THE HIGH COURT

[2009 No. 1298 J.R.]

BETWEEN

HOOPER DOLAN FINANCIAL LIMITED

APPLICANT

AND

FINANCIAL SERVICES OMBUDSMAN, FINANCIAL SERVICES OMBUDSMAN COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ABBEYLEIX CREDIT UNION LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice John MacMenamin delivered on 15th day of April, 2011

1. On 30th June, 2009, the first named respondent ("the Ombudsman") made a finding in relation to a complaint made by the notice party herein. That finding was adverse to the applicant company ("Hooper Dolan") which now challenges that finding by way of judicial review. It is claimed the finding was *ultra vires* the powers of the Ombudsman. However, this is by no means the only question for consideration in this complex case. The issues include whether Hooper Dolan (i) has debarred itself from seeking judicial review by delay, estoppel, waiver or acquiescence; (ii) engaged in non-disclosure, or abuse of process, such as would justify the Court in declining relief by way of judicial review; (iii) has lost *locus standi* by reason of its failure to raise issues as to

jurisdiction either prior to, or during, the decision making process. The decision, and consequent order to be made, also require consideration as to whether the Ombudsman misapplied the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 (S.I. No. 190 of 2005) ("the Regulations"); whether those Regulations were an *ultra vires* exercise of the power delegated to the second named respondent ("the Council"); and whether certain provisions of the Central Bank Act 1942 are invalid as an unlawful delegation of the powers of the Oireachtas, having regard to Article 15.2 of the Constitution of Ireland. Further questions arise as to whether those impugned provisions exceed the boundaries of the "principles and policies" test, or are constitutionally invalid by reason of retrospectivity.

2. Hooper Dolan has also brought an appeal against the impugned decision. It has been decided that the Court should deal with the judicial review first.

3. As a preface to what follows, it will be convenient briefly to outline the legislative framework. The Central Bank and Financial Services Authority Act 2004 substantially amended the Central Bank Act 1942, *inter alia*, by the insertion of a new part, Part VIIB. The purpose of this new part was to reconstitute the position of the Ombudsman and to extend the functional range of that office. All references in this judgment to "the Act" or "the Act of 1942" are to the Central Bank Act 1942, as amended by the Act of 2004.

4. The objects of the new part, Part VIIB, are specifically identified in s. 57BB of the Act as follows:-

> "(a) to establish the Financial Services Ombudsman as an independent officer

(i) to investigate, mediate and adjudicate complaints made in accordance with this Part about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service, and

(ii) to exercise such other jurisdiction as is conferred on the Financial Services Ombudsman by this Part;

(b) to ensure that the Financial Services Ombudsman and the staff of the Financial Services Ombudsman's Bureau are accessible and that complaints about the conduct of regulated financial service providers are dealt with efficiently and effectively and are adjudicated fairly;

(c) to enable such complaints to be dealt with in an informal and expeditious manner;

(d) to improve public understanding of issues related to complaints against regulated financial service providers and related consumer protection matters."

5. The Council was established under s. 57BC of the Act of 1942. Among its functions, there ascribed, are the appointment of the Ombudsman (ss. 57BD(1) and 57BJ) and the making of regulations under section. 57BF..

6. Section 57BF(1) provides:-

"(1) The Council shall make regulations for or with respect to matters –

(a) that are, by this Part, required or permitted to be prescribed, or

(b) that are necessary or convenient to be prescribed for the purpose of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred, on that Ombudsman by this Part.

(2) In particular, a regulation under subsection (1) may do any of the following:-

(a) prescribe matters that the Financial Services Ombudsman must take into account when investigating or adjudicating a complaint;

(b) prescribe procedures to be followed in processing a complaint;

(c) specify circumstances in which the Financial Services Ombudsman can dismiss a complaint without considering its merits..."

7. The principal functions of the Ombudsman, as identified in Part VIIB, are to deal with the complaints made to him by mediation, or, where necessary, by investigation and adjudication (section 57BK(1)). Under s. 57BX(1)(a) of the Act, an "eligible consumer" may complain to the Ombudsman as to the conduct of a regulated financial service provider in relation to financial services provided by such provider.

8. Section 57BY(1) of the Act is pivotal to this case. It deals with jurisdiction. It provides:-

"The Financial Services Ombudsman shall investigate a complaint *if satisfied that the complaint is within the jurisdiction of the Financial Services Ombudsman.*" *[Emphasis added]*

9. Thus a statutory duty to be "satisfied" as to jurisdiction devolves on the Ombudsman or the official deputised to carry out this function. This is a mandatory

provision in its terms and makes the consideration of jurisdiction a *sine qua non* to what follows. The term "satisfied" is an objective term. It connotes reaching a conclusion having considered the relevant background facts, evidence, and law as to jurisdiction.

10. There are a number of definitions contained within the Act which are also relevant. The definition of "eligible consumer" in s. 57BA requires first, a consideration of the definition of the term "consumer". The Act of 1942, at the time of its amendment by the Act of 2004, provided as follows:-

> "consumer means –
>
> (a) a natural person when not acting in the course of, or in connection with, carrying on a business, or
>
> (b) a person, or group of persons, of a class prescribed by Council regulations."

11. The term "eligible consumer" was defined as follows under s. 57BA:-

> "eligible consumer', in relation to a regulated financial service provider, means a consumer –
>
> (a) who is a customer of the financial service provider, or
>
> (b) to whom the financial service provider has offered to provide a financial service, or
>
> (c) who has sought the provision of a financial service from the financial service provider..."

12. But in 2005, the Council made regulations reliant on its power to do so under para. (b) of the definition of "consumer" in s. 57BA of the Act, as cited above. That paragraph empowered the Council to prescribe a person or group of persons as a "class"

of consumer. The effect of this was to thereby prescribe a broader "class" of persons who might avail of the services of the Ombudsman as "eligible consumers". Thus "consumer" was broadened so as to be:-

> "a. A person or group of persons, but not an incorporated body with an annual turnover in excess of 3 million euro. For the avoidance of doubt a group of persons includes partnerships and other incorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate, and
>
> b. incorporated bodies having an annual turnover of 3 million euro or less in the financial year prior to [the] year in which the complaint is made to the Ombudsman (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said 3 million euro)."

13. These are, consequently, the designated categories of person or entities who may now make a complaint. Hooper Dolan challenges this categorisation as being an effective and constitutionally impermissible "amendment" of the Act of 1942.

14. With this framework in mind, I turn now to the factual background. The events in question entirely predate the appointment of the present Ombudsman, Mr. William Prasifka, who has, however, sworn a replying affidavit in which he sets out background events within his knowledge.

Factual Background

15. Hooper Dolan is a company incorporated in the State with limited liability. It carries on business as an investment product intermediary. Its activities are supervised by the Financial Regulator.

16. The notice party herein ("the Credit Union") is itself a financial service provider, as defined. From the year 2004 onwards, Hooper Dolan provided the Credit Union with investment and advisory services in respect of its surplus funds. To this end, Hooper Dolan identified investment opportunities offered by stockbrokers. It then acted as an intermediary in executing orders for investments made by the Credit Union. Hooper Dolan says that it understood the Credit Union to be a sophisticated investor in that it was responsible for, and managed, an investment portfolio of approximately €3.6 million. In an affidavit sworn for the purposes of the appeal brought contemporaneously with this review, John O'Byrne, a director of Hooper Dolan, specifically deposes that his firm was aware of the extent of the funds managed by the Credit Union because it had conducted a review of the Credit Union's portfolio of investments.

17. It is necessary to trace what follows chronologically, as time considerations are relevant both to the *vires* and discretionary issues.

