THE HIGH COURT

[2011 No. 169 MCA]

IN THE MATTER OF SECTION 57CL OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY SECTION 16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY ACT 2004) AND

IN THE MATTER OF AN APPEAL FROM A FINDING OF THE FINANCIAL SERVICE OMBUDSMAN

BETWEEN

ROISIN HYDE

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Cross delivered on the 16th day of November, 2011

1. Preliminary

1.1 This is an appeal against the finding by the Financial Services Ombudsman ("the Ombudsman") dated 27th May, 2011, in which the majority of the appellant's complaints against the Bank for alleged failure to comply with instructions was not substantiated.

1.2 The appellant appeared in person and the respondent was represented by a Mr. Paul Anthony McDermott of counsel.

2. The Act

2.1 Section 57BK(4) of the Central Bank and Financial Services Authority of Ireland Act 2004, provides:-

> "The Financial Services Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

2.2 Section 57CI of the Act provides at subs. (2):-

> "A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
>
> (a) the conduct complained of was contrary to law;
>
> (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
>
> (c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
>
> (d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;
>
> (e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

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

2.3 Section 57CL of the Act provides for an appeal to the High Court against the findings of the Ombudsman and s. 57CM provides for the orders that may be made on an appeal and at subs. (1) and (2) provides that:-

"(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. The Test for an Appeal

3.1 In *Ulster Bank v. Financial Services Ombudsman & Ors* [2006] IEHC 232, Finnegan P. (as he was) set out the following test for an appeal pursuant to s. 57 of the Act:-

"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.*"

3.2 This test was followed by MacMenamin J. in *Molloy v. Financial Services Ombudsman* (15th April, 2011) where he broke down the requirements into the following distinct elements:-

"(i) the burden of proof is on the appellant;

(ii) the standard of proof is the civil standard;

(iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;

(iv) the onus is on the appellant to show the decision reached was vitiated by a serious and significant error or a series or such of errors; and

(v) in applying this test, the court may adopt what is known as a deferential stance and may have had regard to the degree of expertise and specialist knowledge of the Ombudsman."

3.3 I accept this standard and indeed the breakdown as suggested by MacMenamin J.

4. <u>The History of the Case</u>

4.1 The appellant is in architect and in March 2007, the appellant applied to the Bank for a loan facility for the purchase of a property. The appellant claims that she was offered a loan facility of approximately €965,000 which she required being a sum of €715,000 for the purchase of the property and the sum of €250,000 to fund renovation work upon it. The €715,000 portion of the loan was drawn down in April 2007 and is

documented. A difficulty arose in that the appellant's repayments had not been debited from her account as she expected and a disagreement ensued as to whose responsibility it was to set up a standing order or debit. The appellant believed that she had been offered some "breathing space" to allow her to pay stamp duty and discharge her legal fees but on 24th August, 2007, the appellant received a letter from the Bank notifying her that the Bank had just discovered that no payments had been received and requesting immediate payment. The complainant complains and this is in reality of the heart of the matter as I understand it that notwithstanding the fact that a loan facility was agreed in the sum of €965,000 that the Bank refused the additional amount of €250,000 for the refurbishment works.

4.2 The appellant further complained that the Bank refused to issue further finance unless she agreed to abide by a number of onerous conditions and to change the favourable terms that the €715,000 was advanced.

4.3 The Bank states that the letter of offer issued to the appellant and accepted by her on 23rd March, 2007, was for €715,000, this sum was drawn down by the complainant on 29th March, 2007, that no application was made for an additional €250,000 and no letter of offer was issued in this amount and had the Bank furnished the documentation supporting that contention. The Bank contend that the complainant was aware that further funding would require fresh application in that the appellant wrote by letter dated 6th January, 2009, to the solicitors for the Bank as follows:-

> "Finally as originally intended, I am currently developing the property to provide 175m sq of office space and 150m sq of residential. This work is currently onsite and when completed in March 2009 I expect the final value of the property to be

in the region of €1.8m as previously discussed with Mr. Morgan it would then be my intention to re-mortgage the property for an LTV of approximately 50% i.e. €900,000 in order to cover some of the costs of development."

