THE HIGH COURT

[2011 No. 22 MCA]

BETWEEN/

JOHN LYONS AND PATRICK MURRAY

APPELLANTS

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

BANK OF SCOTLAND PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 14th December, 2011

1. This is an appeal pursuant to the provisions of s. 57CL(1) of the Central Bank Act 1942 ("the 1942 Act") (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) taken by the appellants (who are two businessman) against a decision of the Financial Services Ombudsman ("the FSO") dated 12th January 2011 which rejected their complaint against the notice party (or, more strictly, its immediate predecessor, Bank of Scotland (Ireland) Ltd.) ("the Bank"). The fundamental ground of appeal is that the

FSO erred in law in rejecting the necessity for an oral hearing in order to determine certain factual issues between the parties.

2. I will presently outline in more detail the nature of the dispute between the appellants and the Bank. It suffices for the moment to say that the appellants borrowed a series of sums in the region of €17m. in total from the Bank (and its immediate predecessor, ICC Bank) for the purposes of property acquisition, principally in the Limerick, Tipperary and Clare regions between 1999 and 2008. They say that they could only have serviced these various loans from the rental income from these properties on an interest only basis and at the agreed rate of 1.25% (or, in the some cases, figures approximating to 1.5% or 1.8%) over the cost of funds. They maintain that this fact was well known to the Bank and that the parties had reached an oral agreement to this effect, the actual terms and conditions of the various written agreements between the parties notwithstanding. The appellants insist that the various representatives of the Bank orally indicated in a series of meetings - which principally took place between 2004 and 2008 - that they would facilitate such an arrangement, but that this could not be put in writing as this would breach Central Bank guidelines. This viewpoint is also substantially supported by a written statement supplied by the appellants' chartered accountant who was present at many of the relevant meetings with the Bank. It is only fair to say that the existence of any such oral agreement is steadfastly denied by the Bank and its representatives. The bank officials in question have all supplied written statements denying the existence of any such agreement.

3. Matters came to a head in the period between July, 2008 and February, 2009. The appellants contend that in July 2008 the Bank informed them that the applicable interest rate was to be increased to a rate which the appellants contended would push them into default. In effect, the appellants say that they budgeted to pay a sum of €550,000 on an interest only basis to the bank and that this sum continues to be paid. They further contend that at a

meeting in February, 2009 two named representatives of the Bank repudiated the oral agreement.

4. There is presently something of a stand-off between the parties. The appellants say that they have not committed any act of default and that they continue to pay a sum of approximately €550,000 annually to service the mortgage debt on an interest only basis. The Bank maintains that as there was no such agreement, the appellants are now in default. Counsel for the Bank, Mr. Fanning, informed me at the hearing that it contends that the sum of €1.9m.is now due from the appellants and that, but for the existence of the complaint to the FSO which had given rise to the present proceedings, the Bank would have issued proceedings in this Court to recover the said sums.

The complaint to the FSO

5. On 1st November, 2009, the appellants through their then solicitors made a complaint to the FSO pursuant to s. 57BX(1) of the 1942 Act (as amended). By decision dated 12th January, 2011, the FSO determined that the complaint was not substantiated for the purposes for the purposes of s. 57CI(2) of the 1942 Act.

6. At the heart of the present appeal is the contention that the FSO failed to hold an oral hearing in respect of these complaints.

7. At first blush it may seem surprising that a complaint of this nature would come within the remit of the FSO, rather than being the subject of litigation in the Commercial Court. After all, the object of the FSO is that declared by s. 57BK(1), namely, to deal with: -

> "complaints made under this Part by mediation and, where necessary, by investigation and adjudication."

8. Section 57BC(4) goes on to provide that the FSO, when discharging its functions, 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."

9. Section 57BA defines a "complaint" for this purpose as meaning a:-

> "complaint made by a consumer under this Part about the conduct of a regulated financial service provider."

10. The term "consumer" is in turn defined by the same section 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."

11. The Council in question here is the Financial Services Ombudsman Council established by s. 57BC. The appellants here were plainly carrying on business, so that they did not fall within the definition of consumer for the purposes of paragraph (a) of the definition. It is, however, accepted that they fall within the definition contained in paragraph (b) in light of the provisions of the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 (S.I. No. 190 of 2005)("the 2005 Regulations"). Article 2(1) of those Regulations provide that:-

> "The following classes of persons are prescribed by Council as consumers for the purposes of subsection (b) of the definition of "consumer' in Section 57BA of the

Central Bank Act 1942 (as amended by Section 16 of the Central Bank and Financial Services Authority Act of Ireland Act 2004).

