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THE HIGH COURT

No. 2012/132MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57CL OF THE CENTRAL BANK ACT, 1942

BETWEEN/

ANGELA T. CARR

Appellant

-and-

THE FINANCIAL SERVICES OMBUDSMAN

Respondent

-and-

EBS BUILDING SOCIETY

Notice Party

Judgment of Ms. Justice Iseult O'Malley delivered the 26th of April, 2013

Introduction

1. This appeal relates to the findings made by the respondent in relation to a complaint made by the appellant arising out of her dealings with her mortgage lender, the notice party ("EBS"). The history of the complaint began in early 2008, when the appellant requested a temporary switch to an interest-only mortgage. As a result of the changes made her mortgage protection policy was cancelled and her interest rate and insurance premium increased. The appellant fell into arrears and suffered the stress of worrying that she would lose her home over a sustained period of time.

She developed health problems that she believes to have been a direct result of EBS's mismanagement of her affairs.

2. The complaint to the respondent was made on the 9thJune, 2010. The respondent's first finding was issued on the 18thJuly, 2011. In it he found partly in favour of the appellant, in that he considered that EBS had failed to provide a proper level of service to her for the period of September 2008 to April 2010. However, he refused to find that EBS failed to advise her properly in relation to her original request.

3. Submissions were then invited as to the appropriate redress having regard to that part of the complaint that had been upheld. The appellant claimed a figure of over €580,000 for losses to date and a figure of over €250,000 for losses into the future. She also claimed general damages. A supplementary finding issued on the 27th March, 2012 in which the respondent directed EBS to make amendments to her account with the effect of reducing the arrears balance by €4,142.36 and to pay her the sum of €2,500 in compensation for the distress and loss caused to her.

4. The appellant's grounds of appeal as set out in the Summons are that the respondent did not consider all aspects of her complaint; failed to hold EBS properly accountable having regard to the Consumer Protection Act 2007 and the Consumer Protection Code; wrongly decided not to have an oral hearing; failed to identify and investigate a dispute of fact; failed to operate within his own advertised time-scale; inaccurately assessed matters relating to the appellant's health; failed to provide appropriate guidelines in relation to the claim for loss and damage despite a request therefor and failed to award appropriate damages.

5. The respondent's case is that his findings were made within jurisdiction and in the manner contemplated by the Act; that any error made was not significant or serious and was within jurisdiction; and that the decision not to hold an oral hearing was a lawful exercise of his discretion.

6. The notice party entered an appearance but did not participate in this hearing. There is no appeal against that part of the finding which was in favour of the appellant.

Background

7. The appellant, who is an architect, had a tracker mortgage and a top-up loan with EBS. She was made redundant from her position in a small architectural practice in Dublin at the end of February, 2008. She contacted EBS by telephone to ask for an appointment, with a view to requesting a switch to an interest only mortgage, and was advised to put her request in writing. She did so, by letter dated the 6th March, 2008, in the following terms: -

> ***"Re: Mortgage Loan Account Nos. 50046703 & 51475658***
>
> *I would like to change the status of the above loans from Repayment & Interest to Interest Only, for a period initially of 12 months. I am currently exploring career advancement opportunities outside the Dublin area (principally in Cork or Galway) and would propose letting the above property during this time.*
>
> *Changing the loan account to an Interest Only option would reduce the monthly loan payments to a level that would easily be covered by rental income. I have*

consulted my local branch and my understanding is that the monthly expenditure for the mortgage & insurance policies would reduce from approx. €2286.90 to approx. €1866.00.

I have also consulted a number of local auctioneers who confirmed that a monthly rental income of approx. €2000.00 would be achievable on the property. In the event of an increase in interest rates, I would foresee no difficulty in supplementing the rental income from my salary, as my own living expenses will be dramatically reduced. I would be obliged if you could give this proposal due consideration and will be happy to address any further queries you may have."

8. The appellant did not mention the fact that she had become unemployed, because, she says, she had two job offers at the time and was confident of getting employment – hence the reference to her salary.

9. On the 13thMarch, 2008 EBS responded in a letter headed "Re: Conversion of account 50046703 to a residential investment property loan with interest only payments & conversion of account 5147658 to interest only payment". The letter set out, as follows, a list of matters that "required attention" before the requested changes could be made.

(1) "Tracker rates are not applicable to Residential investment property loans. We will require your agreement to convert your loan to our commercial base rate index (currently 5.25%).

(2) You will need to amend your property insurance to Buy to Let Cover as you may not be properly covered now that the property is rented to tenants.

(3) The term on the above loan is 35 years. The maximum loan term allowable on a residential investment property is 30 years. Please forward your written agreement to reducing the term of this loan.

(4) When the account converts to interest only payments, the loan balance will remain static whilst the life cover will reduce over the term of the loan, potentially leaving a shortfall in your life cover. We require written confirmation that you are aware of this and wish to proceed on this basis. (See the attached waiver).

