APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/196

Whelan J.
Noonan J.
Allen J.

Neutral Citation Number [2023] IECA 122

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

BETWEEN

LLOYDS INSURANCE COMPANY SA

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

JOANNA DONNELLY AND HARM LUIJKX

NOTICE PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 22nd day of May, 2023

Introduction

1. In 2006 Ms. Joanna Donnelly and Mr. Harm Luijkx *("the notice parties")* bought a new house in Portmarnock, County Dublin, for use as their principal private residence. The house came with a policy of insurance called Premier Guarantee for Ireland which was originally issued by a Liberty syndicate at Lloyd's but was later taken over by Lloyd's Insurance Company SA *("the appellant")* which provided indemnity against structural defects first discovered within ten years from the date specified in the final certificate for the house.

2. Soon after the notice parties moved in to their new house, they noticed cracking in the lower walls, and later in the upper walls and ceilings. The cause of the cracking in the lower walls was established to be heave, which was attributed to the presence of pyrite in the fill. The cause of the cracking in the upper walls and ceilings was established to be that the roof of the house had sagged, pushing out the upper walls.

3. In 2014 the notice parties made two claims on foot of the policy, the first for the pyrite damage – which was classified by the claims handler as *"Pyrite Claim"* – and the second in respect of the damage to the roof and walls – which was classified by the claims handler as *"Structural Claim."*

4. The pyrite claim was eventually admitted and the house remediated. The roof claim, however, was declined on the basis that it was not covered by the policy.

5. On 26th April, 2017 the notice parties made a complaint to the respondent, the substance of which was that it was – they said – clear in the insurance documents that the policy was to cover damage to the structure of their house, and that there was damage to the structure of their house, so they had assumed that it would all be fixed. They wanted, they said, the Financial Service Provider (they meant the then Financial Services Ombudsman):-

> *" ... to adjudicate on the difference of interpretation of the policy. OSG [the loss adjuster] say they acknowledge major structural damage has been done to my*

housing unit but refuse to fix the issue. My engineer and original builder agree that damage is covered by the policy."

6. On 24th July, 2020, following a protracted investigation, the Financial Services and Pensions Ombudsman *("the respondent")* issued a final decision directing the appellant to repair the damage and to pay compensation to the notice parties in the sum of €20,000 for the inconvenience caused.

7. An appeal by the appellant to the High Court was dismissed for the reasons given in a written judgment of Phelan J. on 19th May, 2022 ([2022] IEHC 290)] but by leave of the High Court the appellant has applied to this court to review the decision on three certified questions of law.

8. The notice parties were duly given notice of the appeal to the High Court and of the application to this court but, seeing the gathering storm, they decided to batten their hatches and wait for the outcome of the litigation between the appellant and the respondent.

The dispute

9. The notice parties' claim, as set out in their correspondence with the loss adjuster and on the complaint form, was that there was structural damage to their house for which they had insurance and they wanted it fixed. The insurer's position was that the admitted major structural damage was not covered by the policy.

10. The seeds of the dispute were sown in an engineer's report commissioned by the notice parties in 2014 and which was submitted in support of the claim. The roof of the notice parties' house was constructed with prefabricated trusses. These are made up of rafters, posts, struts, and chords. They are designed and constructed to carry the weight of the roof tiles but not, unless modified by the addition of bearers and spreaders, to take the weight

of water tanks. The notice parties' engineer in his initial report identified the cause of the damage as a defect in the trusses but the appellant was – and remains – adamant that there is nothing wrong with the trusses. Rather, it is said, the cause of the damage is the positioning of the water tanks in the attic and what the appellant contends is the *"unintended"* load on the chords. The question that immediately springs to mind is, well, unintended by whom? I think that it must be a safe assumption that the manufacturer of the prefabricated trusses did not intend that they would be used – without the addition of bearers and spreaders – to support water tanks: for the good and sufficient reason that they were not designed and constructed to do so. However, the water tanks were installed and positioned by the builder and unless the builder intended that the roof would sag and deflect the walls – and it is not suggested that it did – the builder must have intended that the trusses could support the load.

11. Annexed to the notice parties' engineer's report of 28th May, 2014 were, in Annex A, a number of photographs of cracking, and in Annex B, a drawing showing a cross section of two water tanks and the existing trusses. It was said in the body of the report that the engineer had conducted a preliminary analysis of the roof trusses to support the roof/ceiling and water tanks which was attached in Annex C, but there was no Annex C.

12. The notice parties' engineer's report was submitted in support of what the loss adjuster logged as the structural claim. The loss adjuster noted that there was no Annex C and asked for it but for whatever reason the engineer refused to provide it. A note made by the loss adjuster on 20th June, 2014 suggests that the view was then taken that *"... the engineer has noted that there is a defect in the trusses, but he has not advised the nature of the defect."* On 30th June, 2014 the loss adjuster made a note of a conversation with the engineer to the effect that the engineer would not submit Annex C and that *"... if we showed the report to any engineer that they would see what was wrong. He also said that if we don't accept the claim, he will advise his client to go directly to the FSO."* There followed a

protracted and sometimes tetchy correspondence and a series of engineering inspections and reports. I am bound to say that I fail utterly to understand why the loss adjusters were not provided with the engineer's calculations, however preliminary they may have been.

13. In fairness, the appellant's position is that the notice parties were entitled to have expected that the trusses would support the tanks but contend that their remedy is against the builder. The core argument is that the acknowledged major structural damage to the notice parties' house is the wrong kind of major structural damage. The damage, it is said, is damage caused to the house – which is not covered – rather than damage in the house – which would be.

The policy

14. It is useful at this stage to set out the terms of the insurance policy.

15. Clause 1 of the policy document, under the heading *"Information"* provided that:-

> *"The **Housing Unit** is insured from the date of completion or the date specified in the **Final Certificate** for a period of 10 years against **Major Damage**. See Section 3.3 for details."*

16. The final certificate for the notice parties' house was signed on behalf of the insurer on 5th June, 2006.

17. Section 3.3 provided that:-

> *"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 the original specification.*

*The **Minimum Claim Value** shall be as specified in the **Initial/Final Certificates.** [€650.00]*

*In the event of a claim under this Section the **Underwriter** has the option either of paying the cost of the repairing, replacing or rectifying any damage resulting from item 1 above or itself arranging to have such damage corrected."*

18. The terms used in clause 3.3 were defined in clause 2. The **Housing Unit** was defined as including the **Structure,** which in turn was defined as including:-

"load-bearing parts of floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability."

19. **Major Damage** was defined as:-

*"(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 part 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.**"*

The FSPO's decision

20. The application before this court is for a review of the judgment of the High Court on three questions of law but since the basis of the appeal to this court is that the High Court judge erred in upholding the respondent's decision it is necessary to start by examining that.

21. The respondent's decision of 24th July, 2020 summarised the notice parties' complaint as being that the insurer *"did not correctly or reasonably deal with [their] claim in respect of the damage to their house."* I do not say that that was incorrect but in truth, it seems to me, the complaint was not so much as to the manner in which the claim had been dealt with but that it had been declined. In practical terms, the complaint was that respondent had failed to remediate the damage to the roof and upper walls – as by the terms of the policy it ought to have – and in particular had failed to do so at the time when the notice parties had vacated the house to allow the pyrite remediation to be done.

