from the Decision. Where a proper jurisdictional basis for his Decision exists and has otherwise been identified, an error in incorrectly identifying a further jurisdictional basis is not a material error because the complaint was properly upheld on other grounds.

### **Error in Directing Compensation**

**134.** The jurisdiction to order compensation is provided for in s. 60(4)(d) which empowers the Ombudsman to pay an amount of compensation to the Complainants for any loss, expense or inconvenience sustained by the Complainants as a result of the conduct complained of. The level of compensation which may be directed by the Ombudsman is capped under s. 60(5)(b) at a monetary sum of €250,000. Accordingly, the Ombudsman enjoys a wide discretion regarding compensation. In this case, a sum of €20,000 was ordered by the Ombudsman and so there is no question but that the Ombudsman remained within the limits of the statutory cap. It is, however, contended that the level was disproportionate to the inconvenience caused and was therefore unreasonable.

**135.** Whilst in his preliminary decision it was indicated that this sum was ordered in respect of stress and inconvenience, the Ombudsman clarified in the Decision that the compensation directed was to compensate the Complainants for the inconvenience suffered by reason of the refusal to remediate damage under a Policy of insurance for a period exceeding six years. It is clear from the Decision that the Ombudsman accepted that he did not have jurisdiction to award damages for stress but concluded that considerable inconvenience had been caused to the Complainants arising from the treatment of their claim under the Policy.

**136.** In assessing the reasonableness of the level of the award, it needs to be recalled that the Complainants had vacated their home to permit the pyrite related damage to be remediated. Due to the failure to remediate all damage at the same time, the Complainants returned to a

home which remained structurally unsound with works outstanding. As documented by the Complainants, their daughter was unable to close her bedroom door because of the deflecting roof and walls. The inconvenience of having to endure structural remediation works on a second occasion when all matters could have been dealt with together is obvious.

**137.** I am acutely conscious of the fact that the matter was protracted for a period exceeding six years but that this was contributed to by the time taken in the Ombudsman's office to investigate and determine the Complaint. All of the delay is not attributable to the Provider. Despite this, for an award to be found to be unreasonable as disproportionate, it needs to be demonstrated that it does not come within a range of awards which might be made for this type of inconvenience. In my view the interference with one's peaceful occupation and enjoyment of one's home is an interference with the personal rights of the homeowner. There is no doubt that living in a structurally defective house over a protracted period causes inconvenience. The Complainants' frustration at the failure to make progress with the claim is palpable in the correspondence which was available to the Ombudsman and it is clearly inconvenient to have to engage with builders, loss adjusters, engineers and insurance companies for several years in order to secure remediation works to which one was entitled as a matter of right. This inconvenience could have been avoided had the Provider determined to provide cover in a timely manner and at the same time other works were carried out without the necessity to pursue a complaint under the FSPO Act, 2017 and subject the Complainants to having builders in their home on a second or successive occasion.

**138.** Given the breadth of discretion which the Ombudsman undoubtedly enjoys, I am not persuaded that it has been demonstrated that the Ombudsman fell into serious and significant error in awarding compensation at the level ordered.

## **CONCLUSION AND ORDERS**

**139.** In his Decision the Ombudsman decided that the relevant damage arose by reason of the roofing structure – in particular the roof trusses – being unable to support the water tanks. It held this was a “*defect*” under the Policy. ‘*Structure*’ in the Policy is defined as including “*load bearing parts of ... roofs*”. The Provider agrees that the roof trusses are load-bearing parts of roofs. Accordingly, the trusses are part of the Structure. I am satisfied that the



Ombudsman was entitled to find that it was unreasonable for the Provider not to accept that the damage was caused by a defect in the design, workmanship, materials or components of the trusses and therefore covered by the Policy. I am further satisfied that there was evidence before the Ombudsman upon which he could base his Decision that damage arose from a defect, as defined, in the structure rather than damage caused to the structure.

**140.** Having found that the Provider erred in refusing cover under the Policy, the Ombudsman has power to uphold the Complaint and enjoys an expansive jurisdiction to direct rectification and compensation under s. 60(4). Notwithstanding an error in assuming jurisdiction on a wider basis than correctly flowed from the premise of his findings, he did not err in any material way in exercising that jurisdiction because a basis for exercising jurisdiction was also correctly identified. In directing compensation, I am satisfied that the level of compensation ordered was within a range that was reasonable. It has not been demonstrated that the quantum of compensation was disproportionate to the inconvenience caused or the Provider's culpability in causing inconvenience.

**141.** In all the circumstances, I propose to make an order under s. 64(3)(a) of the FSPO Act, 2017 affirming the Decision and Directions of the Ombudsman.

**142.** This matter will be listed fourteen days after the delivery of judgement to deal with consequential matters and any submissions sought to be advanced in relation to the form of the order to be made.