(5) We require updated address ID for your new home. A copy of a current utility bill is suitable for this purpose.

(6) Payment protection insurance is not required for investment properties. Please forward a written request to cancel this cover.

(7) Please be advised that you should contact the Revenue Commissioner to remove the Tax Relief at Source you are currently receiving on this loan. TRS is not applicable to investment properties."

10. On the 3rdApril, 2008 the appellant wrote to confirm the following: -

"Re: Conversion of Account Nos. 50046703/51475658 to interest only payments.

1.0 I agree to have the existing loan accounts converted from the tracker rate to the commercial base rate index;

2.0 I will amend my property insurance to Buy to Let Cover, to ensure proper cover during the period of tenancy;

3.0 I agree that the term will be reduced from a 35 year loan to a 30 year loan, in accordance with lending requirements for residential investment property;

4.0 I attach the signed waiver in respect of the potential shortfall in life cover, as requested;

5.0 I am currently seeking tenants for the property and have yet to agree permanent alternative accommodation for myself. I will forward this information when available – until that time, all correspondence can be forwarded to above address, as I will have a re-direction service in operation;

6.0 I would confirm that I would like to cancel payment protection insurance for the property at [address];

7.0 I will advise the Revenue Commissioner separately to cancel TRS allowance in this property.

I trust this addresses the issues raised and would be obliged if you would proceed with the conversion of the accounts to a residential property loan with interest only payments."

11. On the 23rd April 2008 EBS wrote to confirm that the account had been reclassified "as a commercial loan". The monthly repayment was €1,644.29 which was expressed to be interest only. The Current Rate was 5.25% which was noted to be the "Current Commercial Base Rate" applicable on that day's date.

12. Unfortunately both of the appellant's job offers fell through. She made the repayments for March, April and May from her redundancy settlement but by that stage she was in difficulty. In May she contacted EBS to tell them of the change in circumstances. She was given a verbal, "informal" agreement to suspend payment and review the account on a quarterly basis.

13. Over the following months the appellant made efforts to improve her situation. Amongst other work-related initiatives she took a business course and succeeded in obtaining part-time employment. By January 2009 she felt able to make a part payment on the mortgage. She had always made the repayments on the top-up loan. On the 6th January she contacted EBS to make a proposal in this regard and to enquire why the interest rate on her account was not dropping in line with ECB rate cuts. She was told that those rates did not apply to commercial loans. This, according to the appellant, was the first time she understood that she was not on a residential mortgage.

14. The appellant then wrote to the credit management department proposing a reduced monthly payment of €500, with a view to increasing this sum later in the year. She received no response.

15. There followed a protracted period of engagement between the appellant (with the assistance of the Money Advice and Budgeting Service) and EBS, characterised by increasing frustration and unhappiness on her part with occasional threats of legal action on the part of EBS. As this period is the subject of the unappealed finding of the respondent in relation to failure to provide a

proper service I do not propose to deal with the chronology of events in any detail. It should, however, be noted that despite the fact that the appellant remained resident in the property her mortgage remained classified as a commercial investment property until September, 2009 when it was converted back to a domestic home loan on a standard variable rate.

The Complaint to the Financial Services Ombudsman

16. Before dealing with the respondent's decision in relation to the complaint it will be convenient to set out the statutory basis for his jurisdiction. That is contained in Part VIIB of the Central Bank Act, 1942 as inserted by s. 16 of the Central Bank and Financial Authorities Act, 2004.

> *57BK.—(1) The principal function of the Financial Services Ombudsman is to deal with complaints made under this Part by mediation and, where necessary, by investigation and adjudication.*
> *(2) Subject to this Part, the Financial Services Ombudsman has such powers as are necessary to enable that Ombudsman to perform the principal function referred to in subsection (1).*
> *(3) The Financial Services Ombudsman may authorise any Deputy Financial Services Ombudsman or any other Bureau staff member, by name, office or appointment, to perform any of the functions, or exercise any of the powers, imposed or conferred on the Financial Services Ombudsman by this or any other Act.*

(4) 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.

17. Chapter 5 of this Act sets out the procedure for dealing with consumer complaints:

57BX.—(1) An eligible consumer may complain to the Financial Services Ombudsman about the conduct of a regulated financial service provider involving—

(a) the provision of a financial service by the financial service provider, or

(b) an offer by the financial service provider to provide such a service, or

(c) a failure by the financial service provider to provide a particular financial service that has been requested.

57CB.—When investigating a complaint, the Financial Services Ombudsman shall provide the parties with an opportunity to make submissions with respect to the conduct complained of.

57CC.—The Financial Services Ombudsman shall ensure that investigations are conducted in private.

57CI.—(1) On completing an investigation of a complaint that has not been settled or withdrawn, the Financial Services Ombudsman shall make a finding in writing that the complaint—

(a) is substantiated, or

(b) is not substantiated, or

(c) is partly substantiated in one or more specified respects but not in others.

(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.