22. The respondent's decision then summarised the insurer's case. The insurer, in its response, had identified two claims, the first for pyrite damage and the second for *"damage as a result of insufficiently supported water tanks in the attic."* I pause to observe that if the response correctly identified the cause of the damage, the notice parties' claim was simply in respect of structural damage, and that, it will be recalled, was how the loss adjusters had logged it.

23. Having summarised the engagement between then then complainants and the insurer between the time they made their claim and 29th March, 2017 when the claim was formally declined, the decision continued:-

> *"The Provider's position is that in order for the claim to be considered, major damage to the housing unit caused by a defect in the structure is required in order for cover under the policy, to operate. The Provider's position is that the damage the Complainants are seeking to have remedied under the policy was not caused by a defect in the structure.*

The Provider states that the timber spreader is not a load-bearing part of the roof and it is not aware of any defect in the design, construction, material or components of the actual trusses themselves causing the physical damage reported, albeit, it accepts the trusses are part of the load-bearing part of the roof."

24. The decision then set out over ten pages the substance of the loss adjuster's file notes and the correspondence which had been submitted in evidence in the course of the respondent's investigation.

25. There were two file notes made by the loss adjuster in relation to the structural claim. The first, on 25th February, 2016, recorded the structural claim as a claim *"for problems with the roof trusses"* and went on to suggest that *"it appears that the two water tanks are not sitting on adequate brackets."* The second file note made on 27th April, 2017 recorded that the loss adjuster had *"... explained that the proximate cause was the inadequate bracket supporting the water tank or the incorrect location of same. [Ms. Donnelly] believed that the proximate cause was irrelevant as long as the structure was damaged."*

26. I pause here to note that in the affidavit of Mr. Garrett Moore grounding the appeal to the High Court it was explained that the author of these notes was a loss adjuster and not an engineer; and had not inspected the trusses; and that a bracket in an intermediate component for fixing one part to another and so, it was said, his comment that the tanks were not sitting on adequate brackets was speculative and incorrect.

27. The decision then moved to the correspondence, starting with a document dated 28th May, 2014 and described in the decision as *"Complainants' Specialist's Report on the Trusses"*. This was the notice parties' engineer's report – which, by the way, was entitled *"Report on Structural Movement"* – in which the decision identified the material statements as being:-

"We have conducted a preliminary analysis of the roof trusses as constructed to support, roof/ceiling and water tanks. …

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.

Recommendation

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

28. As I have said, the engineer's report was submitted by the notice parties in support of their claim made on 9th June, 2014 in respect of the roof, on which the loss adjuster opened a file which he designated *"structural claim."*

29. From the notice parties' engineer's report of 28th May, 2014 the decision moved to an e-mail of 9th July, 2014 from the insurer's engineer to the loss adjuster which recorded that:

"I have discussed this matter generally with [the notice parties' engineer] and he has suggested that he would have concerns also with some roof spread arising from this deflection. On the face if it there appears to be a structural problem here with the trusses and you might wish is to inspect and investigate."

30. The respondent's decision was correctly focussed on what had been initially classified as the structural claim and later came to be referred to on the file as the support of water tanks or trusses claim but to complete the chronology, cover for the pyrite claim – which, strictly speaking, was not really a pyrite claim but a claim in respect of structural damage caused by heave – was formally confirmed on 16th February, 2016 and the notice parties moved out on 17th October, 2016 to allow the pyrite remediation to be carried out.

31. The decision noted that in an e-mail of 27th September, 2016 the notice parties had suggested that the damage in the upper floors might be a knock on from the heave, to which the answer, on the same day, was that:-

> *"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 in the upper floors we would not include it in the scope of works."*

32. By 2nd January, 2017 the stairs were back in the house and the notice parties again raised the question of the damage to the upper floors, this time suggesting that *"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."* If the notice parties' reference to pyrite was an attempted *ruse de guerre* to get the upstairs cracking dealt with, it did not succeed. There followed, over the following months, an extensive exchange of correspondence between the loss adjuster and the insurer's engineer, the loss adjuster and the notice parties, and the notice parties and the builder's engineer, directed to whether the damage was covered by the policy. This was all set out in the respondent's decision and in the judgment of the High Court and it is not useful to set it all out again. The upshot of it was that it was agreed all around that the cause of the upstairs cracking was the inadequate support of the water tanks but the insurer was adamant that the damage thereby caused was not covered by the policy.

33. Starting at p. 13 of his decision, the respondent set out his conclusions. The first was that he was satisfied that the submissions and written evidence did not disclose a conflict of fact such as would require an oral hearing and that there was no necessity otherwise for an oral hearing.

34. Secondly, having set out the relevant provisions of the policy, he reprised the insurer's arguments as initially set out in the correspondence and later in further written submissions which the insurer had made in relation to a preliminary decision which had been sent to the parties for their observations. He found that:-

> *"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 Complaints' home has resulted."* [Emphasis added.]

35. I emphasise the reference to *"roofing structure"* because, as I will come to, part of the appellant's argument is that the respondent was guilty of a serious and significant error in finding that the policy covered the *"roof structure"* and that the High Court judge erred in upholding that finding.

36. Rejecting an argument advanced by the insurer that the damage caused by the water tanks was comparable to that which might have been caused by a heavy box of Christmas decorations or other heavy object placed in the attic by the householders, the decision said:-

> *"This is not a real comparison. In this respect I think that it is important to remind the Provider that the installation of the trusses and the water tank was carried out under the purported workmanship of the builder and not the Complainants."*

37. The respondent rejected a suggestion by the appellant in its submission in relation to his preliminary decision that he had failed in his preliminary decision to distinguish between damage to the structure, on the one hand, and a defect within the structure, on the other. He said that:-

"I consider that it was reasonable of the Complainants to argue that there was a defect in the design, workmanship, materials or components of the structure, in that the defect in the design, workmanship and components of the structure meant that the appropriate supports were not in place for the weight of the water tanks. I consider that the defect in the design, workmanship 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. There are clear guidelines in place for the installation of water tanks in roofs, in particular, in relation to the placement of supports for the tanks.

It may be that the roof trusses themselves would not have been defective, that is, if no water tanks were to be placed in the roof space, but where the water tanks were to be installed in the roof space, the trusses required modification/additions incorporated to accommodate the weight of the water tanks. I consider that it is the absence of these modifications that constitute the defect in the Structure. …

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."

38. On p. 26, the decision addressed another criticism which had been made in the insurer's submissions in relation to the preliminary decision:-

"The Provider states that there are wide-ranging grounds provided for in section 60(2)(b), (c) and (d) of the Financial Services and Pensions Ombudsman Act 2017, for upholding a complaint, some of which have very serious implications for a provider, the subject of an adverse finding. The Provider suggests that in citing

those provisions in my Preliminary Decision, I have not identified <u>which of them</u> has been found to apply in this complaint.

In its post Preliminary Decision submission the Provider repeats much of the arguments proffered during the investigation of this complaint and states:

> *'We call upon the FSPO to reconsider the Preliminary Decision which, we assert, is not supported by the factual or technical evidence, is entirely inconsistent with the contractual terms of the Policy of Insurance between the parties and contains serious errors of law.'*

I do not accept the Provider's assertions 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 Complainants' property as provided for under the policy."*

39. At the end of his decision, under the heading *"Conclusion"* the respondent said that:-

*"My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017** is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2)(b) and (c) and (g)**."*

40. Pursuant to s. 60, subs. (4) and (6) the respondent directed the appellant to:-

"(i) repair the damage that resulted as a consequence of a defect in the design, workmanship and materials or components of the Structure of the Housing Unit (including correctly positioning the water tanks), and

(ii) pay Compensation to the Complainants in the sum of €20,000 for the inconvenience caused."