18. Bloxham Stockbrokers ("Bloxham") appointed Hooper Dolan as an investment intermediary on 4th December, 2003. Hooper Dolan continues to so act. On 10th January, 2005, Hooper Dolan received an email from Mr. John Power, a senior bond trader in Bloxham. He advised Hooper Dolan of a reinvestment opportunity relating to a "new Dresdner Bank Bond" ("the Bond"), and identified certain details of this instrument.

19. Hooper Dolan brought this opportunity to the attention of the Credit Union. On 25th January, 2005, the Credit Union entered into an advisory client agreement with Bloxham, and placed an order to invest €100,000 in the Bond.

20. Four months later, the Credit Union raised a query regarding the Bond. It had been advised to review its suitability in the context of the Trustee (Authorised

Investment) Order 1998 (S.I. No. 28 of 1998) (the "1998 Order"). Hooper Dolan addressed this query based largely on material provided by Bloxham. The essential issue was whether the Bond was actually a Dresdner Bank Bond, properly so called, and whether it complied with the 1998 Order. Hooper Dolan asserted that it was. It is unnecessary to go into this in further detail.

21. On 28th September, 2006, Hooper Dolan received a letter from a Mr. Robert Moynihan of Irish Regulatory Training and Consulting, a consultancy firm which was advising the Credit Union. He disagreed with Hooper Dolan's conclusion that the Bond complied with the 1998 Order.

22. On 20th October, 2006, Hooper Dolan wrote to the Credit Union responding to Mr. Moynihan's letter. It restated its view that the Bond complied with the 1998 Order. It informed the Credit Union that, on that date, the value of the Bond was €99,274.40, and that if it so wished, it could sell at any time.

23. The Credit Union elected not to sell. Time passed. Mr. Moynihan wrote again on 15th August, 2008, saying that he had been authorised by the Board of the Credit Union to seek a final response from the broker as to whether there had been a mis-selling of the Bond.

24. Much correspondence followed. Hooper Dolan asserted that there had been no mis-selling, that the Bond was compliant with the 1998 Order, and that there would be no offer of compensation.

25. The Credit Union finally complained to the Ombudsman by letters dated 21st and 24th December, 2008. It was issued with a complaint form. The contents of this are

important; in particular, as to a question contained there concerning the Credit Union's turnover:-

> "If you are complaining on behalf of AN INCORPORATED BODY *i.e.* a limited company with an annual turnover of €3m or less, please provide the name of the company and the annual turnover for the financial year prior to which the complaint is made to Financial Services Ombudsman Bureau."

The Credit Union answered that its annual turnover was €1,108,516.

26. The form also stipulated:-

> "The Bureau will need evidence from you about this figure. If the figure is more than €3m, *the Bureau will not be able to examine your complaint.*" *[Emphasis added]*

27. As can be seen, this was in order to give effect to s. 57BY(1) of the Act of 1942 which imposed a duty on the Ombudsman to be "satisfied" that the complaint was within jurisdiction. Moynihan attached the Credit Union's financial statement for the year ended 30th September, 2007, to the letter of complaint. It showed a total *income* of €1,108,516, but disclosed much more. Unfortunately, this full document was not made available to Hooper Dolan prior to its engaging in the Ombudsman process. As will be explained in more detail later, it should have been, because the contents of the financial statement went much further than mere "income". It showed figures for receipts and disbursements far in excess of 3 million euro. The financial statement *plus* all the attachments were the foundation stone of the evidence as to jurisdiction. The financial statement comprises some fourteen pages. It includes a cash flow statement for the year ended 30th September, 2007, showing receipts of €20,270,279 and total disbursements of €19,759,435, including

loans granted of €5,597,556. The cash and investments amounted to €7,451,103. This figure is elsewhere identified as being slightly in excess of this amount. This was information Hooper Dolan was entitled to have and should have been given.

28. Equally, it might be said, Hooper Dolan did not at that point raise any question as to the Credit Union's turnover. It did know the Credit Union was an investor with a portfolio of approximately €3.6m, but had no opportunity to detect from the documents supplied any question mark over jurisdiction.

29. The procedure adopted by the Ombudsman is relatively informal. Here, the Deputy Ombudsman investigated the complaint by requiring Hooper Dolan to reply to a schedule of questions.

30. By letter dated 2nd January, 2009, the Deputy Ombudsman wrote to the Credit Union to inform it that it would require a final response letter from Hooper Dolan. By letter of the same date, the Ombudsman wrote to Hooper Dolan to inform it of the complaint. Then, by letter dated 19th January, 2009, the Ombudsman informed Hooper Dolan what a final response letter should contain.

31. By letter dated 2nd February, 2009, Hooper Dolan provided its final response to the complaint. By letter dated 4th February, 2009, the Credit Union indicated that the letter did not add anything and that it stood over its complaint. By letter dated 11th February, 2009, the Ombudsman wrote to Hooper Dolan and the Credit Union offering mediation. Hooper Dolan declined this offer.

32. By letter dated 23rd February, 2009, the Ombudsman wrote both to Hooper Dolan and the Credit Union indicating that, as mediation had been declined, the matter would now proceed to investigation and adjudication. No question arose as to any jurisdictional

limit. It appears no one, on either side, directed their minds to the question. It will be recollected that it is the *duty* of the Ombudsman to investigate if *"satisfied"* that the complaint is within its jurisdiction (s. 57BY(1) of the Act of 1942).

33. On 27th March, 2009, the Ombudsman wrote to Hooper Dolan enclosing a summary of the complaint, seeking documentation and replies to questions. The letter enclosed three documents including a cover letter sent by the Credit Union. Critically, the Deputy Ombudsman, as the deciding officer, never enclosed the Credit Union's financial statement, although that statement was in the possession of her office.

34. There were further exchanges of correspondence. On 30th June, 2009, the Ombudsman issued its finding. It upheld the Credit Union's complaint and directed Hooper Dolan to refund the Credit Union one hundred thousand euro, the entire value of the original investment.

Hooper Dolan's Conduct – Delay

35. What follows is particularly important as part of the issue of delay. The Ombudsman specifically advised Hooper Dolan that, subject to an appeal to the High Court, the finding would be binding within twenty-one days. The deadline for an appeal was therefore 22nd July, 2009. Hooper Dolan received the finding on 2nd July, 2009. On 15th July, 2009, Mr. O'Byrne wrote to the Ombudsman, evidencing only an *intention* to appeal. He did not initiate the appeals procedure however. The Ombudsman replied the next day, saying that an extension of time was a matter for the discretion of the court, but confirming that the office would raise no objection. By letter dated 16th July, 2009, the Ombudsman wrote to the Credit Union to apprise them of the situation. On 22nd July, 2009, the statutory appeal period expired. Hooper Dolan missed the deadline.

36. On 10th August, 2009, the Ombudsman wrote to Hooper Dolan pointing out that no appeal papers had yet been served, despite the fact that a number of weeks had elapsed. The company was told that, in the absence of payment, enforcement proceedings would be commenced.

37. Even then, Hooper Dolan was dilatory. It wrote on 13th August, 2009, to say that appeal papers were being prepared. From at least this point onwards, Hooper Dolan had legal advice. On 17th August, 2009, it issued an (undated) notice of motion seeking an extension of time in which to appeal.

38. In response, the then Ombudsman, Mr. Joe Meade, swore on affidavit on 22nd September, 2009, setting out a chronology of events, and expressing concern about the wide range of the grounds of appeal. By then, Hooper Dolan had listed seven main heads of appeal, together with six further sub-headings. Mr. O'Byrne filed a replying affidavit on 12th October, 2009. A Mr. Brendan Frawley swore on affidavit on behalf of the Credit Union on 19th October, 2009. He opposed the application for an extension of time, asserting the Credit Union had been prejudiced by the delay.

39. From this point onwards, Hooper Dolan's conduct must be considered from the standpoint of abuse of process, as well as ongoing delay.