(3) The Financial Services Ombudsman shall include in a finding—

(a) reasons for the finding, and

(b) any direction given under subsection (4) as a result of the finding.

18. On the 9th June, 2010 the appellant made a formal written complaint to the respondent. She summarised her three primary concerns as follows: -

1. *Mortgage Protection Insurance Policy*

   Failure to provide full documentation on policy at time of purchase.

   Failure to explain instruction to cancel policy and possible implications, consequences, and levels of risk, associated with this instruction.

2. *Mortgage Moved to Commercial Rate of Interest*

   Failure to explain change from tracker mortgage to commercial loan and possible implications, consequences, and levels of risk associated with this instruction;

   Failure to take account of context of customer's request for assistance;

   Failure to advise customer of opportunity to manage and reduce accumulation of arrears by moving mortgage back to home loan for a period of over 15 months.

3. *Quality of Engagement by EBS*

   Repeated failures in customer service:

   - *Lack of engagement to manage or reduce arrears*
   - *Failure to respond to customer enquiries,*
   - *Failure to honour agreed courses of action,*
   - *Failure to record conversations with clients and actions agreed;*
   - *Failure to act in accordance with IBF-MABS Protocol;*

- *Prolonging period of arrears through same and through not providing accurate information to customer when applying for HSE financial assistance.*

19. The appellant made the case that the result of the failures she identified under the first two headings above was that she found herself seriously exposed by the cancellation of the mortgage protection policy while facing increased monthly repayments due to the reduction in the term of the loan and the change from a domestic tracker home loan to a commercial loan at a higher interest rate. She said that had she been fully informed of the risks at the time of the original request she would have been able to make an informed decision about her position.

20. The appellant further requested the respondent, in her submission on the appropriate remedy, to recalculate the level of her arrears. She also sought compensation for the failures she had outlined, the impact on personal credit rating, and the levels of personal stress and distress experienced as a result of those failures. She added that

> *"The extended period of worry and uncertainty over the potential loss of my home, the delays and additional stress experienced during this time, despite my attempts to discuss and resolve matters, have had an adverse effect on my health and, consequently, ability to pursue self employed income. I will be happy to provide further information on request."*

21. In a later submission dated the 2nd March, 2011 the appellant referred again to her health issues "arising from the stress and distress" of dealing with her situation. She added

> *"I have not included details of these issues in writing, as I have been advised it would be classified as "Sensitive Data", under the Data Protection Act, but would be happy to provide further information, if required, in a face to face meeting, including input from health care providers during this period."*

22. The appellant in her submissions referred extensively to the provisions of the Consumer Protection Code, 2006.

23. In relation to the information provided at the time of the appellant's request, EBS relied on the correspondence set out above. It further submitted that it had been in the appellant's best interests to cancel the payment protection policy since this was not applicable to an investment property. The cancellation was therefore necessary to prevent her paying for a policy that she could no longer use.

24. In response, the appellant submitted that she had not asked to have the loan reclassified as an investment loan and had never used the word "investment". She did not understand her request to mean a commercial loan and EBS had never explained the difference to her or what the changes would mean. She received no loan documentation other than the letter of the 13thMarch, 2008 and

was not herself asked for any information other than that requested in the letter. Further, she said that, assuming that it was correct to say that cancellation of the payment protection policy was in her interest, she should nonetheless have been given an adequate explanation as to why this was so.

25. The submissions of both parties to the respondent are considerably more extensive than the above summary but I believe it is sufficient for the purpose of outlining the matters in dispute.

The Respondent's Finding

26. It should perhaps be noted that the complaint was in fact dealt with by a Deputy Financial Services Ombudsman, as provided for in the Act. For the sake of convenience, I refer to him throughout as "the respondent".

27. On the 18th July, 2011 the respondent issued his finding on what might be termed the issue of liability. He considered the first and most significant aspect of the complaint to be the contention that EBS failed to fully advise the appellant as to the consequences of agreeing to her request so that she could make an informed financial decision. The question, as he saw it, was this – did EBS have a duty to advise, and if so what was the extent of the duty?

28. In relation to this aspect, the respondent examined the correspondence passing between the parties in March and April 2008. He found that the appellant did not approach (and did not claim to have approached) EBS for the purpose of seeking

advice but rather had given clear instructions which demonstrated that she had considered the change in the loans to interest only and the rental of the property in some detail. He noted as "extremely relevant" the fact that EBS had not been made fully aware of her personal circumstances at that date. He considered that the letter of the 13th March 2008 made it clear that tracker rates were not applicable to Residential Property Loans and that her agreement was required to convert the loan to the commercial base rate index. The letter also made it clear, in his view, that payment protection insurance was not required for investment properties and that she should request cancellation of this cover.

29. The respondent went on to find that the appellant's response was "a clear letter" dated the 3rd April 2008 in which she confirmed her agreement to reducing the term of the loan, converting to commercial base rate from tracker and confirming she wished to cancel the payment protection insurance. She did not raise any queries in the letter or indicate that she did not understand any of the issues raised. "To the contrary the letter is clear and explicit in its instructions to the Company."