41. As I will come to, part of the appellant's dissatisfaction with the respondent's decision is rooted in the language in which he expressed his findings and the statutory grounds on which the notice parties' complaint was upheld. On its face, however, the decision was less than a model of clarity. On the one hand, the respondent upheld the complaint on the grounds that the appellant's conduct was – s. 62(2)(b) – unreasonable and unjust, and – s. 62(2)(g) – otherwise improper, and on the other – s. 62(2)(c) – that the conduct complained of was, although in accordance with law or an established practice or regulatory standard, nevertheless unreasonable, unjust, oppressive, or improperly discriminatory. The formal finding pursuant to s. 60(2)(b) of that the appellant's conduct was unreasonable and unjust was based on a conclusion that it had failed to remediate the damage as provided for under the policy and the direction given on foot of the finding – obviously drawing on the wording of the policy – was that the appellant should repair the damage that resulted as a consequence of a defect in the design, workmanship and materials or components of the Structure of the Housing Unit.

42. That said, it is tolerably clear from the grounds of the appellant's appeal to the High Court that it understood the respondent as having found that there was a defect in the Structure (with a capital S, as defined by the policy) which was covered by the policy.

The appeal to the High Court

43. By originating notice of motion issued on 27th August, 2020 the appellant appealed to the High Court against the decision and direction of the respondent, seeking orders pursuant to s. 64(3)(b) of the Act of 2017, (1) setting aside the decision of 24th July, 2020, (2) declaring that the appellant was not obliged to admit the notice parties' claim under the policy, and (3) if necessary, an order remitting the decision and all directions included in it for review by the respondent in accordance with law.

44. The motion was grounded on an affidavit of Mr. Garrett Moore, a solicitor and partner in the law firm then instructed on behalf of the appellant. At para. 10 of his affidavit, Mr. Moore summarised the grounds of appeal as follows:-

> *"(i) The incorrect positioning of the timber spreaders or bearers with the resultant incorrect positioning of water tanks on the spreaders/bearers (neither the water tanks nor the spreaders/bearers are elements of the Structure as defined in the Policy* ***("the Policy Defined Structure")*** *resulted in the incorrect transfer loading of the tanks onto the chords of the roof trusses (the roof trusses being elements of the Policy Defined Structure) causing consequential damage (i.e. excessive deflection) to the roof trusses leading to the upper floor plasterboard cracking damage, the subject of the Complaint. Thus it was a defect in workmanship of elements which are not part of the Policy Defined Structure and not a defect in the Policy Defined Structure which caused the loss and consequential damage and, therefore, does not fall within cover of the Policy. In order to overcome this obstacle in finding for the Notice Parties the Respondent determined, despite the factual and technical evidence to the contrary, that the roof trusses (part of the Policy Defined Structure) were missing brackets or supports to support the water tanks and <u>thus determining there was a defect in the Policy Defined Structure</u>. There was no technical or*

any evidence before the FSPO of any defect in the Policy Defined Structure of the Housing Unit. The FSPO has accordingly fallen into serious and significant error in directing [the insurer] to admit the Notice Parties' claim. [Emphasis added.]

(ii) *The direction that [the insurer] pay €20,000 in compensation to the Notice Parties, or any compensation, is entirely disproportionate having regard to the manner in which [the insurer] has managed the subject-matter of the Complaint in all of the circumstances."*

45. To understand the appellant's position – then and now – it is useful to look at para. 21 of Mr. Moore's affidavit. This shows that the advice of the engineers retained by the insurer was that:-

" ... the roof trusses of a housing unit comprise a prefabricated framework consisting of rafters, posts, struts, and bottom chords, and the sole purpose of the roof trusses, from a structural perspective, is to support the roof. It is installed as one piece on site on the wall plates. The framework does not include any spreader/bearer timbers necessary to support water tanks in the roof space when delivered to site by the manufacturer. In fact it is not necessary for water tanks to be positioned in the roof space at all. Water tanks are quite frequently placed at other locations within a property, such as hot presses or general storage areas for ease of maintenance. Therefore, although water tanks are quite often placed in the roof space of a property this decision is singularly the builders to make. Thus, if it is decided that the water tanks are to be positioned within the roof space, the bearer/spreader timbers are supplied and positioned/installed on top of the bottom chord of the roof trusses onsite by the builder, in this case Ballymore Construction Services Limited. The sole purpose of the bearer/spreader timbers laid on top of the

bottom chord of the roof trusses is to support the water tank; these bearer/spreader timbers do not contribute in any way to the structural capacity or stability of the Housing Unit and therefore do not form part of, or would even be classified by a competent engineer as, a load bearing element/part of the Housing Unit or the Policy Defined Structure. They are totally independent of the roof support structure, i.e. the roof trusses." [Emphasis added.]

46. Mindful that the appeal before this court is an application pursuant to s. 64(6) of the Act of 2017 to review the decision of the High Court on a question of law, this does not make sense. To my mind, it is unrealistic to contemplate that a builder might first build a house and then decide where the water tanks might go. More to the point, I do not understand how it can sensibly be said that the bearer/spreader timbers do not contribute in any way to the structural capacity of the Housing Unit. As witness what has happened in the notice parties' house, and as was common case in the respondent's investigation of the complaint, bearer/spreader timbers, correctly positioned, allow the trusses to support the tanks and prevent the trusses from bowing and deflecting the walls of the house. If the prefabricated trusses were perfectly suitable without modification for use in a house which did not have water tanks in the attic, it was common case that they were not so suitable for a house which did.

47. Mr. Moore, in his affidavit, referred to and quoted from I.S. 193:2006, which was at the forefront of the debate from the time it was first referred to in the notice parties' engineer's report of 28th May, 2014.

48. I.S. 193:2006 is an instrument made by the National Standards Authority of Ireland under the National Standards Authority Act, 1996 and formally entitled the Standard Specification (Timber trusses for roofs) Declaration, 1996. It is, as one would expect, a technical document which specifies the requirements for materials, fabrication, and the use of

trusses and gives guidance on the design, structural analysis and bracing for both trusses and roofs. At para. 12.6 the standard specifically addresses *"Support of water cisterns and fixed plant"*, and provides that:-

> *"12.6.1 General*
>
> *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 pant shall be followed. The system of support must ensure adequate distributions of load over the supporting trusses and shall be designed by the building designer in consultation with the truss designer.*
>
> *12.6.2 Minimum support*
>
> *Water cisterns shall be placed on two primary and two secondary bearers, resting on spreader beams, which in turn shall be placed as closely as possible to the node points of at least four trusses as indicated in Figures 7A and 7B. Unless designed otherwise supporting members shall comply with Table 8. …*
>
> *12.6.3 Multiple cisterns*
>
> *Where more than one cistern is required, the above support arrangement shall be duplicated, ensuring that no truss supports a reaction from more than one cistern support system."*

49. Table 7A – to which Mr. Moore specifically referred – is a drawing of a typical water tank support and Table 7B is a plan of a water tank support with a specification for the spreader beam, secondary bearer and primary bearer, and a minimum grade of timber. It is quite obvious from a comparison of the notice parties' engineer's drawing and Table 7A of the standard that the construction of – to use a deliberately neutral term – the attic of the notice parties' house does not comply with the standard.

50. If, from an engineering perspective, the sole purpose of the bearer/spreader timbers is to support the water tank, they are, from the perspective of the householder – and in the opinion of the National Standards Authority of Ireland – necessary to prevent the roof collapsing and bringing the walls with it.