The Bank contends that it was up to the appellant to establish her method of payment as it was a commercial mortgage.

4.4 Given the dispute in relation to the commencement of the payment of the €715,000 and as to whose responsibility it was to initiate standing orders or direct debits, there were arrears due to the Bank and negotiations took place in relation to the method of rescheduling payments.

4.5 The appellant states that these various offers were sent to her office address while she was unavailable due to maternity leave and that she did not return to work until December 2008. The appellant also says that she was, in effect, harassed by the Bank by numerous telephone calls.

5. Findings of the Ombudsman

5.1 On 23rd July, 2009, the Ombudsman made the first finding in relation to the appellant's complaints. This was appealed to the High Court and the appellant's appeal was heard by Hedigan J. on 15th March, 2010. Hedigan J. in his findings quashed the original decision and remitted the matter for further consideration. I am advised by counsel for the respondent and I accept that at the time Hedigan J. did not find any particular fault with the findings of the Ombudsman, but he felt the appellant was making what were new allegations which had not been the subject of the original adjudication and in those circumstances he felt that the appropriate course was to quash the first finding and remit the matter for further consideration.

5.2 The matter proceeded for consideration by the respondent and a finding was made on 27th May, 2011, which is the subject matter of this appeal. This finding was made without any oral hearing but on the documentation.

5.3 The complainant's complaints were duly and properly summarised by the respondent as follows:-

> "(1) Failing to activate her mortgage repayments on the due date and when the error was discovered demanding immediate payment of the missed instalments despite the fact that the error emanated from the Bank.
>
> (2) Failing and/or refusing to issue with the remainder with her loan funds, thus causing her severe financial hardship.
>
> (3) Failing to reach a reasonable compromise agreement with her regarding the restructure of her mortgage.
>
> (4) Failing to deal her numerous queries in a professional, timely or efficient manner."

5.4 The respondent analysed the case on a contract basis dealing with offer and acceptance.

5.5 In relation to allegation (1) at para. 5.3 above, the Bank failed to activate the appellant's mortgage repayments on due date *etc.* the respondent concluded:-

> "In the absence of any recordings or contemporaneous notes of the conversations between the parties during the period April 2007 to August 2007, when the complainant alleged alerted the Bank to the fact that repayments had not yet commenced on her mortgage account and when she was allegedly advised that the Bank had decided to give her 'breathing space' to allow her to pay stamp duty and

to discharge her legal fees, I am unable to verify the complainant's claim that it was she who informed the Bank of the situation and that she was informed that she had been allowed some 'breathing space' before the commencement of the periodic repayments. Similarly, as there is no evidence to corroborate the Bank's assertion that Mr. Kenny requested the complainant to set up a standing order on her account in March 2007, in or around the time of drawdown, I am unable to verify this claim either.

I must therefore scrutinise the tangible evidence which has been presented to me in order to make a determination on the issue. In the Bank's favour the letter of offer, accepted by the complainant of 23rd March, 2007, stipulates 'monthly repayments of interest only repayments of €392.38 will apply for a period of 24 months from drawdown'.

As the complainant drew down the funds on 29th March, 2007, there is a contractual obligation on her to commence repayments in April 2007. So, as repayments did not commence on the due date it could be argued that she violated the terms of her mortgage agreements.

However, on the other hand in the complainant's favour, Ms. Billie Kelly's letter dated 7th August, 2008, acknowledged that while a formal moratorium was not included in the letter of offer for the Bank did in fact allow the complaint a payment deferral "it would appear that while a formal moratorium was not included in the offer letter of 13th March, 2007, we appreciate that a repayment deferral was allowed as interest repayments were not collected.

Due to this contradictory evidence, I can only conclude that there was some form of misunderstanding between the parties as to who would be responsible for ensuring that repayments were collected in line with the mortgage contract. In light of the discrepancies in the evidence highlighted above, I am simply unable to make a finding that the Bank was wholly responsible for the missed payments or that full blame rests with the Bank."