Hooper Dolan's Conduct – Delay and Abuse of Process?

40. The application to extend time was heard by this Court (Ryan J.) on 9th November, 2009. The judge indicated that he was prepared to grant an extension but with some hesitation. He granted costs to the Ombudsman and to the Credit Union on the basis of Hooper Dolan's responsibility for the delay. He noted Mr. Meade's complaint about

the substantial number of grounds of appeal, and observed that the judge who would ultimately hear the appeal would not be impressed.

41. By letter dated 11th November, 2009, the Ombudsman's solicitors wrote to Hooper Dolan's solicitors requesting "netted down grounds of appeal", in accordance with Ryan J.'s recommendation. They sent a reminder on 17th November, 2009. Another month elapsed.

42. Then, in a letter dated 16th December, 2009, Hooper Dolan enclosed revised grounds of appeal. Remarkably, instead of reducing them, it sought to add further fresh grounds. It then revealed for the first time that it intended seeking leave for judicial review on 21st December, 2009. That application was ultimately heard by Peart J. on 21st December, 2009, just short of six months from the date of the decision of 30th June, 2009. All of the other parties before the High Court on 9th November, 2009, had proceeded on the basis that only an application to extend the time for appeal was at stake.

43. Counsel for the Ombudsman contends that Hooper Dolan was guilty of abuse of process in failing to indicate an intention to judicially review its finding at the time of the application. He submits that the Court granted the extension in the belief that the full scope of the challenge was in the appeal, and that the grounds of appeal would be netted down by Hooper Dolan. Instead, Hooper Dolan formulated additional grounds of appeal and having gained that procedural foothold, then, and only then, instituted judicial review proceedings.

44. I draw attention here to the fact that the Credit Union did not participate in this judicial review. It has not alleged any prejudice from the further delay. Had such a case been made it would have necessitated serious consideration.

45. I turn then to the evidence as to the next aspects of the Ombudsman's defence: want of candour, waiver, acquiescence and want of *locus standi*.

Hooper Dolan's Conduct – Want of Candour, Waiver, Acquiescence or Want of *Locus Standi?*

Want of Candour

46. Until the judicial review, Hooper Dolan never raised any question as to the jurisdiction of the Ombudsman to deal with the complaint. It made no complaint about procedure, either before or during the process. Mr. O'Byrne's affidavit, sworn for the leave application, did not exhibit any documentation whatsoever. Thus, the Ombudsman points out, that the judge dealing with that matter would not have been aware that Hooper Dolan had not raised any question as to jurisdiction or as to procedure in the Ombudsman process. It is said that Hooper Dolan's conduct showed want of candour. This point, in conjunction with the others here identified, is considered later in the judgment under the heading of "discretion".

Waiver or Estoppel

47. On behalf of the Ombudsman, Mr. Shane Murphy S.C., additionally contends that Hooper Dolan's conduct amounts to waiver or estoppel. He says that Hooper Dolan were aware from the outset as to the basis on which the Ombudsman was assuming jurisdiction, since the complaint form identified the jurisdictional limit, and required the Credit Union to record its annual turnover. He points out that the cover letter from the Credit Union stated that there was attached thereto the financial statements showing its total income of €1,108,516. Even if Hooper Dolan did not receive the actual full financial statement, he contends it was implicitly on notice of the issue, or at least could have

queried it. Counsel submits the information, or sufficient information to constitute notice as to the Credit Union's position, was available to Hooper Dolan from its previous dealings with the Credit Union; that the jurisdictional challenge was raised for the first time only in these judicial review proceedings; and that, had Hooper Dolan raised a jurisdictional objection at the outset of the investigation, the matter could have been further dealt with then and there by the Ombudsman. Instead, he says, Hooper Dolan allowed the investigation to proceed to a finding, and only very belatedly raised *vires*.

48. Was Hooper Dolan guilty of acquiescence or waiver? Counsel points to the fact that Hooper Dolan was well aware of the Credit Union's investment portfolio of €3.6m; and submits Mr. O'Byrne is disingenuous when he swears that it only became aware of the possibility of a full award of compensation relatively late in the day. In response, counsel for Hooper Dolan, Mr. Colm MacEochaidh S.C., submits that his client was never sufficiently apprised of the Credit Union's financial position, and the Ombudsman process did not encourage either party to obtain legal advice prior to the investigation, in that, as was pointed out to his client, any legal costs incurred would be the responsibility of the parties.

49. I turn next to consider the evidence and submissions on the *vires* issue as to whether the Credit Union was an "eligible consumer".

Evidence and Submissions on *Vires*: Was the Credit Union an "Eligible Consumer"

50. Section 5 of the Interpretation Act 2003 enjoins a court, or any deciding officer who must interpret the law, to construe a statutory provision (other than a penal or other sanction) in a manner which reflects the plain intention of the Oireachtas where that intention can be discerned from the Act as a whole. Such an obligation arises where an

Act is obscure and ambiguous, or where a literal interpretation might give rise to an absurdity.

51. A similar interpretive duty applies in the case of a statutory instrument. There the duty is to give a construction that reflects the plain intention of the maker of the instrument where that intention can be discerned from the instrument as a whole in the context of the relevant enactment.

Did the Ombudsman Act in Excess of Jurisdiction in Assuming Jurisdiction of a Case Outside its Statutory Remit?

52. Neither of the terms "annual turnover" nor "income" are defined in the Act of 1942 or the Regulations. Hooper Dolan submits that if the jurisdictional term "annual turnover" is properly applied and interpreted, the Credit Union is not an "eligible consumer".

53. The purpose of statutory interpretation is the "discernment of the intention of the legislature (*Ní Eilí v. Environmental Protection Agency & Anor* (Kelly J.) [1997] 2 I.L.R.M. 458). Words and phrases should be given their ordinary and natural meaning.

54. A *court* must incline to a meaning which is plain and unambiguous; effect must be given to such a meaning. In seeking to apply these tests, and the natural meaning test, the applicant relies on *O'H. v. O'H.* [1990] 2 I.R. 558 at 563; *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1; and *Inspector of Taxes v. Kiernan* [1981] I.R. 117.

55. But the primary question *here*, I find, is not what are the *modes* of interpretation, but the identification of the appropriate office holder who could, or should, have engaged in that process of application of evidence and interpretation.

56. The Ombudsman operates under the *aegis* of the Council. One power conferred on this body is to make such regulations as are necessary or convenient for the purpose of enabling the Ombudsman to perform his wider statutory functions (s. 57BF of the Act of 1942). As previously noted, the Council, made regulations entitled the Central Bank Act 1942 (Financial Service Ombudsman Council) Regulations 2005 (S.I. No. 190 of 2005) ("the Regulations"). These Regulations came into effect on 1st April, 2005, and notice thereof was published in Iris Oifigiúil on 29th April, 2005. The Regulations set the jurisdictional limit of the Ombudsman at €3m in turnover. Hooper Dolan says the Credit Union turnover was much greater than this. There is, first, an evidential question; then a legal question: how should turnover be defined?

57. The parties now seek to make their case in lengthy affidavits, sworn for this case. Obviously, none of this evidence was placed before the Ombudsman. But that evidence raises important questions of mixed fact and law regarding the identification and definition of "turnover" of a credit union, as defined by the Council in its Regulations.

58. Mr. Harding, a chartered accountant, was retained by Hooper Dolan. Professor Colm Kearney, a Professor of International Business in Trinity College Dublin, deposed on behalf of the Ombudsman. The affidavits came, from both, replete with substantial appendices, containing complex mathematical formulae purporting to set out a number of modes of interpretations of the term "turnover".