51. However, I must not allow myself to be distracted from what I have to decide by looking too closely at what the case is about.

The judgment of the High Court

52. The appellant's appeal was heard by Phelan J. on 8th and 9th March, 2022. For the reasons given in a comprehensive written judgment delivered on 19th May, 2022 ([2022] IEHC 290), Phelan J. made an order under s. 64(3)(a) of the Act of 2017 affirming the decision and directions of the respondent.

53. The High Court judge, at paras. 6 to 8, identified the core grounds of the appeal as being:-

1. That the respondent was guilty of serious and significant error in construing the definition of Structure in the policy in such a manner as to include the notice parties' claim, and
2. Separately, that the respondent had exceeded his jurisdiction in directing relief on the basis that the appellant's conduct was in accordance with law but nonetheless unreasonable, unjust, and improper.

54. There was a separate challenge to the notice parties' entitlement to compensation and the quantum of the compensation directed to be paid.

55. The judge summarised the appellant's core argument as being that the policy distinguished between damage caused to a part of the Structure – which was not covered –

and a defect in the Structure – which was covered. The argument was that while the trusses were part of the structure, the water tanks were not and the incorrect positioning of the tanks in the attic was not a defect in the trusses themselves; and that it was defective workmanship in the installation of the uninsured tanks and supports had caused the trusses to deflect.

56. At para. 7, the judge said that:-

> *"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."*

57. And at para. 10, that:-

> *"The Ombudsman stands over the Decision as one which flows from a proper interpretation of the Policy and is supported by the evidence before the Respondent."*

58. The judge went on in para. 10 to identify the respondent's alternative argument that even if the notice parties might not be entitled to a remedy under the contract, his jurisdiction under the Act of 2017 was wider than that of a court and is not tied to the strict contractual rights of the notice parties.

59. It will be recalled that the notice parties' complaint was that the appellant had refused to accept a claim which was covered by the policy. If the respondent's decision was not all that it might have been, the substance of the appeal to the High Court was that the respondent was wrong to have decided that the claim was covered by the policy, and the substance of the respondent's answer was that he had been correct in finding – or at least had been entitled to have found – that the claim was covered by the policy. As I will come to, the argument which the appellant would now make is that the respondent did not make a finding pursuant to s. 62(2)(a) that the appellant's conduct was contrary to law, and indeed, that he made a finding pursuant to s. 62(2)(c) that the appellant's conduct was in accordance with law: but it

appears that at the time of the appeal to the High Court the core issue was understood – on both sides – to be whether the claim was or was not covered by the policy.

60. The judge first set out the relevant provisions of the contract of insurance and then the material parts of the protracted exchange of correspondence and engineers' reports.

61. At para. 61, the judge gave an overview the respondent's jurisdiction:-

> *"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 judge then set out the provisions of s. 60 of the Act of 2017. Section 60(1) of the Act of 2017 provides that on completing his investigation of a complaint relating to a financial service provider, the Ombudsman shall make a decision that the complaint is (a) upheld, (b) is substantially upheld, (c) is partially upheld, or (d) is rejected.

63. Section 60(2) of the Act of 2017 provides that:-

> *"(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 solely 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."

64. The respondent, said the judge – adopting the *dictum* of Simons J. in *Molyneux v. Financial Services and Pensions Ombudsman* [2021] IEHC 668 – enjoys a hybrid jurisdiction, whereby he may not only adjudicate on acts of alleged maladministration but may also determine any dispute of fact or law that arises in relation to conduct by or on behalf of the financial services provider.

65. The judge then identified – in s. 64 of the Act of 2017 – the appellate jurisdiction of the High Court from a decision of the respondent, and the leading authorities in relation to that jurisdiction as the decision of the High Court in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323, the decision of the Supreme Court in *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 and the decision of this court in *Millar v. Financial Services Ombudsman* [2015] IECA 126 and 127. At para. 69, the judge quoted extensively from the judgment of Simons J. in *Molyneux*:-

"62. … 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. …

64. 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.

65. 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 appellant 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).

67. 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."

66. The High Court judge then identified and addressed four issues, first, whether the decision was vitiated by error of law as to the proper interpretation of the contract; secondly, whether the decision was supported by the evidence; thirdly, the correctness of the respondent's reliance on s. 62(2)(b), (c) and (g); and fourthly, whether the appellant had established any error in the direction of compensation.

67. The material parts of the High Court judgment are best identified and analysed by reference to the grounds on which leave was granted for the appeal to this court.

The appeal to the Court of Appeal

68. By her order made on 6th July, 2022 the High Court judge upheld the decision of the respondent but granted leave to the appellant to appeal on three questions of law:-

"1. Was it an error of law for the High Court to uphold one aspect of a decision which the FSPO made on foot of contradictory findings namely:

(i) A finding per s. 60(2)(b) and s. 60(2)(g) of the Act of 2017 that the Provider was in breach of policy in not providing cover; and

(ii) A finding that the provider acted in accordance with law for the purposes of s. 60(2)(c) of the Act of 2017?

2. For the purposes of determining whether a claim fell within coverage under the Policy, did the High Court make an error of law in failing or refusing to draw a distinction between the Structure as defined in the Policy (including roof trusses) and 'roofing structure' nowhere defined in the Policy?

3. Did the High Court fall into error by finding that the Policy could be interpreted by reference to how a reasonable person would expect trusses to perform?"

69. However, the order of the High Court records that the decision to grant leave to appeal was not intended to and should not prevent the respondent from arguing that the relevant points are impermissible new arguments that the appellant is not entitled to argue or rely on at the appellate stage.

70. It will be recalled that the appeal was argued before the High Court on 8th and 9th March, 2022 and that judgment was delivered on 19th May, 2022. The High Court order of 6th July, 2022 shows that the matter was listed for that day for consideration of the appellant's application for leave to appeal to this court and that in the meantime there had been an exchange of written submissions on the leave application. The parties' written submissions on the leave application are not in the papers filed with this court, nor is the transcript of the hearing of the leave application. However, it is clear from the proviso in the order that there was a dispute as to whether the questions formulated by the appellant had been raised before the High Court. The leave application clearly presented a challenge – four months after the

case had been argued and coming up to two months after judgment had been delivered – to identify whether the appellant was seeking to make new arguments but it was – I will content myself by saying – less than ideal to leave that issue to this court.

71. By s. 64(6) of the Act of 2017, the decision of the High Court on the hearing of an appeal from a decision of the FSPO is final, save that a party to the appeal may, by leave of either court, apply to the Court of Appeal to review the decision on a question of law.

72. It seems to me that, in principle, the Court of Appeal cannot review a decision of the High Court on a question of law which was not decided by – or at least not argued before – the High Court. It follows that on a leave application on which there is a dispute as to whether the question of law for which leave is sought was or was not argued before the High Court, the court to which the application is made must first decide whether the question posed is or is not one which the Court of Appeal can be asked to address.

73. As I will come to, the respondent objects that the arguments on which the appellant now seeks to rely were not previously made and ought not be entertained by this court but does not make the point that the this is something which the High Court ought to have decided before dealing with the leave application. With some misgivings, I will deal with the appeal as it presents.

The first question

Contradictory findings

74. Before addressing the arguments as to whether it should be entertained by this court, it is useful to identify the issue which the appellant seeks to agitate.

75. It cannot be gainsaid that the respondent's invocation of s. 60(2)(c) was erroneous. The respondent found that the appellant's conduct was unreasonable, unjust, and improper.