1. 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 unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate."

12. In effect, therefore, the consequence of the 2005 Regulations is radically to expand the scope of the jurisdiction of the FSO to categories of cases beyond retail banking simpliciter to a point beyond which, some might think, it might sensibly or appropriately bear. It means, for example, that loans negotiated by a syndicate of businessmen running to hundreds of million Euros could well be the subject of a complaint to the FSO. Whether this definition of "consumer" as effected by the 2005 Regulations is, in fact, *intra vires*, s. 57BA or, if it is, whether the section would survive a constitutional challenge in the light of Article 15.2.1 of the Constitution having regard to cases such *as Laurentiu v. Minister for Justice* [1999] IESC 47, [1999] 4 I.R. 26 and *John Grace Fried Chicken Ltd. v. Catering JLC* [2011] IEHC 277 are matters which fall outside the scope of this statutory appeal.

13. This entire debate nonetheless raises what counsel for the Bank, Mr. Fanning, correctly described as an existential question. What, after all, is the purpose of the FSO and, perhaps, more specifically, how does its functions differ from those of the courts? In *Koczan v. Financial Services Ombudsman* [2010] IEHC 407, having referred to the powers given to the FSO by s. 57BK(4), I observed:-

"The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the courts. It is clear from the terms

of s. 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of *ex aequo et bono* which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s. 57CI(2) which provide that:-

> '(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.'"

14. So far as the *ex aequo et bono* jurisdiction is concerned, this is illustrated by a number of statutory appeals that have come before this Court. In *Koczan*, for example, the issue was whether an income protection policy gave sufficient warning to the insured that the policy might lapse if he became incapacitated through workplace injury and was unable to pay the insurance premia. This is a classic instance of where wider considerations of fairness and reasonableness should be brought to bear to mitigate a possible injustice caused by the bare language of a consumer contract.

15. A similar situation was in view in *Square Capital Ltd. v. Financial Services Ombudsman* [2009] IEHC 407, [2010] 2 I.R. 514. Here the financial services provider had advised a client seeking an investment opportunity to purchase two apartments in the United Kingdom, without disclosing the fact that it owned the apartments in question. When the client encountered difficulties with the investments in question, she complained that she had not been fairly or impartially advised. Against that background, it is scarcely surprising that McMahon J. upheld the Ombudsman's adverse finding in that regard. One may venture the suggestion that *Koczan* and *Square Capital* represent classic examples of the kind of complaints which the Oireachtas intended would be investigated by the Ombudsman, since they relate to instances of unfair dealing and perhaps even forms of sharp practice for which the ordinary judicial system and the law of contract may provide no adequate remedy.

16. Other cases are much more problematic. It may be noted, for example, that in *Cagney v. Financial Services Ombudsman*, High Court, February 25, 2010 Hedigan J. seemed to doubt whether it was appropriate for the FSO to entertain a claim which essentially alleged fraud on the part of the credit institution. While it is not necessary for present purposes to express a view on this question, it suffices to mention this case as illustrating the reality that it may be difficult to determine - certainly on an *a priori* basis - what cases fall into the category of cases properly within the realm of the *ex aequo et bono* on the one hand (and thus

within the classic provenance of the Ombudsman as the Oireachtas presumably intended) and those which parallel or replicate the standard breach of contract style claim on the other.

17. Yet, in addition to these wider concepts of *ex aequo et bono*, many of the grounds contained in s. 57CI(2) by which a complaint can be substantiated would appear to draw on wider public law concepts - such as reasonableness, irrelevant considerations and improper motive - which, historically, at any rate, play no role in the field of private law generally or that of contract law in particular. But here, then, is the nub of the problem identified by Mr. Fanning: where, then, does the Ombudsman's jurisdiction begin and end? As the present case illustrates, virtually every commercial dispute involving private individuals can, if necessary, be shoe-horned into the broader reaches of s. 57BC(4) or, for good measure, s. 57CI(2), since almost by definition these phrases are at least wide enough to embrace virtually all types of contractual disputes and yet are sufficiently elastic to encompass public law-style challenges to decisions made by retail banks.

