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Judgment Title: Ulster Bank Investment Funds Limited v Financial Services Ombudsman

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Composition of Court: Finnegan, P.

Judgment by: Finnegan, P.

Status of Judgment: Approved

[2006] IEHC 323

THE HIGH COURT

NO. 2006 No. 87SP

IN THE MATTER OF

THE CENTRAL BANK ACT 1942 AS AMENDED AND

IN THE MATTER OF

PART VIIB THEREOF AND

IN THE MATTER OF

AN APPEAL PURSUANT TO SECTION 57CL THEREOF

BETWEEN

ULSTER BANK INVESTMENT FUNDS LIMITED

PLAINTIFF

AND FINANCIAL SERVICES OMBUDSMAN

DEFENDANT

AND

ANDREW McCARREN, JOY McCARREN, MARIE O'DONOHOE, DEIRDRE LYNCH, BRIAN WYNNE, TERESA WYNNE, PAT DOHERTY AND MARITA DOHERTY

NOTICE PARTIES

Judgment of Finnegan P. delivered on the 1st day of November 2006

This is an appeal pursuant to the provisions of the Central Bank Act 1942 section 57CL as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004 section 16. The issue to be determined at this point is the scope of the appeal provided for.

The relevant statutory provisions are as follows –

57CK.—(1) When dealing with a complaint, the Financial Services Ombudsman may, on that Ombudsman's own initiative or at the request of the complainant or the regulated financial service provider concerned, refer for the opinion of the High Court a question of law arising in relation to the investigation or adjudication of the complaint.
(2) The High Court has jurisdiction to hear and determine any question of law referred to it under this section.
(3) If a question of law has been referred to the High Court under this section, the Financial Services Ombudsman may not—
(*a*) make a finding to which the question is relevant while the reference is pending, or
(*b*) proceed in a manner, or make a decision, that is inconsistent with the opinion of the High Court on the question.

57CL.—(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.
(2) The Financial Services Ombudsman can be made a party to an appeal under this section.
(3) An appeal under this section must be made—
(a) within such period and in such manner as is prescribed by rules of court of the High Court, or
(b) within such further period as that Court may allow.

57CM.—(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.
(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:
(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;
(b) an order setting aside that finding or any direction included in it;
(c) an order remitting that finding or any such direction to that Ombudsman for review.
(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.
(4) The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts).

The issue is between the Plaintiff and the Defendant the Notice Parties having opted not to take part in the proceedings at this point.

In Dunne v Minister for Fisheries and Forestry 1984 I.R. 230 Costello J. was concerned with the provisions of the Fisheries (Consolidation) Act 1959 section 11 which provided for an appeal to the High Court against a bye law made by the Minister pursuant to the Act. Section 11(1)(d)(ii) of the Act provided that the High Court on appeal could confirm or annul the instrument. Costello J. distinguished between the exercise by the Court of its powers at common law of judicial review and an appellate jurisdiction conferred by statute and cited Wade's Administrative Law (Fifth Ed p. 34) with approval –

"The system of judicial review is radically different from the system of appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order

to judicial review the Court is concerned with its legality. On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?"

He went on to say at p. 237

"However, this does not mean that in every case the Court's jurisdiction on a statutory appeal is the same; in every case the statute in question must be construed. In construing a statute it does not seem to me to be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the Court would have powers in addition to those already enjoyed at common law."

The following matters appear from the statutory provisions in issue here –

1. Section 57CL provides for an appeal to the High Court by the complainant or the regulated financial service provider concerned. Subsection (2) provides that the Financial Services Ombudsman can be made a party to the appeal. It is thus envisaged that the appeal may be conducted between the complainant and the regulated financial service provider concerned the Financial Services Ombudsman not being a party. A full appeal on the merits will ordinarily be between the parties to the original hearing the deciding body not being a party. In judicial review on the other hand the deciding body will normally be a party or at least a notice party with the option of taking part in the proceedings. Section 57CL(2) in providing that the Financial Services Ombudsman can be made a party is an indicator, albeit not a strong one, that the Legislature envisaged something more akin to a review rather than a full appeal on the merits.

2. Section 57CM(4) distinguishes proceedings before the High Court – "an appeal" and before the Supreme Court "review the determination on a question of law". It is clear from this that the appeal to the High Court is not confined to one on a question of law.

I bear the foregoing in mind in considering the authorities.

My decision in **Glancre Teo v Cafferkey (2004) 3 I.R. 401** is of no assistance here. That decision turned on the need to maintain internal consistency within the planning code and in particular between section 27 of the Local Government (Planning and Development) Act 1976 (now section 160 of the Planning and Development Act 2000) and section 5 of the Local Government (Planning and Development) Act 1963.