But the premise of the respondent's jurisdiction in s. 60(2)(c) is – insofar as is material for present purposes – that the conduct complained of was in accordance with law, and, as the High Court judge found, the substance of the respondent's decision was that the policy, properly construed, covered the damage the subject of the claim. As the judge put it, at para. 122, it was no part of the decision that the conduct was lawful but that the appellant should provide cover notwithstanding. On the contrary, the respondent clearly found that that cover had been wrongly refused because the policy covered the damage in question. She continued:-

> *"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 by 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)."*

76. While the judgment of the High Court shows that on the hearing of the appeal below the appellant the relied on the erroneous invocation in the decision of s. 60(2)(c) and, indeed that the High Court addressed that argument, nevertheless it seems to me that there is substance to the objection in the respondent's notice – presaged in the proviso in the order giving leave to appeal – that the appellant now seeks to agitate a point that was not raised in the process before the respondent and was not raised in the notice of motion by which the appellant appealed to the High Court or in the affidavit on which the statutory appeal was grounded.

77. The respondent's decision shows that at the conclusion of his investigation of the complaint he circulated a preliminary decision in which he outlined his preliminary or

provisional conclusions on which the parties were invited to make submissions, and that the appellant made an extensive written submission, referred to in the decision as a *"post Preliminary Decision submission."* The decision shows that the appellant offered a large number of sometimes very trenchant criticisms of the preliminary decision, including, on p. 26, that:-

> *"The Provider states that there are wide ranging grounds provided for in section 60(2)(b), (c) and (g) of the Financial Services and Pensions Ombudsman Act 2017, for upholding a complaint, some of which have very serious implications for a provider, the subject of an adverse finding. The Provider suggests that in citing these provisions in my Preliminary Decision, I have not identified which of them has been found to apply to this complaint."*

78. The substance of the appellant's submission on the preliminary decision was that it was *" ... not supported by the factual or technical evidence, is entirely inconsistent with the contractual terms of the Policy of Insurance between the parties and contains serious errors of law."* It does not appear to me that the appellant then identified any inconsistency between the three grounds on which the respondent then proposed to uphold the complaint. The substance of the submission – squarely based on the findings set out in the preliminary decision – was that the respondent was wrong in his then provisional view that the claim was covered by the policy.

79. Neither do I see in the papers filed in support of the appeal to the High Court any complaint of inconsistency. The notice of motion sought an order pursuant to s. 64(3)(b) of the Act of 2017 setting aside the decision and a declaration pursuant to s. 64(3)(d) – which allows the High Court to make such other order in relation to the matter as it considers just in all the circumstances – that the appellant was not obliged to admit the notice parties' claim under the policy. It seems to me that the application for a declaration that the appellant was

not obliged to admit the claim was the converse of the respondent's finding, in substance, that the claim ought to have been admitted. Similarly, as I have said, the focus of the grounds of appeal set out in the affidavit of Mr. Moore on which the appeal was grounded was very much on the policy of insurance and in particular on the respondent's construction of the policy.

80. Opening the appeal before the High Court, Mr. Redmond S.C. identified the fundamental dispute as being what caused the damage and whether or not it is an insured peril, and the appellant's main criticism of the respondent as his *"... rewriting of the policy or the attempt to imply a term which isn't there and isn't necessary to give efficacy to the policy of insurance."*

81. The respondent's finding pursuant to s. 60(2)(b), (c) and (g) was addressed by counsel relatively briefly at the conclusion of his oral presentation to the High Court. What was said was that paras. (b), (c) and (g) were all predicated on the notion that the financial services provider was not in breach of law, specifically, in breach of contract. As to para. (c), in particular, it was said that there was no treatment of its particular application to the complainant and had not been addressed in the decision. Counsel went back to the respondent's findings that the appellant's conduct was unreasonable, unjust, and improper and continued:-

> *"So let's just rationalise this for a moment; on the one hand we are being told we are not in breach of contract but we are unreasonable, unjust and improper in failing to remediate under the policy. I will confess to being somewhat bemused by that suggestion because it really has to be one or the other and when I say it has to be one or the other, I think it is appropriate at this stage to refer you to the two relevant authorities that I want to open."*

82. Counsel then referred to the judgment of Hyland J. in *Danske Bank v. Financial Services and Pensions Ombudsman* [2021] IEHC 116 and of Simons J. in *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2020] IEHC 538. He submitted that the finding of the respondent was pursuant to all three of paras. (a), (c) and (g) and that the finding of the respondent was:-

> *"... that we acted in accordance with law, in accordance with contract law but that it was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant. But the only evidence of unfairness in its application to the complaint is that extract I read out to you from the decision in relation to what is regarded as unjust, unreasonable or improper and that was just declinature per se. ...*
>
> *I say riddle me this, if the decision of the FSPO is that we did not act other than in accordance with contract law, how can the written submissions approved by the FSPO make the following argument: ..."*

83. Having identified the argument on behalf of the respondent to which counsel referred, he continued:-

> *"So is it the case, and I await with bated breath clarification in due course, is it the case that it is being suggested that the insurance provider acted and declined within terms and in doing so interpreted the policy in a way which was unreasonable or improper? How can you possibly improperly construe a policy and still act within the terms of the policy? ...*
>
> *... there is no explanation anywhere on affidavit, in the submissions, in the decision as to how declinature within terms was unreasonable or improper."*

84. It is important to underline here that the argument was that each of the grounds in paras. (b), (c) and (g) of s. 60(2) were predicated on the financial service provider not being

in breach of law. I will come in due course to whether this is correct but the argument was that the appellant could not have acted unreasonably or improperly in declining a claim which was not covered. The inconsistency contended for was an inconsistency between the invocation of or reliance on paras. (b), (c) and (g) and any finding that the appellant had acted unreasonably or unjustly and not on any inconsistence in the invocation of all three grounds.

85. The premise of the submission on this point – and of counsel's plaintive questions – was that the respondent had decided that the declinature was in accordance with the terms of the insurance contract. This, with respect, was utterly inconsistent with the thrust of the grounds of appeal and the argument in support of the appeal – and before then in the appellant's written submission to the respondent on his preliminary decision – which was that the respondent had erred in his finding that the claim was covered by the policy. It is true that in the High Court, counsel for the appellant rejected the argument made on behalf of the respondent – which had been presaged in the respondent's written submissions – that the decision could be justified by reference to any of paras. (b), (c) or (g), insisting that the respondent could not just abandon any of the grounds relied on, but it was not a separate ground of the appeal to the High Court that the respondent's reliance on, or invocation of, s. 60(2)(c) was, by itself, a fatal flaw in the decision.

86. Returning to the judgment of the High Court the judge, starting at para. 124, considered the consequences of the respondent's error in relying on s. 60(2)(c) on the sustainability of the decision and concluded that it was not fatal.

87. The judge first considered the nature of the decision making process and cited *dicta* in three cases, *Millar, Jackson Way v. Information Commissioner* [2020] IEHC 73 and *Westwood Club v. Information Commissioner* [2015] 1 I.R. 489, the substance of which is that the decisions of administrative tribunals are not to be subjected to the minute analysis that might be applied to a court judgment or a statute.

88. Secondly, the judge noted s. 12(11) of the Act of 2017 by which the respondent:-

> *"... 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."*

89. And thirdly, the judge found that the basis for the respondent's jurisdiction was clear and flowed from the terms of the decision itself and the reasoning given. It was clear, she said, that the respondent's jurisdiction was dependent on one of the grounds set out being applicable. In this case, she said, the respondent had identified two grounds which flowed from the premise of his decision and a third which did not, but it was sufficient if he established jurisdiction under one ground only.