18. This realisation brings uncomfortable consequences in its wake. Could, for example, a bank customer who had defaulted on his loan agreement potentially fend off significant commercial litigation by initiating a complaint to the FSO? That, incidentally, is what the Bank say has occurred here. After judgment in these proceedings had been reserved, it came to light that the appellants had very recently commenced High Court separate proceedings whereby they claim damages for negligence against the Bank for what they claim was negligent lending on its part. Of course, no opinion can be offered at this juncture on the merits (or otherwise) of such a claim, but it suffices here to mention this merely to show how the expansive definition of what is a "consumer" for the purposes of the 1942 Act makes the drawing of *a priori* distinctions between complaints to the FSO on the one hand and commercial litigation involving banks and non-corporate customers on the other very difficult, if not altogether impossible.

19. This point has been already judicially recognised. Thus, for example, in *O'Hara v. ACC Bank plc* [2011] IEHC 367 Charleton J. observed:-

> "To all intents and purposes, it is clear that the allegations made in the complaint before the Financial Services Ombudsman are the same as those which are sought to be litigated in these proceedings. The nature of the jurisdiction conferred on the Financial Services Ombudsman by the Oireachtas cannot be ignored. It would be contrary to the statutory scheme and it would also be unfair for parties to a complaint before the Financial Services Ombudsman to be later subjected to very similar litigation. The legislation has made any determination by the Financial Services Ombudsman subject only to an appeal. Absent a special reason of sufficient impact to nullify any potential abuse of process, it would be wrong for this Court to say that complaint could be re-litigated all over again. Such a finding would undermine the will of the Oireachtas."

20. It follows, therefore, that an adverse finding by the FSO rejecting a complaint can, in some circumstances at least, create at least a form of issue estoppel preventing the re-litigation of these issues in subsequent litigation, precisely because the adjudication on many such complaints is effectively replicating in one shape or another that which would be the staple diet of the judicial system. This in itself must have consequences for the Ombudsman's adjudicatory system.

Whether there should be an oral hearing in respect of the appellant's complaint?

21. All of this brings us to the nub of the present appeal, namely, the decision of the FSO to reject the appellant's complaints without an oral hearing. It goes without saying in the context of an adjudicatory system which is statutorily designed to be informal and expeditious that the courts should be reluctant to impose some form of adversarial court-style

model: see, *e.g.*, the comments in this regard of Charleton J. in *J & E Davy v. Financial Services Ombudsman* [2008] IEHC 256 and those of MacMenamin J. in *Ryan v. Financial Services Ombudsman*, High Court, 23 September 2011. Indeed, as MacMenamin J. pointed out in *Ryan,* if such a model were in fact to be imposed on the Ombudsman, it would mean in reality that the office simply could not function. The FSO cannot be regarded as some form of miniature version of the Commercial Court and, as counsel for the Ombudsman, Mr. McDermott, submitted, it could not practically function if this is what was expected of it.

22. In that vein, there have been several decisions of this Court upholding decisions of the FSO not to hold an oral hearing. Thus, in *Molloy v. Financial Services Ombudsman*, High Court, 15 April 2011 the complainant contended that he had been wrongly advised in respect of house insurance policies. Here the complainant effected a home insurance and some years later claimed on foot of the policy following a house fire. The policy was, however, repudiated by the insurance company when it emerged that the complainant had three convictions for public order offences which had not previously been disclosed.

23. The essence of the complaint was that the insurance policy had been mis-sold and that the nature of the disclosure obligation had not been brought to his attention. The complaint was, however, dismissed without an oral hearing, but in circumstances where the events leading up the signing of the insurance proposal form had been carefully explained and documentred. MacMenamin J. upheld that decision, in essence because the deciding officer could reasonably conclude that the "documentary evidence was sufficient to resolve the matters at issue." The judge further noted that it was "not unreasonable to conclude that it would be difficult to sign the document without seeing what was written on it."

24. In *Cagney v. Financial Services Ombudsman*, High Court, 25th February 2011 the appellant maintained that a key document was a forgery. Hedigan J. noted, however, that the

claim was a bare assertion to this effect and no evidential groundwork for this had ever been put before the FSO, Not surprisingly, however, Hedigan J. upheld the decision of the FSO that no oral hearing was necessary in these circumstances, although it seems at least implicit in the judgment that a different view might have been taken had the appellant at least laid the evidential foundation for this claim by way, for example, of expert evidence.