5.6 The respondent went on in his determination to reject the complainant's submissions that her letters to the Bank were not responded to and he referred to letters issued to the complainant on 24th August, 2007; 6th September, 2007; 19th September, 2007; 25th October, 2007; and 23rd November, 2007.

5.7 The respondent agreed that the Bank did issue letters to the appellant's office addressing contravention of her instructions of her letter of 14th September, 2007, in which she instructed them to send her correspondence to her home address but the respondent stated that: "I am inclined to believe that the complainant did in fact receive these letters prior to December 2008". The respondent concluded that the appellant "must have had sight of the Bank's correspondence notwithstanding the fact that they were sent to her office address". The respondent reached that conclusion by reference to submission dated 22nd October, 2010, from the applicant to the respondent in which dealing with this correspondence she stated: "it should be noted that none of these letters contained responses to request for information made in my letter of 14th September, 2007 and that following her failure to respond to my letter I again sent a copy of this letter to Ms. Kelly on 28th September, 2007 and 23rd October, 2007".

5.8 In dealing with the complaint set out at (2) in para. 5.3 that the Bank failed to issue the remainder of the loan funds, the respondent in rejecting the complaint analysed the correspondence and concluded that while there was a request for €965,000, an offer was made by the Bank of €715,000. The respondent concluded by an analysis of this correspondence that the Bank never intended to enter into a legally binding agreement to extend finance to the complainant in respect of the refurbishment works.

5.9 In dealing with the complaint set out at (3) above in para. 5.3 that the Bank failed to reach a reasonable compromise agreement with the complainant, the respondent found in this matter that the Bank went to enormous lengths to try to facilitate the complainant in relation to restructuring and while the respondent accepted the submission that the conditions attached to the known offer were quite onerous given the fact that the complainant's loan had been in arrears and that interest only payments had been made at first some three years which had not been sufficient to discharge the interest's only liability and that no capital repayments had been made that the Bank was in the respondent's opinion more than reasonable in the circumstance.

5.10 In relation to the complaint as set out at (4) in para. 5.3 above that the failed to deal with the appellant's numerous queries in a professional, timely or efficient manner, the respondent partly accepted the appellant's complaints in this matter in relation to the failure by the Bank to follow the appellant's express instructions which was described as "the sole glitch" in the level of service extended by the Bank to the complainant.

5.11 Under this heading the respondent awarded the appellant a sum of €350 to compensate her for the inconvenience and frustration caused by the Bank's failure to comply with the appellant's letter of 14th September, 2007 and accordingly, concluded

that the complaint was partially upheld under s. 57CI(2)(g) of the Central Bank and Financial Service Authority of Ireland 2004.

6. The Respondent's Submissions

6.1 It was submitted by Mr. McDermott on behalf of the Ombudsman that the Ombudsman was acting within his jurisdiction, that he clearly sets out the case made by each party and gave a reasoned judgment. Mr. McDermott correctly pointed out that it was not the function of an appeal under the Act to hear the original complaint on its merits.

7. An Oral Hearing

7.1 In para. 4 of the appellant's affidavit, she complained that the respondent did not require the Bank to "given information under oaths to finely establish the validity of their claims". Clearly the respondent enjoys a broad discretion as to whether or not to hold an oral hearing. In *Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324 at p. 364, it was held in the Supreme Court that:-

> "Assuming, as conceded by the respondent, that there is power to direct an oral hearing then it will be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact. There is here such conflict in relation to the oral advice given by the applicant to the notice party and also in relation to the expert evidence as to the nature of the bonds. In *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, Costello P. held it was not possible on the records available to determine that the applicant's wages for the relevant period exceeded the insurable limit. In the course of his judgment Costello P. said at p. 251:-

> 'There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing... What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.
>
> I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case.'"

7.2 It is submitted by Mr. McDermott that the appellant did not suggest an oral hearing was necessary at any stage during the investigation nor did the Bank ever suggest that an oral hearing was necessary and submitted that it was difficult to see how the decision of the respondent could now be attacked on the basis of the issues that were not properly raised or ventilated before him.