90. The appellant's argument, as it was put in the High Court, was that the respondent was not entitled to make a finding under s. 60(2)(b) and (g) of unreasonable, unjust or improper conduct in circumstances in which he found as a fact that there had been no breach of contract. I do not believe that that correctly encapsulates the respondent's decision. In my view, the undoubted fact that the respondent did not make a finding pursuant to s. 60(2)(a) that the conduct complained of – the declinature of the claim – was contrary to law is not to be conflated with a finding that it was in accordance with law. The arguments between the engineers and the loss adjuster got bogged down in the identification of the claim and the cause of the damage by reference to water tanks and trusses and supports but the core complaint was that the appellant had declined to deal with a claim that was covered by the policy. And it seems to me that the substance of the decision was that the claim was covered and should have been accepted.

91. The cornerstone of the argument that the decision was inconsistent is the proposition that there was a finding that the decision was in accordance with law. I cannot agree. The dispute from the outset was whether the damage to the notice parties' house was or was not

covered by the policy. The decision, starting on p. 15, dealt comprehensively with the appellant's arguments – in the main by reference to the submissions made in response to the preliminary decision – that it was not. The conclusion, on p. 27, was that the appellant's conduct was unreasonable in that it failed to provide a remedy for the damage *"as provided for in the policy"*; that the appellant had acted unjustly in refusing to remediate the damage *"as provided for in the policy"*; and that the appellant's conduct was improper in that it did not remediate the damage *"as provided for under the policy."*

92. The respondent's invocation of s. 60(2)(c) was clearly in error but it was erroneous because the decision had identified no basis on which it might be invoked. I cannot find in the erroneous invocation of a ground for which there was no basis, any basis for the proposition that the respondent decided that the conduct complained of was in accordance with law.

93. While I have to say that in principle, I am not unsympathetic to the criticism which the appellant would now make of the decision that it does not explain why no finding was made pursuant to s. 60(2)(a) – simply, that the decision to decline the claim was wrong in law – this is not a question which was canvassed either in the appellant's submissions in response to the preliminary decision or in the High Court. In truth, any argument that the respondent should have simply found that there had been a breach of contract would probably have sat uneasily with the central tenet of the response to the complaint, and of the submission in response to the preliminary decision, and of the appeal to the High Court: which was that there was no conceivable basis for the notice parties' claim, in fact or in law.

94. Further, it was submitted, the respondent made a finding of unreasonable, unjust, and improper conduct without identifying any objective standard by reference to which the reasonableness, justice or propriety of the conduct fell to be considered in the first instance. I am not persuaded of that, either. The decision identified the conduct as the declinature of the

claim and the substance of the decision was that the appellant was wrong to have declined the claim.

95. The first question now before this court is whether the High Court erred in upholding the decision of the FSPO on foot of contradictory findings, on the one hand, per s. 60(2)(b) and (g) that the appellant was in breach of policy in not providing cover, and on the other, a finding that the appellant acted in accordance with law for the purposes of s. 60(2)(c). The question as formulated, with no disrespect, is a bit woolly. The High Court judge did not uphold the decision on foot of contradictory findings but on two of the three grounds invoked by the respondent. The judge found, at para. 122, that the respondent was entitled to conclude that paras. (b) and (g) provided a basis for the exercise of jurisdiction and that he was entitled to conclude that the appellant's conduct was unreasonable and unjust, and that the delays and refusal of cover was improper . There is no appeal against those findings. While the judge found that the respondent was not entitled to have invoked or relied upon para. (c), it was because he had not made a finding that the appellant's conduct was in accordance with law. Thus, there were not inconsistent findings but consistent findings that supported the respondent's reliance on paras. (b) and (g) and no finding that engaged the power in para. (c).

96. Mr. Redmond now argues that the alternatives in s. 60(2) to a finding under para. (a) – that the conduct complained of was contrary to law – are all premised on a finding or conclusion that the conduct was lawful. On the wording of the section, I do not believe that that is so. Moreover, it seems to me that the argument is inconsistent with the appellant's primary submission – which, by the way is wrong – that the declinature of a claim in accordance with the terms of the policy cannot be unreasonable, unjust or improper, as well as with the argument hinted at but not developed in the appellant's submissions in relation to

the preliminary decision, that some of the wide-ranging grounds in s. 60(2) may have serious implications for a financial services provider the subject of an adverse finding.

97. The first thing to say is that s. 60(2), on its face, contemplates that a complaint may be upheld on one or more of the grounds set out. To my mind it is not difficult to contemplate a situation – such as a breach of contract – in which conduct contrary to law might not have been unreasonable, or a situation in which the provider may have been guilty of both. That, I think, was effectively acknowledged by the submission to this court that a finding against a financial services provider that it had acted, for example, oppressively or in an improperly discriminatory manner might be more serious from a reputational point of view than a finding that it had failed to pay a claim on the basis of a misinterpretation of the policy or the claim or the like.

98. *Danske Bank v. Financial Services and Pensions Ombudsman* [2021] IEHC 116 was an appeal by the Bank against a finding of unreasonable and improper conduct in connection with a refusal to make an ECB tracker interest rate available to a borrower after the expiry of a fixed time, fixed interest rate. The complainants in that case had signed mortgage documents which made clear what would happen at the end of the fixed rate period and had identified no illegality on the part of the Bank. Hyland J. concluded that the argument made on behalf of the Bank that where no illegality had been identified the FSOP was not entitled to uphold the complaint failed to recognise the import of the jurisdiction under s. 60(2)(b) and (g) to uphold a complaint irrespective of whether it had acted in accordance with law. The issue in this case is not quite the same but it seems to me that in the same way that – as Hyland J. put it – the mere absence of a breach of law does not immunise a financial services provider from a finding or unreasonable or improper conduct, neither does the presence of a breach of law preclude the upholding of a complaint on any of the other grounds.

99. In any event, as I have said, the argument in the High Court was not that the grounds relied on in the decision were inconsistent but that they were all precluded by the reliance on or invocation of s. 60(2)(c) which the appellant tried to escalate to a finding that it had acted in accordance with law.

100. For completeness, I should refer briefly to two cases which were decided after this case was argued in the High Court and which were discussed in argument before this court.

101. The first is the judgment of this court in *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2022] IECA 77. That was an application by the FSPO pursuant to s. 64(6) of the Act of 2017, by leave of the High Court, for a review of a judgment of Simons J. ([2020] IEHC 538) setting aside and remitting a decision of the FSPO. The complainant's principal complaint was that the underwriter of a group income protection scheme had wrongly declined a claim. This court upheld – albeit not on all grounds – the judgment of the High Court that the decision in favour of the complaint was vitiated by serious and significant error. At paras. 112 and 114, under the heading *"General Observations"*, Binchy J. (with whom Costello and Collins JJ. agreed) said:-

> *"112. More generally, while it is well recognised that in discharging his functions the FSPO it is not bound to do so with the same degree of formality or in the same level of detail as a court must do, nonetheless it is important that the FSPO should either make a decision on the matters that he himself has identified as being before him by way of complaint, or if he is not doing so in respect of any given matter, he should explain briefly why he feels it is not necessary or appropriate for him to do so. In this case, it may be that the FSPO deliberately did not address the first two elements of the Complaint, i.e. that Utmost had wrongly declined the initial claim and then wrongly denied the appeal of the notice party, on the basis that it was unnecessary or even inappropriate for him to decide these issues because he found*

in favour of the notice party on the third element of the Complaint, or for some other reason. Whatever the explanation, however, he should have explained his treatment, or nontreatment of these issues in the Decision…

114. Finally, and relatedly, while the FSPO stated in the Decision that the Complaint was upheld on the grounds prescribed in sub-sections 60(2)(b) and (g) of the Act of 2017, he did not specifically tie any of his findings regarding the conduct of Utmost to either of these statutory grounds. It may be that he took the view that the conduct he found fault with fell foul of both grounds, but when upholding a complaint, the FSPO should, when explaining his decision, expressly refer to the statutory ground or grounds upon which each element of a complaint is upheld, and on what basis. Similarly, any directions made pursuant to s.60(4) of the Act of 2017 should refer to the sub-section pursuant to which they are made."