30. The respondent considered that since the appellant knew that she had been made redundant and EBS did not, she should have been aware that her circumstances might require her to make a claim on foot of the payment protection policy and that she was taking a considerable risk in cancelling it. She did not seek any advice in respect of the policy but instead gave clear and explicit instructions as to the changes she wished to make. The respondent found that she gave these instructions based on her perception of her circumstances at the

time and that EBS could not be blamed for the change in her circumstances or for acting in accordance with her instructions.

31. Similarly, the respondent found that the correspondence clearly established that the appellant had agreed to move from a tracker to a commercial base rate without raising any queries about the consequences.

32. In those circumstances the respondent considered that EBS acted reasonably and properly in carrying out the instructions.

33. The other major aspect of the complaint related to the manner in which EBS dealt with the appellant's case once her financial difficulties became apparent. Having reviewed the evidence and the submissions the respondent came to the conclusion that EBS failed to properly engage or deal with her once it became fully aware of her financial difficulties. He was satisfied that by September 2008 EBS should have reviewed the arrangements and changed the property to a tracker or residential variable rate. Its failure to do so resulted in the accumulation of further arrears. He considered that this failure to provide a proper service began in September 2008 and continued up to April 2010, since when, in his view, EBS had properly and reasonably engaged with the appellant.

34. It is noteworthy that at no point in this finding does the respondent refer to the provisions of the Consumer Protection Code. Similarly, it is not referred to in the affidavits filed by the respondent.

35. The respondent then directed the parties to make brief submissions to him in relation to the loss suffered by the appellant arising from the finding of the failure to provide a proper service during the period identified by him.

Jurisdiction in relation to redress

36. Section 57CI of part VIIB of the Central Bank Act, 1942 as inserted by s. 16 of the Central bank and Financial Authorities Act, 2004 sets out the Ombudsman's jurisdiction in relation to redress as follows:

> *(4) If a complaint is found to be wholly or partly substantiated, the Financial Services Ombudsman may direct the financial service provider to do one or more of the following:*
>
> *(a) to review, rectify, mitigate or change the conduct complained of or its consequences;*
>
> *(b) to provide reasons or explanations for that conduct;*
>
> *(c) to change a practice relating to that conduct;*
>
> *(d) to pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of;*
>
> *(e) to take any other lawful action.*
>
> *(5) The Financial Services Ombudsman may not direct the payment of an amount of compensation exceeding an amount (if any) prescribed by Council Regulations.*

37. The Council referred to is the Ombudsman Council, which in S.I. 190 of 2005 set the maximum limit for compensation at €250,000.

The submissions in relation to redress

38. By letter dated the 15thAugust, 2011 the appellant made a detailed submission to the respondent in relation to loss and damage. She says that she sought clarification from the respondent of the issues relevant to this claim and was told to "include everything and be specific". An email from the respondent has been exhibited, which informed her that the respondent could not give guidance on her submission. Under the heading of "Loss and expense" she sought special damages of an uncalculated amount relating to the mortgage adjustment, the top-up adjustment and the insurance adjustment. She asked the respondent to take into account the amount of cover that would have been provided by the payment protection policy and the level of interest that would have accrued had the original tracker been maintained. She also wanted the arrears to be capitalised over the term of the loan.

39. The appellant says that in preparing her submission she took legal advice and researched the law on damages in personal injuries cases. The submission set out nine separate sub-headings and claimed loss to date and into the future as follows:

- Distress/Inconvenience - €309,656.25 to date. This was calculated on the basis of her estimate that she had spent just under 2,500 hours dealing with the issue between September 2008 and April 2009, which she valued at her professional rate of €125 per hour.
- Medical and health – €22,862.37 to date and €38,742.72 in the future. The appellant informed the respondent that the ongoing stress of the situation led to a deterioration in her health, increasing from August 2009 to the point where she was diagnosed with depression in February 2010. She did not have a medical card and the figures given are her estimate of her medical expenses including the cost of medical appointments (including travel, phone calls, prescription charges, time input etc). The names of a medical practitioner and a therapist were given, with the statement that they would "provide confirmation on request".
- Career and reputation – €200,150 to date and €206,500 into the future. From late 2008 the appellant was working on setting up her own business and believed that it would have achieved a level of success that would have significantly increased her income. The deterioration in her health left her unable to work and she had to withdraw from a number of projects. From March 2011 she could not afford her professional membership or professional indemnity, which meant that she could no longer practice as an architect. The claim is in respect of cancelled work and business expansion and an expected two year period of recovery.
- Banking and finances – €20,259.43 to date. This claim is for time input, meetings, letters, phone calls, charges and fees.