7.3 I hold that the question of whether or not an oral hearing should take place is indeed a matter of broad discretion for the respondent but the issue before me is whether the failure to do so in the circumstances was a serious and significant error. This is an issue of fair procedures and can be decided by me in this appeal.

7.4 I fully accept the words of MacMenamin J. in *Ryan v. Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011) when he stated:-

> "The Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing … It is important to recognise that, if the Ombudsman's office is to be permitted to carry out its statutory function, effectively it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law."

7.5 The difficulty in this case, however, is that by his decision not to hold an oral hearing, the Ombudsman was compelled to conduct his investigations slowly based upon the documentation. Accordingly in dealing with the complaint at (2) above as set out para. 5.3, the respondent concluded that from an analysis of the offer and acceptance documents that only €715,000 was offered and that this was accepted by the appellant. He could hardly have come to any different conclusion based on the documents. The appellant is a layperson without the benefit of legal advice in the presentation of her complaint but it is clear that what the complainant was saying was that the Bank had, in effect, given her oral representations that the balance of €250,000 would be paid down subsequently and that it was only when the difficulties or disagreements arose in relation to the payments of the €715,000 that they changed their minds or sought to alter their positions. Such a case could not in my judgment be fairly determined without an oral hearing so that witness's credibility could be properly assessed.

8. Decision

8.1 I have indicated above and I so hold that without an oral hearing I do not see how the appellant's complaint at (2) above could be fairly or properly determined and I hold

this amounted to a serious and significant error. In dealing with the other complaints, I note that the decision as to the activation of the complainant's mortgage repayments (1) at para. 5.3 was also made on documentary analysis from the correspondence and conclusion that the appellant "must have had sight of the Bank's correspondence". This conclusion was made by reference to the submissions of the appellant in October 2010, which the respondent concluded indicated that she had received the earlier letters prior to the time when she said she did.

8.2 I hold that merely on an analysis of the correspondence the above conclusion was not warranted as in her submission of 22nd October, 2010, the appellant was in effect saying that the earlier letters failed adequately to respond to her previous letter. She did not resile from her substantive point that she had not received them in time.

8.3 In coming to this conclusion based on an erroneous analysis of the October 2010 submission. I hold that the respondent was guilty of a serious and significant error.

8.4 Also in dealing with this question, an oral hearing would seem to have been indicated.

8.5 In relation to the appellant's complaint at (3) above in para. 5.3 that the Bank failed to reach a reasonable compromise. I believe that his findings were reasonable on the documentation that he supervised but that if the respondent is going to submit the other matters to an oral hearing that a final decision on this issue can be reached after such hearing as well.

8.6 In relation to the allegation at (4) above in para. 5.3 that the Bank failed to deal with the appellant's queries in a professional, timely or efficient manner, I hold that the award of €350 to compensate her for inconvenience was reasonable in relation to the

limited finding that the respondent made that the Bank failed to comply with the complainant's instructions of her letter of 14th September, 2007. Clearly, however, if the respondent should make further findings against the Bank then such a figure would not be reasonable.

8.7 I am alive to and accept the deferential standards as set out by Keane C.J. in *Orange v. Director of Communications Regulations and Anor* [2004] I.R. 159 but I do not think any of the matters I have alluded to refer to the specialised knowledge of the respondent in relation to the banking world rather they deal with the issue of fair and proper procedures and adjudication.

8.8 I have come to the conclusion that the errors as outlined above were significant and serious so that the appeal should be allowed.

8.9 It is not my function and I have no view to the ultimate merits of the appellant's case and it is entirely appropriate that the order should be remitted for review by the Ombudsman.

9. <u>Order</u>

9.1 Accordingly, I order that the decision of the Financial Services Ombudsman of 27th May, 2011, be and is hereby quashed and further that the matter is remitted to the Financial Services Ombudsman for further consideration of the appellant's complaints. I will hear the parties in respect of costs or outlay.

16/11/11