59. Professor Kearney espouses the view that, for financial institutions "turnover" is an alternative term for business revenue or sales; alternatively, it may be the speed at which an amount, a number, or a proportion of anything is dealt with. Mr. Harding contends that "turnover" is understood as being a measure of the value of any defined

activity or range of activities undertaken by an entity during the course of a specific period. He argues that the first of Professor Kearney's definitions is true only for organisations whose main activity is selling, and that a credit union does not come within that category. He contends that, for the purposes of identifying turnover of a credit union, one cannot look to its revenue or sales or to the speed at which the amount, a number, or proportion of anything is dealt with. Instead, one must look to the activity or activities of the credit union.

60. Professor Kearney responds that, for financial institutions, including credit unions, the term conventionally used for "turnover" or "revenue" is "income". He opines that the term "turnover", as utilised in the Regulations, refers to revenue or sales. Thus he contends that the Credit Union's "income" for the year ended 30th September, 2007, was €1,108,516 and was, *ipso facto*, "turnover".

61. On the basis of his interpretation, Mr. Harding contends that the Credit Union's "turnover" was, either, the value of loans advanced in the year ended 30th September, 2007, (€5,597,556); or the total receipts plus total disbursements amounting to €40,029,714.. He says that for a court to determine the issue of 'turnover', it would be necessary to determine the activity or range of activities undertaken by a credit union. He asserts that the main function of credit unions is the issuance of loans. He concludes that the value of loans advanced was in excess of the financial limitation set by the Regulations. He says, that, a *fortiori*, an application of the 'throughput' definition of €40,029,714, would be vastly in excess of the statutory limitation laid down in the Regulations.

62. None of this sworn material was put before the Ombudsman. The point was never mentioned.

63. For reasons which will be explained, this Court can approach matters on the basis of the simple observation that the term "turnover" is capable of a number of interpretations in the context of a credit union. One of these definitions would not, in itself, have raised any issue or problem with regard to turnover so far as jurisdiction is concerned. Others might well have done.

64. Hooper Dolan never made the point: the issue of jurisdiction was never even queried. But I think this is subordinate to the fact that the Ombudsman never sent Hooper Dolan the Credit Union's financial statement. It was material, even if it did not form part of the evidence of the complaint. It was certainly part of the case, as a whole, and as matters transpired, a vital part.

65. In *J & E Davy v. Financial Ombudsman & Anor* [2010] 2 I.L.R.M. 305, Finnegan J., among many other issues, had to deal with s. 57BX(8) of the Act of 1942. This requires the Ombudsman to provide a financial service provider with a copy of the complaint as a matter of fair procedure and natural justice. But he added at p. 336:-

> "In the present case having regard to the serious nature of the complaint and the serious consequences likely to flow from the same and having regard to the express statutory provision I am satisfied that Davy ought to have been furnished not just with the letter of the complaint b*ut with the appendices attached to the same*." *[Emphasis added]*

He added:-

"I am not satisfied that to furnish the letter of complaint but not the appendices meets the requirements of the Act or of fairness."

66. Later in the same passage he observed:-

"...It is necessary that *any* factual matters which are before a decision maker and which form part of the material upon which he will base his decision should be made available to the parties to the procedures." *[Emphasis added]*

67. Part of the Ombudsman's decision making process was as to jurisdiction. In my view these procedural requirements apply as much to material evidence going to jurisdiction as to simple evidence on the substantive complaint. The question of jurisdiction forms part of the decision making process. The fact that Hooper Dolan had within its own procurement *some* information regarding the Credit Union's portfolio pales into insignificance. Context can be vital in law. It was here where matters fell down in that neither Hooper Dolan nor the deciding officer in the Ombudsman's office apparently directed their minds to the vital preliminary issue as to whether there was jurisdiction to entertain or deal with the complaint. But there was a qualitative and quantitative difference. The full evidential and legal context was known to the Ombudsman;, there is no evidence that Hooper Dolan knew of it. There is of course no direct evidence as to whether the provision of this financial statement would have led to the jurisdictional issue being raised by Hooper Dolan but I do not think this is the critical issue. It is a hypothetical question. The question in issue here is the performance of a statutory duty giving effect to a constitutional right to fair procedures.

68. Pursuant to s. 57BZ(2) of the Act of 1942, the power vested in the Ombudsman is to "make preliminary inquiries for the purpose of deciding whether a complaint should be

investigated and also to request a complainant to provide for other written particulars of the complaint". It was open to the Deputy Ombudsman, the deciding officer, to query the figures put forward by the Credit Union if she was of the view that further inquiries were necessary. In correspondence with Mr. Moynihan, the Credit Union's adviser, Mr. O'Byrne wrote:-

> "Every prospectus contains warnings *and a Credit Union that manages millions of euro on behalf of its members can hardly be described as anything other than competent and they would be aware that every investment contains risk."*

This shows *some* knowledge of the Credit Union's activities. I do not think this is sufficient to "fix" Hooper Dolan with all the knowledge necessary to address a jurisdictional issue. Whatever about the Credit Union's financial statement not having been furnished to Hooper Dolan, it had been provided to the Deputy Ombudsman. It contained the cash flow statement for the year ended 30th September, 2007, indicating total receipts of €20,270,279 and disbursements of €19,759,435. The cash and investments of the Credit Union amounted to €7,961,947. The Deputy Ombudsman had this data and such data must be taken to have been sufficient to consider the size of the Credit Union's turnover. It was a warning, a red flag, or should have been. A brochure provided to Hooper Dolan by the Ombudsman's office, specifically stated:-

> "When the complaint form is received by this office, *it is assessed to determine whether the complaint falls within the remit of the Ombudsman or whether it should be investigated. It may be necessary to request further information from the complainant at this point. If the matter is deemed to be outside the remit of*

the Ombudsman or a decision is made not to investigate it the complainant will be informed as to why it cannot be investigated."

The brochure also states that *'a copy of the complaint form and attachments will on that date be sent to the provider by this office'."*

69. The jurisdictional provisions of s. 57BY (cited earlier) are fundamental. They impose a statutory duty. They provide, under subs. 1, that the Ombudsman *"shall investigate the complaint if satisfied that the complaint is within the jurisdiction of the Financial Services Ombudsman..."*. Thus the onus is on the deciding officer in the Ombudsman's office to be satisfied as to jurisdiction. Any real consideration of the appendices to the financial statement provided by the Credit Union would have demonstrated that the additional document, *on its face*, raised questions as to jurisdiction. The answer to the questionnaire provided *some* information, but it was by no means the totality available. I do not think that the Deputy Ombudsman should have accepted the contents of the form at face value when there was before her, and readily available to her, other factual evidence provided by the Credit Union which, at a minimum went right to the question of whether there was jurisdiction, although it is fair to say that the financial statement did not go to the gravamen of the actual complaint.

70. But there is, first, a critical *evidential* deficit. There is no evidence that the then Deputy Ombudsman at any point directed her mind to the question of jurisdiction as explained, so as to be "satisfied" in a real way in accordance with the statutory obligation. A reasoned assessment and investigation of that jurisdictional material relevant to the adjudication was mandatory. The answer for "income" should not have

been taken at face value, when there was other very significant material which related to "turnover", and thus jurisdiction.