- Welfare benefits – €6,600 to date, in respect of the HSE's mortgage interest allowance.
- Rental income - €10,450 to date and €9,900 into the future. The basis for this claim is that her illness made it impossible to take in a lodger.
- Financial services/credit rating – €7,420 to date in respect of the loss of two credit facilities, resulting from inability to make payments because of loss of health and loss of income.
- Consumables – €935 for paper, ink etc.
- Legal advice – €4,500 to date.

40. These figures add up to a total of €582,833.15 for losses to date and €255,142.72 for future loss. In addition, general damages are claimed under all but the last two headings.

41. The appellant also, in this submission, raised an issue in relation to the top-up loan, querying the fact that the payment protection policy had been cancelled on it.

42. EBS submitted that it was clear that the appellant was not entitled to general and special damages as claimed. They proposed that they should amend her account to reflect what would have been the position had the loan been reclassified as a Home Loan in September 2008 at the prevailing standard variable rate. The effect of this would be a reduction in the arrears balance of €4,142.36. EBS also announced a willingness to offer a "customer care award" of €500.

43. With reference to the top-up loan EBS said that the applicable interest rate had not been amended at the time of reclassification in April 2008.

The finding in relation to remedy

44. The respondent issued his supplementary finding on the 27thMarch, 2012. In it he referred to the extensive submissions by both parties and said that he was satisfied that they did not disclose any conflict of evidence such as would require an oral hearing to resolve. He stressed the fact that, having found a failure on the part of EBS in relation to the period September, 2008 to April, 2010, he was determining only the losses arising therefrom and not any other matter. On the issue of the appellant's health-related claims he found as follows: -

> *"Whilst having considerable sympathy for the Complainant, who suffered a series of unfortunate circumstances, I am not satisfied on the evidence provided to me that the losses claimed, arise from out of a failure by the Company to provide a proper level of service to the Complainant for the period of September 2008 to April 2010. Much of the loss claimed by the Complainant arises due to her financial circumstances and due to her medical circumstances and the unfortunate diagnosis of depression in February 2010, together with the consequences of the Complainant's ill health on her career, reputation, life and finances as contended by her.*

I accept that the failure of the Company to provide a proper level of service for the period September 2008 to April 2010 was a factor that would have caused stress to the Complainant. However it is clear from the submissions that this was one of many factors which could have given rise to stress at this time. I am not satisfied from the evidence provided that the failure by the Company to provide a proper level of service during the relevant period caused the losses contended by the Complainant and in particular caused the Complainant's ill health and the impact on her career, reputation, life and finances as contended by her."

45. The respondent went on to hold that he was satisfied that if EBS had properly engaged with the appellant it would have reclassified the account as a Home Loan in September 2008. He found that the obligation would have been fulfilled by applying the prevailing standard variable rate, rather than reinstating the tracker rate. He then calculated the effect that this would have had on the arrears and directed EBS to amend the account accordingly. He further directed payment of the sum of €2,500 in compensation for the distress and loss caused to her as a consequence of the failure to provide a proper level of service during the period identified by him.

46. The respondent considered that it would not be appropriate to reopen the complaint in respect of the top-up loan.

Jurisdiction of the High Court on appeal

47. The jurisdiction of the High Court on appeal is set out in part VIIB, chapter 6 of the Act as follows:

> *57CL.—(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.*
>
> *(2) The Financial Services Ombudsman can be made a party to an appeal under this section.*
>
> *(3) An appeal under this section must be made—*
>
> *(a) within such period and in such manner as is prescribed by rules of court of the High Court, or*
>
> *(b) within such further period as that Court may allow.*
>
> *57CM.—(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.*
>
> *(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:*
>
> *(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;*
>
> *(b) an order setting aside that finding or any direction included in it;*
>
> *(c) an order remitting that finding or any such direction to that Ombudsman for review.*

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.

(4) The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts).

Submissions

48. I would like to say at this point, I hope without being in any way patronising, that the appellant's submissions, both written and oral, have been strikingly cogent and reflect both the significant effort she has put into the case and her grasp of the legal issues.

The first finding

49. In her written submissions the appellant challenges the first finding of the respondent under the following headings.
    - Failure to hold EBS accountable to standards of customer service as described in the Consumer Protection Code (2006);
    - Failure to hold EBS accountable to the standards of information to be issued to customers in compliance with the Consumer Protection Act;

- Failure to consider all aspects of the case, in relation to the main mortgage account, as presented and in accordance with the role and duties of the Financial Services Ombudsman, as specified in the Complaints Procedures document and on the web-site;
- Failure to consider or make a finding with regard to the top-up loan;
- Failure to reply to a direct request for a "face-to-face" meeting to consider aspects of the evidence;
- Failure to identify and investigate a dispute of fact;
- Failure to operate within stated time-scales.

50. The appellant identifies as the most serious of these points the failure, as she sees it, to test the behaviour of EBS against the standards of the Consumer Protection Code and the Consumer Credit Act. She argues that she had a right to expect that the case would be considered in the context of those measures and that that did not happen.