102. The other case to which I wish to refer briefly is the judgment of Paul Burns J. in *Hiscox S.A. v. Financial Services and Pensions Ombudsman* [2022] IEHC 557. That was a case in which the owners of a children's play/activity centre complained that its claim on foot of a business interruption insurance policy had been wrongly declined. In his preliminary decision, the FSPO proposed to uphold the complaint on the grounds set out in s. 60(2)(b) and (g). The insurer in further submissions made the point that the dispute turned on highly complex issues of the interpretation of the policy and submitted that *"the idea that matters of interpretation are clear, and therefore form a basis for a finding of unreasonable conduct, is quite simply manifestly wrong."* While the insurer stood over the submissions it had previously made as to how the policy should be interpreted, it submitted that any finding against it – if any should be on the ground set out in s. 60(2)(a). The FSPO nevertheless found against the insurer on the grounds in s. 60(2)(b) and (g). The decision found that the insurer's failure to admit the claim was *"contrary to the contractual provisions in place*

between the parties and was also unjust and unreasonable within the meaning of Section 60(2)(g)" and later that the insurer's conduct also fell within s. 60(2)(g).

103. At para. 53 of his judgment, Burns J. said that it was not clear from the decision why the complaint had not expressly been stated to have been upheld on the ground set out in s. 60(2)(a) but he did not regard the failure to have done so as a serious and significant error so as to vitiate the decision, given that it was open to the FSPO to uphold the complaint on other grounds and she had done so. He said, at para. 62, that:-

> *"The point is that conduct contrary to law does not automatically fall into one of the other grounds although it may do in the particular circumstances. There should be some additional factor or circumstance to justify holding the conduct to be unreasonable, unjust or improper."*

104. In this case, the focus of the notice parties' complaint was that the appellant had refused to admit a claim which was covered by the policy, and the substance of the decision was that the claim was covered and ought to have been admitted. There was some discussion in the course of the oral argument as to whether the substance of the respondent's findings might have been more clearly tied in to the statutory grounds but as Ms. Barrington S.C. correctly pointed out, the appeal to the High Court was not based on any such alleged shortcoming and the appellant had not suggested any such shortcoming in its submissions in relation to the preliminary decision. I understand and am not entirely unsympathetic to the argument that a refusal on the part of an insurer to admit a claim is necessarily unreasonable, unjust, or improper but that is not a point which was made to the respondent or on the appeal to the High Court.

105. The premise of the first question is wrong. The respondent did not make a finding that the appellant acted in accordance with law in not providing cover. His erroneous reliance on s. 60(2)(c) did not amount to such a finding. The respondent did not, as the

amended notice of appeal suggests, decide that the appellant had acted in accordance with law in declining cover and the High Court did not agree with the appellant that he had.

106. The foundation of the appeal to the High Court was that the respondent had fallen into serious and significant error in finding that the claim was covered by the policy and that that error undermined all three of the statutory grounds invoked. The case the appellant would now make – that the respondent made contradictory findings – is a new argument which might have been but was not raised in the process before the respondent and was not only not raised in the appeal to the High Court but is inconsistent with the grounds of appeal.

107. To go back to the leave application, it seems to me that a forensic engagement at that time with the first question formulated by the appellant would have demonstrated that the High Court judge could not conceivably have erred in doing something which she had not done.

The second and third questions

The coverage under the policy

108. On the hearing of the appeal before the High Court, the focus of the appellant's submissions was on the correctness of the respondent's conclusion that the damage to the notice parties' house came within the terms of the policy – or, strictly speaking, the entitlement of the respondent to have taken the view that the damage came within the terms of the policy. On the hearing of the appeal before this court the argument was mainly directed to the entitlement of the High Court judge to have concluded that the respondent was entitled to have concluded that the damage came within the terms of the policy.

109. The appellant argues, first, that the judge erred *"... in failing or refusing to draw a distinction between the Structure as defined by the Policy (including roof trusses) and 'roofing structure' nowhere defined in the Policy."* As expressed by Mr. Moore in his

articulation of the grounds of appeal, the proposition is that although the trusses were, the water tanks and the bearers/spreaders were not, elements of the Structure as defined by the policy. To accommodate or underline the argument, Mr. Moore introduces a new definition of ***"Policy Defined Structure"***, which includes the trusses. The point is correctly made that the definition of Structure in the policy does not refer to the water tanks and bearers/spreaders but neither – I am bound to say even at this stage – does it refer to the trusses.

110. As counsel put it, the appellant's main complaint – from the time of the preliminary decision – has been that the respondent made a serious and significant error in treating non-structural items sitting on top of the trusses as forming part of the structure as defined and insured under the policy. The respondent, for his part, has steadfastly denied that he treated non-structural items sitting on top of the trusses as part of the structure. Rather, he says – as set out on p. 18 of his decision – he found 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 areas of the property."*

111. It seems to me that in attempting to engage with the appellant's argument, the respondent to a degree became ensnared in it. In my view, the proposition that there was nothing wrong with the prefabricated trusses goes no further than their delivery to the site. If the prefabricated trusses would have been sufficient without modification to support a roof without a water tank, it seems to me that it was common case that they were not capable of supporting a roof with water tanks in it. Mindful always that I am not to examine the claim afresh, it seems to me that the appellant's characterisation of the bearers and spreaders as *"non-structural items sitting on top of the trusses"* fails to recognise – as I.S. 193: 2006 spells out in words and pictures – that the bearers and spreaders are essential elements of

timber trusses for roofs which are intended to support water cisterns. And that, it seems to me, was the substance of the respondent's finding.

112. As I understand the arguments, it was common case that the trusses were part of the Structure. There appears to have been agreement – or agreement in large measure – that there was no defect in the prefabricated trusses *per se* but that is not to say that there was no defect in the trusses installed in the notice parties' house. In addressing the appellant's submissions in relation to the preliminary decision, the decision refers repeatedly to the *"actual trusses"* and the *"roof trusses themselves"* but this can only have meant the prefabricated trusses in the condition in which they left the factory and not the trusses as they were installed in the house.

113. In addressing the respondent's finding that if the roof structure was intended to hold water tanks it should be designed and constructed for that purpose, counsel acknowledged that a decision of the respondent was not to be parsed but suggested that in referring to *"roof structure"* the respondent had expanded the definition of Structure in the policy. The argument was that what the respondent was saying was that:-

> *"'I'm happy that – even though I am not regarding non-structural items as part of the structure, i.e. the water tanks and spreaders, there is a problem with the roofing structure …' – which again spans out to capture the spreaders and tanks – he reaches out again past the definition of 'Structure' to gather in, effectively, the offending items and to make them part of his decision."*

114. I do not believe that this correctly reflects what the decision said. The appellant's argument was that the tanks and bearers/spreaders were not part of the structure and its criticism of the preliminary decision was that account had been taken on non-structural items sitting on the trusses. The premise of the written submission in relation to the preliminary decision and of the argument ever since advanced by the appellant is that the respondent

accepted the proposition that the bearers/spreaders were not part of the structure: which he did not.