71. There is then the second *procedural* deficit in failing to provide this material to Hooper Dolan who should have been given it. The evidential onus was on the Ombudsman on this issue. The absence of evidence of consideration of the issue of jurisdiction is an error which goes to jurisdiction here, when there was material before the deciding officer from which it might very reasonably have been inferred that a jurisdictional question arose. As a matter of fair procedure the entire financial statement should have been provided. The duty of the Deputy Ombudsman was, then, to provide a nexus, the vital connection between the laws and the facts. The duty is not dissimilar to that held to apply to peace commissioners in *Ryan v. O'Callaghan* (Unreported, High Court, Barr J. 22nd July, 1987); *Berkley v. Edwards* [1988] I.R. 217; and *Byrne v. Grey* [1988] I.R. 31. By way of illustration by analogy, in *Byrne v. Grey*, Hamilton P. said that the peace commissioner issuing the warrant must *himself* be satisfied. He negated the possibility that a peace commissioner should be entitled to proceed simply on the *suspicion* of a garda síochána. *Byrne* and other cases illustrate that a peace commissioner cannot accept even a reasonably based suspicion of a garda síochána. The duty to be "satisfied" devolves upon the person who must make the decision. The suspicion even if reasonable is not simply to be taken at face value. I consider that the omissions here were errors going to jurisdiction which rendered what followed a nullity. I do not consider that an error *as* to jurisdiction can be an error *within* jurisdiction. These identifiable errors of omission of want of jurisdiction would thus normally be amenable to the remedy of judicial review.

72. In so finding, I specifically refrain from making any comment whatever as to what view the Deputy Ombudsman should, or would, have taken in relation to the question of the statutory limit. That was a matter for her to determine in the fulfilment of her statutory function. A review court should not step into the shoes of those who should decide such issues. The Ombudsman did not act in accordance with law and, *prima facie*, Hooper Dolan should normally be entitled to relief, subject to discretionary issues which are dealt with in the final section of the judgment.

73. There are other matters which must first be dealt with, including other aspects on the *vires* question. I think these first require consideration of the interpretation of the legislation in accordance with the provisions of the Constitution.

74. I must preface what follows by the confession that I am conscious of the criticisms directed by the Supreme Court to judges of first instance in *Equality Authority v. Portmarnock Golf Club* [2010] I.R. 671, and *McDaid v. Sheehy* [1991] 1 I.R. 1. As noted above, in *McDaid*, the Supreme Court concluded that a court of first instance should not engage in questions as to constitutional validity, unless it is necessary to do so; neither should such a court embark on a consideration of the constitutional validity of a question which is moot. There is a dilemma. But I do not think what follows here is precisely comparable either to *McDaid* or I think, *Portmarnock*. A finding that the Ombudsman acted in a manner which was *prima facie* unlawful does not in itself determine the issues before the Court. As will be explained, there remains the question of the nature of any remedy, assuming the discretionary threshold is surmounted. One remedy within the power of the Court is remittal. As noted previously, were the Court to find that the impugned statutory instrument or the sections were constitutionally invalid,

remittal would be otiose. It simply could not arise. If, on the other hand, the Court was to conclude that the impugned provisions are valid having regard to the provisions of the Constitution then the remedy of remittal remains a live issue. In my view, therefore, a simple finding of want of jurisdiction would not be determinative of the issues between the parties. If I am wrong in the resolution of this dilemma, then what follows in the next sections until the final consideration of discretion must necessarily be considered as technically *obiter dicta*.

Further Legal Aspects of the *Vires* Issues - Considerations

75. In addition to the earlier, relatively simple jurisdictional issue, Hooper Dolan seeks a declaration that ss. 57BA and 57BF of the Act of 1942 are invalid, having regard to Article 15.2 of the Constitution. The Regulations are also impugned. Do the statutory provisions in question purport impermissibly to confer a power on the Council to legislate for and amend the definition of 'consumer' in s. 57BA of that Act? Are these outside the limits of any principles or policies identified in the Act? As to the statutory instrument, is the definition of 'consumer' therein promulgated in excess of the Council's powers? Do the Regulations go beyond what is lawful in revisiting the definition of 'consumer' by permitting the inclusion of non-natural legal persons, subject only to a monetary limit in "turnover"?

76. Hooper Dolan says that the statutory power given to the Council to make regulations prescribing a class of persons or a group of persons as coming within the meaning of 'consumer' is a statutory power granted in the absence of any discernible principles or policies by reference to which the power might be exercised.

77. In the Act of 1942, at the time of its amendment by the Act of 2004, the term 'consumer' was defined as meaning "(a) a natural person when not acting in the course of, or in connection with, carrying on a business or (b) a person or group of persons, of a class prescribed by Council regulations".

78. However, as noted above, in 2005 the Council made regulations broadening the definition of "consumer" so as to include (to paraphrase now):

> (a) a person or group of persons, but not an incorporated body with an annual turnover of less than €3m, including partnerships and other incorporated bodies as illustrated in the section; and (b) incorporated bodies having an annual turnover of €3m or less in the financial year prior to the complaint to the Ombudsman...subject to the exclusion of any body associated with a group of bodies with a turnover in excess of €3m.

79. Was it permissible for the Council to designate or "identify" class (b) as coming within the term "consumer", or is class (b) impermissibly broad?

80. As a preliminary observation to the principles and policies issue, I should point out that the Act of 1942, as amended, does not contain a "negative resolution" procedure, permitting the annulment of the Regulations by resolution of either House of the Oireachtas. This is sometimes relevant in applying the principles and policies test. The legal principles informing the interpretation of Article 15.2.1 of the Constitution were classically expressed in *CityView Press v. An Chomhairle Oiliúna* [1990] I.R. 381.

81. In *CityView*, the defendant had been granted the power, by regulation, to promulgate a 'levy order'. This was for the collection of a levy from each enterprise in a particular industry. The legislation in question did not specify the manner in which the

levies were to be calculated. It imposed no financial ceiling upon them. Nonetheless, the Supreme Court held that the policy was clearly laid down by the Act; the legislation provided for enabling machinery for the carrying out of these policies. Since the only matter left over for determination by the defendant was the manner of calculating the levy in relation to a particular industry, the Court did not consider this to be an unconstitutional delegation of authority, despite the fact that the defendant had a very broad discretion as to the level at which the levy should be fixed.

82. There is a low evidential threshold to the test. O'Higgins C.J. expressed himself thus in *CityView*:-

> "In the view of this Court, the test is whether what is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the Statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the laws laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."

83. It will be seen, then, that *how* a levy was calculated did not require specification. Neither was it necessary to identify a monetary ceiling.

84. How, then, do these principles of interpretation apply in the instant case? As was pointed out by counsel for the Ombudsman, Hooper Dolan is not entitled to assert

arguments based on a *ius tertii* basis. What is in question here is the Abbeyleix Credit Union, not a large firm of accountants with a turnover many times that of Hooper Dolan.

85. Section 57BA and the Regulations are to be construed having regard to the presumption of constitutionality; it is to be assumed that the legislature did not intend to delegate anything to the Council other than a power "to fill in the detail". Such detail may, or may not have been, anticipated by the legislature. As Murphy J. said in *O'Neill v. Minister for Agriculture* [1998] I I.R. 539 at p. 556:-

> "It has never been suggested that the power to make statutory regulations should be confined to some stereotyped administrative provisions. It may, and I see no reason why it should not be, that regulations designed by a Minister and his officials to secure a particular statutory objective would be novel and innovative and accordingly, not in their terms anticipated by the legislature."

See also *BUPA Ireland Limited v. H.S.E.* [2006] IEHC 431, (Unreported, High Court, McKechnie J., 23rd November, 2006).,

86. In the present case, the expression "consumer" is expressly defined in s. 57BA of the Act of 1942. It is broad, as it includes "persons or a group of persons" of a class prescribed by the Regulations. I refer to it now *insofar* as it might be interpreted as being relevant to any principles and policies test.

87. It is important to emphasise that this definition does not take place in a legislative vacuum. The real questions here are twofold. First, what is it that the legislation intended to do? Second, do the Regulations now in force go beyond the legislative intention?