Orange Communications Limited v The Director of

Telecommunications Regulation & Anor 2000 4 I.R. 159 concerned an appeal pursuant to the Postal and Telecommunications Services Act 1983 section 111(2)(b)(i) as amended by Regulation 4 of the European Communities (Mobile and Personal Communications) Regulations 1996 which allowed an appeal to the High Court upon which the High Court might either confirm the decision of the first Defendant or direct the first Defendant to refrain from granting the licence concerned. In considering the scope of the appeal Keane C.J. first looked at the European Commission Directive of 10th April 1997 (971/13/E.C.) which required that there be an appeal from the decision of the national regulatory authority. At page 183 Keane C.J. expressed the view that the requirements of the Directive could have been met (subject to one qualification) by a form of judicial review. However the Oireachtas had given the Plaintiff, in that case an unsuccessful applicant, an unqualified right of appeal to the High Court. In relation to that appeal Keane C.J. at p. 184 said –

"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."

In relation to curial deference Keane C.J. referred with approval to a passage from the decision of the Canadian Supreme Court in **Canada (Director of Investigation and Research) v Southam Inc. (1997) 1SCR at 748** and also to the decision of Kearns J. in **M & J. Gleeson v The Competition Authority (1999) 1 ILRM 401** in which he was considering the nature of an appeal under the Competition Act 1991 section 9 and in which the same passage was cited with approval. It seems to me that the passage in the Canadian case is equally apposite here –

"An appeal from a decision of an expert Tribunal is not exactly like an appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the Courts, it is because the Tribunal enjoys
some advantage that judges do not. For that reason alone, review of a

decision of a Tribunal should often be of a standard more deferential than correctness … I conclude that the … standard should be whether the decision of the Tribunal is unreasonable. This is to be distinguished from the most deferential standard of review which requires Courts to consider whether a Tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly a Court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it …"

Thus it is not necessary for the Plaintiff on an appeal under the Postal and Telecommunications Services Act 1983 section 111 or the Competition Act 1991 section 9 to establish that the decision being challenged was so manifestly unreasonable as to be contrary to common sense as in **The State (Keegan) v Stardust Compensation Tribunal (1986) I.R. 642**.

Carrigdale Hotel Limited v The Comptroller of Patent Designs and Trade Marks & Anor 2004 3 I.R. 410 concerned an appeal pursuant to the Copyright Act 1963 section 41(3) which provides as follows –

"An appeal shall lie to the High Court from any award made by an arbitrator in pursuance of a reference under this section to which the parties to the dispute did not consent and the High Court may make such order confirming, annulling or varying the award of the arbitrator as it thinks fit."

The Court (Laffoy J.) considered the standard of review. Both parties accepted that a hearing de novo was not envisaged. Again it was accepted that the standard applicable to judicial review was not appropriate. The learned trial Judge reviewed the authorities and concluded as follows –

"Accordingly, I consider that the test to be applied on this appeal in determining whether the award should be confirmed, annulled or varied is whether the Plaintiff has established 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 regard must be had to the degree of expertise and specialist knowledge which the adjudicator has."

In short the decisions of Keane C.J. in **Orange v The Director of Telecommunications Regulation & Anor** and Kearns J. in **M & J Gleeson v Competition Authority** were followed.

It is desirable that there should be consistency in the Courts in the standard of review on statutory appeals. Accordingly unless the words of the statute mandate otherwise it is appropriate that the standard of review in this case

be that enunciated by Keane C.J., Kearns J. and Laffoy J. I see nothing in the wording of the statute with which I am concerned to mandate a different approach to the statutory appeal under the Central Bank Act 1942 section 57CL. 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**.

Having regard to my decision on the standard of review it is appropriate that the appeal should proceed on the basis of the materials which were before the Financial Services Ombudsman only. The Court however has a discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate in the interest of justice. See **Dunne v Minister for Fisheries and Forestry 1984 230 at 239**. In determining whether or not additional evidence should be admitted regard should be had to the principles on which the Supreme Court admits additional evidence set out in **Murphy v Minister for Defence (1991) 2 I.R. 161.** See **Carrigdale Hotels Limited v Comptroller of Patents 2004 3 I.R. 410 at 429 – 430**. However in the interests of justice regard should be had to the nature of the deciding body whose decision is being appealed: the proceedings before that body may well lack much of the formality which will attend a hearing before the High Court with which the Supreme Court will principally be concerned. An issue may arise on appeal which could not arise at a hearing for example an issue as to the extent of expertise of the deciding body. Thus a more flexible approach than that adopted by the Supreme Court on the admission of further evidence will be required.