25. Hedigan J. took a similar view in *Caffrey v. Financial Services Ombudsman,* High Court, 12th July 2011. Here the appellant seems to have been a sophisticated investor of long standing (although this was itself disputed) who had purchased a particular corporate bond through a stockbroker on the secondary market at a below par rate. The appellant maintained that the true nature of the bond was not explained to him, but this was rejected by the FSO following a detailed analysis of the surrounding documentation and the general circumstances in which the bond was purchased.

26. Hedigan J. upheld the decision not to have an oral hearing, doubting that the parties would have been in a position "to give an accurate and detailed description as to the contents of a short telephone conversation that occurred five years previously." Hedigan J. also stated that the fact no oral hearing had been requested was a factor "which should be weighed in the balance."

27. In many ways, however, the decision which is most directly in point is that of Cross J. in *Hyde v. Financial Services Ombudsman*, High Court, 16th November, 2011. Here the appellant contended in her complaint to the Ombudsman that the credit institution in question had agreed to advance the sum of €965,000 for a property transaction. Some €715,000 was required for the actual purchase of the property and it was envisaged - or so the appellant maintained - that the balance would be paid for renovations. She further contended that the bank had represented orally that the balance of €250,000 would be paid down subsequently,

but that it had resiled from this commitment when difficulties or disagreements arose in relation to the servicing of the €715,000 mortgage.

28. Cross J. held that "without an oral hearing, I do not this how the appellant's complaint....could be fairly or properly determined". He continued thus:-

> "I am alive to and accept the deferential standards set out by Keane C.J. in *Orange Communications v. Director of Communications Regulation* [2000] 4 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."

29. It seems to me that this decision is very much on point so far as the appellants are concerned. It must, after all, be recalled that the existence of an oral agreement or understanding regarding the essence of an interest-only loan deal for a ten year period was of the essence of the appellants' complaint. This is much in line with the approach taken by Finnegan J. for the Supreme Court in *J & E Davy* v. *Financial Services Ombudsman* [2010] IESC 30, [2010] 2 I.L.R.M. 305 where the decision of Charleton J. to the effect that a material disputed question of fact could only be resolved by an oral hearing was upheld. Whatever about cases such as *Molloy, Cagney* and *Caffrey*, in the present case – just as in *Hyde* - the appellants could not realistically hope to establish the underlying merits of their case without an oral hearing.

30. Dealing with the question of whether an oral hearing was necessary in the present case, the Ombudsman stated:

> "In some disputes, an oral hearing may be considered necessary where a fact in dispute critical to the outcome of the complaint cannot be fairly decided or resolved

without hearing the parties' version of events. In this instance, I am satisfied that both parties have given detailed accounts of their meetings/discussions relating to the lending facilities and I do not consider that an oral hearing would serve any purpose, rather than a reiteration of the points already submitted in writing. I refer in particular to the statements provided by the Bank's staff members and the complainants."

31. This, however, is tantamount to saying that simply because the bank officials adhered steadfastly in their statements to their position that they gave no such oral assurances regarding interest only loans that an oral hearing - and specifically cross-examination - would prove to be of no value. Mr. McDermott stressed the fact that this claim was based entirely on assertion and that no documentary evidence had been produced to support it, other, perhaps, than the fact that interest-only loans had been offered prior to 2008 and had been continued from time to time as the credit facilities were re-financed.

32. It must be recalled, however, that all banking - and, perhaps, especially retail banking - is built on trust. Oral assurances from bank officials regarding the likely future course of the banking relationship are, of course, not unknown. This may well be particularly true of a period in our recent economic history - perhaps in especially the period from 2004 to 2007 - for which Greenspan's famous description of such societal conduct - "irrational exuberance" - seems especially apt: see A. Greenspan, *The Age of Turbulence - Adventures in a New World* (Allen Lane, 2007) at 176-178.