51. The provisions of the Code relied upon are listed as those requiring a regulated entity such as EBS to:

- Seek from its customers information relevant to the product or service requested
- Make full disclosure of all relevant information, including all charges in a way that seeks to inform the customer
- Ensure all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer
- Provide each consumer with the terms and conditions attaching to a product or service before the consumer enters into a contract for that product or service

- Gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer, and
- To gather and record details of any material changes to a consumer's circumstances before providing that consumer with a subsequent product or service.

52. The appellant says that in her case EBS disregarded these obligations with the result that it sold a commercial loan to a customer with no income. She says that the respondent erred in holding her at fault for this as, she contends, the law places the obligation on the lender. If this is correct, she says, it follows that EBS failed to properly advise her at the time. Countering the argument that these obligations arise only where a bank is offering advice, she relies on the judgment of Hogan J. in *Irish Life & Permanent v. Financial Services Ombudsman* [2012] IEHC 367 for the proposition that a person approaching a bank with a view to reducing outgoings is seeking advice.

53. In the alternative, the appellant argues that even if the advice regarding the necessity to switch to a commercial loan was correct because she was proposing to rent out the property, the information communicated to her was inadequate as regards the full consequences and cost. As well as these matters, she says that appropriate advice at the time would have included putting a suitable time-scale in place so that the change would not take place until the property was rented.

54. The appellant has read and considered the legal authorities dealing with the role and procedure of the Financial Services Ombudsman. She accepts that the High Court is not engaged in a re-hearing but a review of the process; that regard must be had to the specialist nature of the respondent's task and his expertise in the area; that the respondent is intended to provide an independent and informal means of resolving consumer complaints and that in exercising his powers he does not act as a court would. She refers to the judgment of MacMenamin J. in *Hayes v. Financial Services Ombudsman* (unrep. High Court, 3rd November, 2008) where the following passage is found:-

> *"He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria that would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter, or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with law, it is unreasonable, or is otherwise improper."*

55. However, the appellant says that this does not mean that the respondent is not required to handle cases in accordance with some form of defined procedure, or that he is not bound by the law.

56. The appellant relies on the decisions of Michael White J. in *Irish Life & Permanent plc v. Financial Services Ombudsman* [2011] IEHC 439 and Hogan J. in *Irish Life & Permanent v. Financial Services Ombudsman* [2012] IEHC 367, upholding the

applicability of the Consumer Protection Code to the respondent's considerations.

57. The appellant further cites *Davy v. Financial Services Ombudsman* [2010] 3 IR 324, *Hyde v. Financial Services Ombudsman* (unrep. High Court, Cross J., 16th November, 2011) and *Molloy v. Financial Services Ombudsman* (unrep. High Court, MacMenamin J., 15th April, 2011) in relation to the entitlement to an oral hearing. While accepting that not every case requires an oral hearing she says that the length of time taken to investigate and determine this complaint, coupled with the fact that respondent chose to split the finding, demonstrates its complexity and this, she submits, points to a need for an oral hearing. Her main complaint in this regard is the fact that the respondent did not call her medical witnesses, a matter that I will deal with in relation to the arguments on the redress finding.

58. The respondent makes a general submission, based on the authorities, as to the informal nature of his role under the legislation, the criteria for the holding of an oral hearing and the exercise of the court's jurisdiction on an appeal. He cites *Ulster Bank Investments v. Financial Services Ombudsman* [2006] IEHC 323 as the leading authority and refers to several of the cases in which it is followed.

59. In relation to the specifics of the case, the respondent makes the point that if the appellant had satisfied him that there was something wrong about the transfer of the mortgage "everything would have been rewound to that date". He was not so satisfied. EBS was not the appellant's financial advisor. When the appellant

made her request, EBS could not have known that she was unemployed. The letter did not ask for advice, rather it presented a thought-out commercial plan to which would have resulted in a profit to her from her house. If she had said that she had just lost her job the context would have been different but the bank could not be blamed for not knowing this.

60. It is submitted that the letter from EBS on the 13thMarch, 2008 was clear in its terms, as was the letter of the 23rd April. It is said, in effect, that it was obvious that the appellant's proposal required her to give up her tracker rate and her payment protection policy and take on a commercial rate because what she wanted to do was a commercial undertaking.

61. Counsel for the respondent submitted that the duty of a bank under the Consumer Protection Code, as it stood at the time, was to advise as to the consequences of a particular action only if the bank had taken the initiative in a particular situation. It is noted that the Code was revised in 2012, and now provides that a bank must give advice when a customer wishes to change from one type of mortgage to another. By contrast, under the 2006 version the duty did not arise, and there was no obligation to enquire into the customer's circumstances, when the bank was responding to instructions. However, in response to queries from the court, counsel said that he did not wish to be taken as adopting a fixed position on behalf of the Ombudsman. He did make the case that in this particular case the respondent "clearly did not feel that any of the terms of the Consumer Code imposed a duty."