88. I turn to the first question. The objects of this part of the Act are expressly set out in s. 57BB. I find that both the overall policy, and the legislative policy (insofar as the

two might differ) are clearly identified (see *Laurentiu v. D.P.P.* [1999] 4 I.R. 26; *Leontjava v. D.P.P.* [2004] 1 I.R. 591). The stated objects are to establish the Ombudsman as an independent officer to investigate, mediate and adjudicate in respect of complaints made against financial service providers by consumers informally and expeditiously. The term Ombudsman is not simply a label attached to a job, it goes much further. The holder of that office is not intended to deal with disputes *between* large enterprises; but rather grievances and complaints by an individual citizen against abuses or capricious acts of public officials, large companies or organisations. The original old Norwegian provenance of the word appears to draw its meaning from a "steward" or "manager"; classically, the office is intended to redress an unequal balance between a relatively powerless individual and a strong organisation. As referred to earlier, an essential part of that function is to investigate, mediate, report and settle complaints without the necessity for resort to courts. Section 57BB and other provisions of the Act identify the goal of the Act as being consumer protection in the context of financial service providers.

89. But there is no statutory provision that "financial service providers" are to be confined to natural persons. Thus, accepting the submission of senior counsel for the Attorney General, Michael Collins S.C., I would instance small businesses, shops, clubs, partnerships, companies, trade unions and other associations who have any dealings with money as coming within the permissible class. In fact, the principles and policies of the new part are defined in s. 57BB, cited earlier. The section identifies precisely the objects, identified above. The section itself identifies legislative policy. That statutory *function* includes dealing with complaints in an informal and expeditious manner, improving

public understanding of issues related to complaints against regulated financial service providers and related consumer protection matters. The intent behind the policy is that the Ombudsman should be concerned as to the interaction of the public, or classes of the public (in a broad sense), with financial service providers. This category of persons or entities should be seen as distinct from large corporations, well versed in the financial world, which would be precluded and outside any legislative principle or policy. The very nature of the products sold by financial service providers necessitates that they are sometimes quite opaque to the targeted customers. The statutory objects, the *policies*, are to protect those who have been persuaded to buy financial products unsuited to their circumstances, or who lack the necessary professional or financial knowledge properly to assess such products.

90. Why should persons, or classes of person, whether natural or otherwise, be in less need of protection merely because they happen to be organised into groups, associations, corporate bodies or any of the other myriad of collective vehicles through which people choose to conduct their affairs? I cannot conceive of any reason why not. This is particularly so when the products being sold are financial products whose merits or otherwise may be far less obvious than day-to-day consumer products. I consider that the legislature clearly made a deliberate choice in amending the Act of 1942 to allow for the definition of consumer *beyond* the traditional definition of simply a 'natural person', not involved in business, to those who might be. I am not persuaded that the Regulations *amend* the Act, but rather, *within* the stipulated intent of the Act, they *define* or identify the classes of persons or entities who may have recourse to the office of the Ombudsman.

I reemphasise that what is in question here is a consumer, *qua* Abbeyleix Credit Union, not some *ius tertii* spectre of a hypothetical large accountancy firm.

91. It is instructive here to compare the definition of "consumer" in the Act of 1942 with that contained in the Consumer Protection Act 2007 (which set up the National Consumer Agency). In the Act of 2007, "consumer" is defined as meaning:-

> "[A] natural person (whether in the State or not) who is acting for purposes unrelated to the person's trade, business or profession."

92. This is very much in contrast to s. 57BA, which defines consumer in para. (a) of its definition in similar but not identical terms to the Act of 2007, but then consciously, it expands the definition by adding a para (b) *viz* "a person or group of persons, of a class prescribed by Council regulations". Clearly then, the term 'persons' include a body corporate, an unincorporated body of persons, as well as an individual (s. 18(c) of the Interpretation Act 2005). I conclude, therefore, that the Oireachtas was expressly permitting that in this niche area of financial services, the term 'consumer' could be expanded, not by the Council, but by the legislature, so as to include some, but not all corporate bodies. It would be inappropriate to provide an "ombudsman" for *all corporate bodies*. The entire *raison d'être* of an ombudsman is to provide an informal, flexible remedy, outside the court system, where persons (including bodies corporate) at the lower end of the financial scale can bring their complaints. A similar power to extend, by order, the meaning of consumer from a natural person acting outside the course of his or her business is given to the Minister for Finance by s. 2(9) of the Consumer Credit Act 1995, as amended by s. 33 and Sch. 3 by the Act of 2004.

93. It is equally clear that the legislature intended the term 'consumer' to extend beyond the traditional concept of a natural person not acting in the course of a business. In particular, it intended that groups of persons could, in some circumstances, constitute a 'consumer'. It remained for the Council to prescribe the exact parameters which could define such class or classes of consumers.

94. I am not persuaded that para. (b) gives an unidentified, untrammelled power to the Council to amend or expand the statutory definition. It is not open-ended. It is certainly not open-ended in its application to this credit union. The Court must not impart a *ius tertii* interpretation. Properly interpreted, both the section, and the Regulations, comply with the principles and polices contained, not in the Regulations, but in the Act itself by virtue of the extension of the definition to bodies corporate through para. (b) of the definition in s. 57 BA, cited earlier.

95. I find the function performed by the Council is actually to restrict or identify the categories of corporate bodies which can avail of the Ombudsman services. I consider the Council was therefore given the power to identify, by *restriction*, the sort of corporate bodies who could properly fall within the concept of "consumer" for the purposes of the Ombudsman services. I find it clear from the legislation that it is inherent in the nature of the Ombudsman's functions, as identified earlier, that any person or entity who avails of its services should be of a comparatively small size.

96. It is clear, therefore, from the choice of term, that while the *Oireachtas* clearly expanded the class of persons who could complain to the Ombudsman beyond individuals to corporate bodies in 2005, it is in the nature of what an ombudsman does that such corporate bodies must be confined to relatively small organisations. The

paradigm was identified in the legislation. How precisely the dividing line was to be drawn was left to the Council. It had, and still has, the power to make regulations for that purpose. It chose to draw the line by reference to incorporated bodies with a *maximum* annual turnover of €3,000,000. I am not persuaded that there is any constitutional impropriety in the exercise of this statutory power imparted to the Council by the legislature. I am not persuaded that there is here an undermining of the legislative process. It is in the nature of things that many people will avail of financial service products through some form of incorporation. But this is not to lose the essence of an ombudsman's service as being informal and flexible.

97. Partnerships, therefore, come within the definition of "consumer" for the purposes of the Act of 1942. Some partnerships may be quite sizeable businesses. These are the exception rather than the rule. This fact does not create inconsistency with the principles and policies of the legislation. In the vast majority of cases, partnerships are constituted of private individuals with personal liability. As such, to afford them the status of "consumers", in my view, is not inconsistent with the traditional concept of consumer. Unlike incorporated companies, partnerships are not obliged to file their accounts in any public office or register, and accordingly, it would be impractical, and perhaps impossible, to apply a "turnover test" to partnerships without compelling a disclosure of financial information that runs entirely counter to policies to do with the nature and regulation of partnerships. It was, therefore, logical for the Council to draw a dividing line in the manner in which they did, having regard to the statutory reference to "groups of persons".

98. But I think Hooper Dolan's argument has another flaw. Despite the great skill with which the case was advanced, I consider that it contained within it a fundamental misconception as to the principles and policies which are in fact actually discernible from the Act. I have commented earlier that the definitions were not devised in some legislative vacuum but in the context of the new part of the Act. In fact the *definition* or *identification* of "consumers" as natural persons, *in itself* does not come within the rubric of 'principles or policies' at all, although relevant to that identification process. That is to merely isolate the first half of the statutory definition of consumer as a natural person. Not only does it ignore the second part of the definition (which expressly includes incorporated bodies) by the deliberate use of the term "person", it also ignores the whole scheme of the Act, the express objects set out therein, and the nature of what an ombudsman is about. Accordingly, I conclude that s. 57B:

(a) does not involve any impermissible deregulation of legislative power to the Council; and

(b) the Regulations made by the Council were a lawful and proper exercise by the Council of the power vested in it.