33. Naturally, the recipient of such an assurance will not normally regard it as legally binding. The common law, with its preference for writing and its general distaste for parol evidence in the sphere of contract law, will but rarely lend its assistance to such claims, especially where (as here) the context is that of a commercial loan for business purposes. This is illustrated by the classic decision of the English High Court in *L'Estrange v. Graucob Ltd.*

[1934] 2 K.B. 394, an authority relied on by Mr. McDermott for this purpose. Here, aided by the spirited arguments of one A.T. Denning, counsel for the defendants, two distinguished judges, Maugham L.J. and Scrutton L.J (whose respective fidelity to the orthodoxies of the common law could never be questioned) held that a plaintiff could be bound by the terms of a standard form contract, the terms of which she had never actually read. While the full rigours of this orthodox common law position may be mitigated by doctrines such as estoppel, part performance, undue influence and the like, the traditional preference on the part of the common law for the written word in matters of commercial dealing remains undimmed. These considerations notwithstanding, the recipient of such an oral assurance is nonetheless likely to regard such it as sufficiently definite to arrange their affairs accordingly. It is precisely in this realm that, as I put it in *Koczan*, disputes of this nature may be resolved by the Ombudsman by reference to "wider conceptions of *ex aequo et bono* which go beyond the traditional limitations of the law of contract."

34. The assertion nevertheless that, simply because the witnesses to one side or the other adhere to their stated position in written statements, cross-examination is likely to be of no value is one which, time after time, experience has shown to be unfounded. No greater truth-eliciting process has been devised, a point so graphically emphasised by Hardiman J. - who, as advocate, was himself one of the greatest masters of the art of cross-examination - in his judgment in *Maguire v. Ardagh* [2002] IESC 21, [2002] 1 I.R. 385:-

> "Where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury (as in the case of Parnell) through misapprehension, through incomplete knowledge, through bias or prejudice, through failure of memory or delusion. In some cases a witness may not be aware that

his evidence is false. A witness may be telling the literal truth but refrain, or be compelled to refrain, from giving a context which puts it in a completely different light. And a witness called to prove a fact favourable to one side may have a great deal of information which he is not invited to give in evidence, favourable to the other party."

35. While it true that those comments were uttered in the context of an Oireachtas investigation into the circumstances which resulted in the shooting dead of a member of the public by members of an elite Garda squad where the good name of members of the force was at stake, they nonetheless highlight the value of the role of cross-examination. Similar thinking is evident in the judgments of the Hamilton C.J. and O'Flaherty J. in *Gallagher v. Revenue Commissioners* [1995] 1 I.R. 55, where the Supreme Court held that a Revenue official facing allegations of deliberately undervaluing used cars for excise purposes could not be forced to accept at face value written statements regarding such valuations from third party valuers. The Court held that if the substance of the applicant's constitutional right to fair procedures was to be protected, the right to cross-examine these valuers was essential, no matter how inconvenient the result.

Conclusions

36. In these circumstances, it is impossible to avoid the conclusion that the Ombudsman's decision was vitiated by a serious error, negating as it did in the circumstances of this case the very substance of the appellants' constitutional right to fair procedures. In reaching this conclusion I am very mindful of the fact that this decision will have many inconvenient consequences (including, perhaps, considerable resource implications at a time of austerity) for the Ombudsman's office. The Ombudsman cannot, of course, as Mr. McDermott pithily put it, replicate the structure and procedures of the Commercial Court. Perhaps

cases such as the present one will prompt a review of the proper scope and role of the Ombudsman vis-à-vis the court system.

37. Yet the fact remains that, as matters stand, the essence of the appellants' case has not been properly evaluated in the absence of an oral hearing. Perhaps such an omission might not be fatal if the Ombudsman's role was purely facilitative and offered something in the nature of a mediated agreement. Naturally, mediation is a thousand times preferable than litigation, not least in this area.

38. Once, however, the Ombudsman proceeds to adjudication, a legal Rubicon is thereby crossed. As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures: see generally, *Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 14. This has further consequences, for, as Cross J. noted in *Hyde*, the resolution of the question of whether there should be an oral hearing is not a matter which goes directly to the specialist expertise of the Ombudsman, so that the deference to that expertise as enunciated by Finnegan P. in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323 is simply not applicable in this case.

39. In any event, none of this could take from this Court's bounden duty to uphold the constitutional rights of the appellants and to provide them with an effective remedy where (as here) such a right has been infringed: see, *e.g.*, my own judgment in *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214.

40. For all of these reasons, therefore, I propose to allow the appellant's appeal pursuant to s. 57CM(2)(b) of the 1942 Act. I will further remit the appellants' complaint to the Ombudsman for re-hearing in accordance with s. 57CM(2)(c) and I will discuss the parties' legal representatives the precise form of the order.

Approved
Gerard Hogan
12 December 2011