The second finding

62. The appellant categorises the respondent's errors as follows: -

- Failure to provide appropriate guidelines on what matters could be considered by him as relevant to loss and damage, despite a direct request;
- Failure to award compensation for loss and damage where a direct link had been established between the lender's conduct and the loss and damage complained of;
- Failure to provide an opportunity for credibility to be established by means of an oral hearing, where he doubted the evidence submitted;
- Making assumptions about the causes of the appellant's health issues where those matters lay outside his area of expertise.

63. The appellant takes issue with the view expressed by the respondent that there were "numerous factors in her life giving rise to considerable stress" and that it had not been shown that her illness was due to the conduct of EBS. She notes that he failed to list such factors. She refers to her business experience and success before the onset of her illness as establishing her ability to cope with challenges. She considers his finding in this regard to be a finding that her evidence was not credible – this, she argues, means that an oral hearing should have been held and her medical witnesses called.

64. The submission made by letter dated the 2nd March, 2011 is relied on as amounting to a request for an oral hearing.

65. The respondent notes that the appellant sought damages in excess of €800,000. The cap on his jurisdiction, pursuant to regulations made under the Act, is €250,000. He cannot and does not act like a court in assessing damages, given that his statutory duty is to act informally rather than forensically. The respondent has available to him a range of options when it comes to redress and is not obliged to award compensation. Where he does, he is not bound by the concepts of causation or the methods of calculating damages that a court would employ. It is instead normal, according to counsel, for the respondent to award a relatively small sum in respect of stress or distress under the heading of "inconvenience".

66. It is argued that the appeal to this court should not be treated as "an appeal against quantum in the usual sense" – McGovern J. in *de Paor v. Financial Services Ombudsman* [2011] IEHC 483. The judgment of Hedigan J. in *Walsh & Ors. v. Financial Services Ombudsman* [2012] IEHC 258 is relied on for the proposition that it is not the respondent's role to measure general damages.

67. It is also submitted that the respondent's view that the appellant's health problems could not be blamed in EBS was supported by evidence. Reference is made to some of the appellant's submissions to the respondent wherein she mentions the fact that a number of clients had withdrawn from projects because of their own financial problems, leaving her struggling to cover essential

professional expenses. The respondent further argues that the decision not to hold an oral hearing was a matter within his discretion and was based on his belief that there was no dispute of fact between the parties.

Authorities

68. The approach to be taken by the High Court to an appeal under this section was set out by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323 as follows: -

> *"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 and not that applied in The State (Keegan) v. Stardust Compensation Tribunal."*

69. This test has by now been followed in a number of cases concerning the Financial Services Ombudsman and needs no further elaboration.

The right to an oral hearing

70. The appellant relies on the cases of *Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324, *Hyde v. Financial Services Ombudsman* (unrep. High Court, Cross J., 16th November, 2011) and *Molloy v. Financial Services Ombudsman* (unrep. High Court, MacMenamin J., 15th April, 2011).

71. In *Davy,* the Supreme Court held that on the facts of that case written submissions were not sufficient for the resolution of the facts in dispute, the issue being the degree of investment expertise of the members of a committee of a Credit Union. Giving the judgment of the Court, Finnegan P. noted that while the Act did not contemplate a full oral hearing it would be appropriate to consider holding one in the interests of fairness where there was a conflict of material fact. In so holding he adopted the test referred to in the judgment of Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240.

72. In *Hyde,* there was a dispute as to whether certain oral representations had been made to the complainant. Despite the fact that the complainant had not made a direct request for a hearing, Cross J. held that the respondent could not have fairly and properly determined the issue on the papers and held that failure to hold a hearing amounted to a serious error.

73. In *Molloy,* the complainant had said that he dealt with a particular bank official in relation to a form that he had signed and that the contents of the form had not been sufficiently brought to his attention. The bank contended that it was a

different official, who had no specific memory of the conversation but said her practice would have been to recommend that the customer read the form. In declining to hold that the respondent should have had an oral hearing MacMenamin J. noted, firstly, that the respondent had considered the issue and had decided that the documentary evidence was sufficient to resolve the matter. He went on to hold, on the facts, that an oral hearing could not have established anything more and would not have affected the outcome. Significantly, MacMenamin J. also considered that the appellant should not be permitted to raise the issue on appeal when he had been legally represented during the complaint process and had not made the point until after the finding.

General Damages

74. In *Walsh & Ors v. The Financial Services Ombudsman* [2012] IEHC 258, Hedigan J. rejected a claim that the respondent had awarded insufficient compensation where one of the appellants contended that the bank's conduct had exacerbated an ulcerative condition.