Can a "Consumer" be Simultaneously a "Financial Services Provider"?

99. What follows is again subject to the *McDaid v. Sheehy* provisio identified above. A further aspect of Hooper Dolan's argument is that the term 'consumer' cannot comprise a body such as a credit union, which is also a financial service provider.

100. In s. 2 of the Act of 1942, "financial services provider" is defined as:-

"... a person who carries on a business of providing one or more financial services."

101. Section 2 further provides that a "regulated services provider" means:-

"(a) a financial services provider whose business is subject to regulation by the Bank or the Regulatory Authority under this Act or under a designated enactment or a designated statutory instrument, or

(b) a financial services provider whose business is subject to regulation by an authority that performs functions in an EEA country that are comparable to the functions performed by the Bank or the Regulatory Authority under this Act or under a designated enactment of a designated statutory instrument, or

(c) *in relation to Part VIIB only, any other financial services provider of a class specified in the regulations for the purposes of this paragraph.*" *[Emphasis added]*

102. Thus, by part (c) above, the power to designate a financial services provider is imparted by the Act of 1942 to the Council for the purposes of regulation. The Council designates the nature of such providers in regulations. It is true that, pursuant to s. 57BX(4) of the Act, there is reference to a consumer being entitled to "make a complaint in respect of the conduct of a regulated financial service provider" but I do not read the Act as precluding the possibility, such as exists in the instant case, of a body such as a credit union being (for the purposes of the Act) an "eligible consumer", albeit in circumstances where it also "provides" services of a financial nature to individuals or other persons. I do not accept that it can be inferred from the Act that there is some

statutory opposition or "juxtaposition" between the two classes of financial services market participants: one being authorised by the Central Bank to provide financial services; the other which must necessarily be deemed to be at a potential disadvantage in relation to financial services. Hooper Dolan submits that "one cannot be simultaneously in both classes", but I do not think that is the case. The true test is not as to category or label, it as to the *activity* in which the entity concerned is engaged at the relevant time. To a credit union member, a credit union itself might be a financial services adviser. At another time to a firm such as Bloxhams, a credit union, perhaps composed of a body of persons less tutored in the ways of the world, would be a consumer.

103. I might remark also that this point never arose among the very many issues considered in *J&E Davy*, cited above, where, it might be said, no stone was left unturned, and which was vigorously pursued to the Supreme Court.

Retrospectivity

104. I turn next to the issue of retrospectivity. Article 15.5.1 places a constitutional limit on the content of law. It provides that:-

> "The Oireachtas shall not declare acts to be infringements of the law which were not so as the date of their commission."

105. It is contended that the Act of 1942 is retrospective, and therefore constitutionally infirm. In short, I do not agree. The Act does not declare any act to be an infringement of the law. It is true that s. 57BX(4) specifically provides:-

> "A consumer is entitled to make a complaint in respect of the conduct of a regulated financial services provider even if the conduct complained of occurred

before the commencement of this section provided the conduct did not occur more than six years before that commencement."

106. Here, it might be observed firstly that prior to the legislation there existed a voluntary ombudsman scheme. Mis-selling an investment has always been conduct that would attract a remedy, be it in the courts or under the previous ombudsman's dispensation. The present scheme simply provides a method of resolving issues outside of the courts. The financial service provider is still entitled to have recourse to the courts. It does not create a remedy previously unknown to the law.

107. In fact, the Act simply creates a means by which consumers can seek to have complaints determined without recourse to the courts. In *McKee v. Culligan* [1992] 1 I.R. 223, Finlay C.J. said of Article 15.5.1 that its provisions:-

> "... are an express and unambiguous prohibition again the enactment of retrospective laws declaring acts to be an infringement of the law whether of the civil or criminal law."

But he added:-

> "It does not contain any general prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description." (p. 272)

108. There is ample authority to illustrate the extent of what is, and is not, prohibited in the terms of Article 15.5.1. In *McGrath v. Garda Commissioner (No. 2)* [1992] I.L.R.M. 38, it was held that Article 15.5.1 was not breached by the retrospective creation of *disciplinary* offences for members of An Garda Síochána as these did not constitute civil wrongs or criminal offences. In *M. v. D.* [1998] 3 I.R. 175, it was held that Article 15.5.1

was not breached by the retrospective creation of the civil asset *forfeiture* scheme. In *Haughey v. Moriarty* [1999] 3 I.R. 1, Geoghegan J. held that, even if the new provision for *costs* contained in the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 had been applied retrospectively to the plaintiff, that would not have amounted to a breach of Article 15.5.1. In *Minister for Family Affairs v. Scanlon* [2001] 1 I.R. 64, a provision of the Social Welfare Acts permitting the recovery of wrongly paid sums was held to be capable of applying retrospectively. But here there is no criminal or civil penalty: no act is declared to be an infringement of the law retrospectively; what is retrospective here is a *means,* a vehicle, for resolving disputes outside the courts. No new legal right or duty is created.

109. O'Higgins C.J. in *Hamilton v. Hamilton* [1982] I.R. 466 at 474, citing Craies on Statute Law (7th ed., p.387) commented that a statute which takes away or impairs any vested right acquired under existing laws, or creates any *new* obligations, or imposes a new duty or attaches any disability in respect of transactions already past is to be deemed to be retrospective. The question here is whether the amended Act does any of these things. I am not convinced it does. "Mis-selling" would have been a tort or civil wrong prior to the inception of the Act.

110. While it is true that there is a *presumption* against *interpreting* legislation so as to have injurious retrospection, this does not arise in the instant case; as the Act in its express terms is retrospective in nature, but not "injurious". I do not consider it 'unreasonable' that the Council should designate some time at which to determine whether or not a customer of a financial service provider was a 'consumer'. Hooper Dolan suggests that it should be at the time when the service was provided. This

interpretation is motivated I think by the facts of the case. This dividing line would have little meaning in this context for the Act is retrospective in nature for a period of six years. I do not consider it follows that there lies some inherent flaw in the point of time identified by the Oireachtas. One might also observe that the relevant "time" which arises here is no more than four months approximately between the provision of the service and the effecting of the Regulations.

111. I turn then finally to the issue of discretion. It is to be seen from the perspective of a finding that the Ombudsman did not act in accordance with law in that the Deputy Ombudsman failed to be "satisfied" as to jurisdiction.

Discretion

112. Hooper Dolan has brought a judicial review and a statutory appeal against the finding made by the Ombudsman on 30th June, 2009. The judicial review proceeding was initiated on 21st December, 2009, at what can only be identified as the eleventh hour. There is total silence in the affidavits as to whether Hooper Dolan sought legal advice; whether it had a regular firm of solicitors; when it sought legal assistance; and what it says it would have done differently had it retained legal advisers from the outset..

113. There are issues as to credibility. Mr. O'Byrne swore in an affidavit for the statutory appeal that his understanding was that the Credit Union had an investment portfolio of approximately €3.6m on behalf of its members. He can hardly plead ignorance of the Credit Union's financial affairs. The relationship between Hooper Dolan and the Credit Union dated back to the year 2004. Mr. O'Byrne describes the Credit Union as being "a sophisticated investor". More directly, he says he was "aware of the

extent of the funds managed by the notice party because the appellant [Hooper Dolan] conducted a review of the notice party's portfolio of investments".

114. Mr. O'Byrne swore that Hooper Dolan was not aware of the potential for serious adverse findings and a financial consequence for it of such findings until the decision of the Ombudsman was received by it on or about 2nd July, 2009. I think this is disingenuous. It is difficult to reconcile this with a letter which Mr. Moynihan (advising the Credit Union) sent to the Ombudsman dated 21st December, 2008, where he wrote:-

"I ask you to direct [Hooper Dolan] to buy it back from the Credit Union at cost."