115. The appellant sought to identify cause of the acknowledged problem as the positioning of the water tanks. The house, it was said, would not have been damaged if the tanks had been positioned correctly. Counsel emphasised that the appellant's evidence in this regard had not been contested. Incidentally, I do not see in the evidence any suggestion as to where, elsewhere than where they were positioned, the tanks might have been positioned but the whole point of I.S. 193: 2006 is to ensure that, if there are to be water tanks in the attic, the trusses are designed and constructed for the support of the tanks, wherever they are positioned. The requirement, in clause 12.6.2, that water cisterns be placed on two primary and two secondary bearers, resting on spreader beams, which in turn must be supported as closely as possible to the node points of at least four trusses, will to a greater or lesser extent dictate or limit the positioning of the tanks but the critical consideration is not so much the positioning of the tanks but the design and construction of the trusses so as to ensure adequate distribution of the load over the supporting trusses.

116. The appellant sought to make much of the fact that its evidence that the tanks were not correctly installed was uncontradicted but that is wholly unsurprising since it was the notice parties' case that the tanks had not been correctly installed. The defect in the installation was that the trusses had not been designed and constructed to bear the weight of the tanks.

117. The appellant suggests that the respondent – by the back door – expanded the definition of Structure to incorporate the spreaders and the water tanks and their positioning. As I understand the decision, the respondent accepted that the water tanks were not part of the Structure and the appellant has accepted from the start that the trusses were part of the Structure. If there were no spreaders or bearers on the actual prefabricated trusses themselves

as they arrived on the site, there plainly ought to have been in the design and construction of the trusses which are acknowledged to have been part of the *"Policy Defined Structure"* of the notice parties' house.

118. Turning to the judgment of the High Court, the High Court judge, at para. 82, identified the respondent's key conclusion, on p. 23 of his decision, as being that:-

> *"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."*

119. In argument on the appeal to this court, counsel contended that the starting point for the High Court judge was to accept that there was a defect in the structure rather than to examine the circumstances which may or may not have led to the damage to the property. I cannot accept that argument. What was said by the judge at para. 82 was said more or less in the middle of a three-page summary of the respondent's decision. She set out what she identified as the respondent's key conclusion. She did not accept it as her own.

120. The alleged error is then said to have been compounded by the what the judge said at para. 96, which was that:-

> *"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."*

121. But what was said by the judge at para. 96 was said after the judge had identified and considered the issue as to whether the decision was vitiated by an error of law in the proper interpretation of the contract, and after – for the reasons given – she had concluded that it was open to the respondent to have concluded that the damage was caused by an insurable event, namely a defect in the structure of the roof.

122. The appellant now complains that the judge failed to determine whether it was correct, let alone reasonable, to *"insinuate into the definition of 'Structure'"* the location of the water tanks or adequate supports for the water tanks. But the premise of this criticism is that the respondent had in fact supplemented the definition: which the appellant said he had but the respondent said he had not.

123. At para. 101, the judge concluded that:-

> *"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."*

124. The appellant now complains that the judge did not deal with *"the positioning of the tanks as being the menace"* or the load-transferring elements under the water tanks; but what the judge was doing was identifying the conclusions of the respondent on the evidence and argument which had been offered to him, and then considering whether those were conclusions that were reasonably open to him. For the reasons given she found that they were.

125. In his peroration on this point, counsel suggested that both the respondent and the High Court judge expanded the definition of structure to include incorrect positioning and inadequate support for the water tanks and then said, *"That's part of the structure – good night and good luck."* I cannot agree. The proposition that the respondent expanded the definition of structure to include the support for the water tanks is entirely dependent on the

proposition that the provision of support for the tanks was not part of the load bearing part of the roof.

126. It was agreed on all sides that the trusses were part of the load bearing part of the roof. As far as I can see, the heresy that the bearers and spreaders were not part of the trusses appears to have originated in an e-mail written by the loss adjusters. It is a view to which, demonstrably, the ladies and gentlemen in the National Standards Authority of Ireland do not subscribe. Similarly, the notion that the installation and positioning of the tanks in the attic was an unintentional loading can be traced back to an e-mail written by the loss adjusters.

127. I am not persuaded that there is any difference between *"the Structure as defined in the Policy (including roof trusses)"* and what the respondent and the judge – and before them the engineers – referred to as the *"roofing structure".* The Structure, as defined by the policy, included the load bearing parts of the roof.

128. It seems to me that once it is recognised that the prefabricated trusses were not, as they were delivered to the site, fit for the purpose for which they were intended, it must be plain that the respondent was entitled to have come to the conclusion, which he did, that the damage caused by the inadequate support of the tanks resulted from a defect in the design, construction and workmanship of the load bearing part of the roof, as provided for in the policy. It follows that the High Court judge was entitled to have come to the conclusion, which she did, that the respondent's conclusions were reasonably open on the evidence.

129. In oral argument the second and third questions were dealt with together. The third question, it will be recalled, was whether the High Court had erred in finding that the policy could be interpreted by reference to how a reasonable person would expect trusses to perform.

130. This ground of appeal derives from a single paragraph in the judgment of the High Court, para. 100, where the judge said:-

"From the perspective of a 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 or at least that the Ombudsman was entitled to take this view."

131. It is acknowledged by the appellant that when interpreting a contract of insurance, the meaning which a reasonable person would ascribe to the words used is a relevant consideration but it is contended that the judge erred in contemplating how a reasonable person would expect roof trusses to perform.

132. I see no substance in this argument. What the judge had to say at para. 100 was more or less in the middle of her analysis of the question as to whether the decision of the respondent was vitiated by an error of law as to the proper interpretation of the contract. It is perfectly clear from what came before and after that the judge was contemplating whether a reasonable person in the position of the notice parties would expect that the events which had taken place would be covered. At para. 96, to which I have already referred, the judge had already said:-

"... 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 the 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 is structurally unsound. It is recalled that the definition of Structure expressly references the loan 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."

133. The appellant does not say that the judge was not entitled to contemplate whether a reasonable person would have expected a policy of insurance against structural defects to have responded to damage caused by a structural defect in the load bearing part of the roof. It seems to me that to contemplate that a reasonable person would have expected the structural parts of the roof would be free from a defect which would cause such damage is simply the converse. I see no error.

Summary

134. For the reasons given, I am satisfied that the High Court judge did not decide what the first question suggests she decided and that the arguments on which the appellant would rely before this court were not made in the High Court. The appellant has failed to persuade me that the High Court judge fell into error as contended for in either questions two or three.

135. I find, accordingly, that the appeal must be dismissed.

136. The respondent having been wholly successful on the appeal, it seems to me that he must be entitled to an order for his costs of the appeal but if the appellant wishes to contend otherwise, I would give leave to the appellant, within fourteen days of the electronic delivery of this judgment to file and serve a short written submission – not exceeding 1,000 words – in which event the respondent will have fourteen days to reply.

137. As this judgment is being delivered electronically, Whelan and Noonan JJ. have authorised me to say that they agree with it.