115. Mr. O'Byrne can hardly have been taken entirely by surprise. A copy of that letter was furnished to Hooper Dolan. At the very minimum Hooper Dolan knew what the Credit Union was seeking to achieve. This begs many questions. This was not a bolt from the blue. When did Hooper Dolan first go to its lawyers?

116. Mr. O'Byrne's grounding affidavit for leave did not contain any exhibits. It certainly did not fully identify the extent of the information which was available to him in relation to the Credit Union's activities. From 8th December, 2008, to 2nd February, 2009, Hooper Dolan never raised any query about jurisdiction, conduct or procedure. The appropriate time to bring such complaint as to procedures should have been before the process was embarked upon (see *Maguire v. Ardagh* [2002] 1 I.R. 385, judgment of Geoghegan J. at p. 739; judgment of Keane C.J. in *B. v. Fitness to Practice Committee of the Medical Council* [2004] 1 I.R. 103.)

117. There is considerable authority to the effect that waiver and acquiescence may apply even where there is a question of jurisdiction. In *Brennan v. Governor of Portlaoise Prison* [2008] 3 I.R. 364, Geoghegan J. dealt with a point raised very much *ex post facto,*

as to whether the Special Criminal Court had acted within jurisdiction when the applicants had not been brought before that Court at the first opportunity. He observed at para. 4:-

> "In a judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Kehoe* [1985] I.R. 444, delivered by McCarthy J. and dealing with a jurisdictional point relating to the Special Criminal Court it was held that an objection to jurisdiction normally had to be made when the accused was first brought before the court. If the point was not taken at that stage, to quote McCarthy J., 'it is spent'. As that did not happen in this case, Ó Néill J. refused the application."

118. Geoghegan J. continued by identifying circumstances where it could not be reasonably expected that jurisdictional issues could be raised, such as an unrepresented accused who had not had access to legal advice.

119. He went on to point out at para. 21:-

> "There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a *bona fide* exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time. That would, of course, be very much in line with the judgments in *A. v. Governor of Arbour Hill Prison* [2006]

IESC 45, [2006] 4 I.R. 88 though that case covered a somewhat different factual situation and the principle applicable here long predated it."

120. Active participation in a hearing has been held to be sufficient to deprive an applicant of the right to subsequently complain about the conduct of that hearing. Thus, in *R. (County Council of Kildare) v. Commissioner of Valuation* [1901] 2 I.R. 215, an application for an order of *certiorari* to quash a revised valuation made on appeal by the county council was refused because the applicant had allowed the Court to proceed with the revision and complained only when the decision was unfavourable. Whilst the Court of Appeal held that the County Court order was made without jurisdiction, the applicant council was precluded by its conduct from obtaining relief. In fact even relatively limited participation in a hearing may be treated as waiver, especially if an applicant has not made known his objections (see *State (O'Leary) v. Neilan* [1984] I.L.R.M. 35 (failure to make unequivocal challenge to jurisdiction; acquiescence in a number of adjournments); see also *Corrigan v. Irish Land Commission* [1977] I.R. 317 (allegation of bias later raised on review against a tribunal when not raised before the tribunal itself). But is the case comparable? I think not.

121. I do not consider that Hooper Dolan exhibited total candour in the presentation of the evidence for the application of leave. I emphasise this is not to be taken as a criticism of Hooper Dolan's legal advisers, but of Hooper Dolan itself. It knew the situation from its previous dealings with the Credit Union. An applicant for judicial review, at the leave stage, must act with the utmost good faith (see *Adams v. DPP* [2001] 2 I.L.R.M. 401). Hooper Dolan was well aware of the fact that the Deputy Ombudsman was proceeding upon the basis of the financial statement showing total income of €1,108,516. Yet it had

carried out a review of the Credit Union's investment portfolio. At no stage did it seek further information or query the fact that the Ombudsman had accepted jurisdiction. This is more remarkable in the context of the relationship between the parties. The correspondence and all the material, including the appeal material, should have been exhibited. At the leave application, the Court was, however, appraised of the appeal only.

122. Hooper Dolan can be criticised for seeking to raise issues on a *ius tertii* basis. Issues were raised as a purely hypothetical question.

123. Hooper Dolan never said that it was induced to act, or would have acted, in a different manner because of its engagement with the Ombudsman procedures. A number of examples with regard to how the Regulations *might* operate in relation to *other* consumers were canvassed in the course of argument (see judgment of Hardiman J. in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 at 165 and see *Cahill v. Sutton* [1980] I.R. 269). But is this enough to debar Hooper Dolan on any of the dissenting grounds?

124. I revert to a closer focus of Hooper Dolan's conduct. It has sailed very close to the wind in many ways. But an application for judicial review cannot be dismissed on some "general principles" basis.

125. I turn first to delay. It is not demonstrated that any party suffered prejudice from the delay in seeking leave. The Credit Union chose not to participate in the proceedings and did not file an affidavit. There is ample jurisprudence that delay may defeat a right to seek judicial review. The obligation on an applicant is to move promptly (see *R. v. Stratford-on-Avon D.C., ex parte Jackson* [1985] 3 All E.R. 769; *DeRóiste v. Minister for Defence* [2001] 1 I.R. 190; *Dekra v. Minister for the Environment and Local Government* [2003] 2 I.L.R.M. 210 at 239 to 240.

126. In *Dekra*, Fennelly J. observed that:-

> "An applicant, who is unable to furnish good reason for his own failure to issue proceedings for judicial review 'at the earliest opportunity and in any event within three months from the date when grounds for the application first arose' will not normally be able to show good reason for an extension of time. In particular, he cannot, without more, invoke the absence of any prejudice to the opposing party as the *sole basis* for the suggested good reason." *[Emphasis added]*

Here the applicant was actually within the six month time limit provided O. 84, r. 5(c) of the Rules of the Superior Courts for *certiorari*. It was not necessary to apply to *extend* time. The case is this distinguishable.

127. The remedy sought here is, of course, *certiorari,* where the time limitation is six months. In the instant case, the Court has been informed as to the sequence of events which took place from the time of the Ombudsman's decision up to the time when leave was sought. I have already criticised other aspects of Hooper Dolan's conduct.

128. But to my mind all of this conduct, whether delay, waiver, want of candour or acquiescence, seen individually or collectively, falls short of a situation where an applicant should be debarred from obtaining a discretionary remedy. I think the jurisdictional lacuna outweighs Hooper Dolan's conduct; howsoever, typified as waiver, delay, acquiescence or alleged abuse of process on its part. I consider on balance it would be disproportionate to prevent Hooper Dolan from obtaining a relief of discretionary grounds in circumstances where this Court has found that there was a want of jurisdiction. The want of jurisdiction of the case outweighs any conduct issue.

129. This Court refrains from making any finding of fact or law in relation to the evidence as to jurisdiction. These legal and evidential issues are ones which pre-eminently should be put before the Ombudsman. In other circumstances, a failure to raise issues at first instance could very well give rise to a finding of want of *locus standi*. I am not persuaded that such a finding would be just on the facts of the instant case where there was an onus on the Deputy Ombudsman, as the deciding officer, to provide all the relevant material.

130. But the remedy must be proportionate to the wrong. Hooper Dolan has succeeded on one ground only.

131. There is a broad discretion as to the form of remedy. I consider that the justice of this case necessitates that the matter should be remitted, including the issue as to jurisdiction, to the Ombudsman to be considered *de novo* in accordance with law. In order to avoid any possibility of other jurisdictional issues, such as an accusation of objective bias, I would recommend that the matter be dealt with by another officer in the Ombudsman's office. I will hear counsel on the form of the order and the issue of costs in light of the findings.