> *"The appellants complain that the damages of €2500 awarded by the Ombudsman are wholly inadequate. They do not however suggest what sum would be adequate. There is no scale being put before the Court by which to judge adequacy. Is it inadequate in comparison to the damages which may be awarded in the High Court for stress or personal injury? I do not think such a comparison is valid. Cases in the High Court involve far more formality. In this case there is a note from the first named applicant's general practitioner which states that the he has suffered a reoccurrence of*

an ulcer due to business stress. This is a long way from showing that Bank of Ireland is wholly responsible for the ulcer. Such a note would not be sufficient in High Court litigation. The Financial Services Ombudsman is an informal cost free system of resolving disputes. It is not a tribunal for measuring damages. In particular, it is not its role to measure general damages as does the High Court."

The Consumer Protection Code, 2006

75. The Consumer Protection Code, 2006 was issued by the Financial Regulator in August, 2006. The Regulator's power to issue codes was at that time governed by s. 117 of the Central Bank Act, 1989. The Code applied to all entities regulated by the Financial Regulator under a range of legislation, the details of which are not relevant for present purposes. There is no doubt but that EBS was and is a regulated entity. Equally obviously, the appellant was a consumer.

76. The Code was revised in 2012 by the Central Bank, which has taken over the functions of the Financial Regulator.

77. The 2006 Code contains all the provisions referred to in the appellant's submissions. However, it also contains certain exemptions.

78. Chapter 1 is headed "General Principles". The regulated entity must ensure that in all its dealings with customers it:

- *Seeks from its customers information relevant to the product or service requested (1.5) and*
- *Makes full disclosure of all relevant material information, including charges, in a way that seeks to inform the customer (1.6)*

79. Chapter 2, paragraph 24 reads in relevant part as follows: -

> *Before providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or a service appropriate to that consumer. The level of information gathered should be appropriate to the nature and complexity of the product or service sought by the consumer, but must be at a level that allows the regulated entity to provide a professional service.*
>
> *This requirement does not apply where:*
>
> *(i) the consumer has specified both the product and the product provider and has not received any advice.*

78. The same exemption applies in Chapter 2, paragraph 30. The obligation in that paragraph is to ensure, having regard to the facts disclosed by the consumer and

other relevant facts about that consumer of which the regulated entity is aware, that any product or service offered to the consumer is suitable to that consumer.

79. However, Chapter 2, paragraph 25 states, without any exception, that a regulated entity must gather and record details of any material changes to a consumer's circumstances before providing that consumer with a subsequent product or service.

80. In *Irish Life and Permanent plc v. Financial Services Ombudsman* [2012] IEHC 367 Hogan J. at paras. [55]-[56] referred to the legal status of the Code in the following passages:

> *"It is true that while s. 117 of the Central Bank Act 1989 gives the Central Bank power to adopt codes, that section is silent on the legal consequences of a breach of the Code. While it is not necessary here to essay the full dimensions of the Code's precise legal import and status, it is sufficient to note that they are not entirely a species of "soft" law, i.e., purely precatory statements not susceptible of legal enforcement. Thus, for example, in Stepstone Mortgage Funding Ltd. v. Fitzell [2012] IEHC 142 Laffoy J. refused to make an order for possession of a family home where the lender was not in compliance with the Code for Mortgage Arrears (2010). These codes can certainly inform - in principle, at any rate - the thinking of regulatory authorities in assessing appropriate standards for credit institutions.*

It follows, therefore, that the Ombudsman was entitled to think that the present case came within s. 57CI(2)(g), so that the conduct here was "otherwise improper" in the sense used in that sub-section. In other words, the Ombudsman was entitled to conclude that a retail Bank should properly alert its customers- if only in the most general of terms - of the potentially serious adverse consequences of a particular decision, especially where it seems clear where those customers were seeking advice and guidance from the Bank's mortgage advice centre and that these are standards which modern retail Banks might reasonably be expected to uphold."

81. It might be noted here that Hogan J. found as a fact that the customers in this particular case were seeking advice.

Discussion and conclusions

82. The test to be applied by the High Court in appeals of this sort is that set out in the judgment of Finnegan P. in *Ulster Bank*, set out above. The question is, therefore, whether the appellant has demonstrated a serious or significant error in the findings of the respondent.

83. Looking at the issues raised by the appellant, the first and most significant is what she describes as the failure to hold EBS accountable to standards of customer service as prescribed by the Consumer Protection Code, 2006.

84. I admit to being somewhat puzzled as to absence of reference to the terms of the Code in the finding of the respondent, in his affidavits and in the written submissions filed on his behalf. I agree with the views expressed by Hogan J. in the *ILP* case as to the propriety of consideration of the Code in the task of the respondent and might, perhaps, go further. The Code is a significant feature of the landscape within which the respondent operates and it is probably expected by many complainants that they can rely on it. It would in my view be desirable that the respondent should, therefore, make reference to it in his determinations, if only to say why he does not think it applicable in the circumstances of a given case.

85. However, in view of the clear findings of fact made by the respondent that EBS reasonably perceived the appellant, not as someone seeking advice, but rather as a customer giving instructions, I see no point in remitting the matter for reconsideration under this aspect. Having made those findings he would, in my view, have been certain to conclude that the Code obligations were excluded by the exemptions. That would not be the case under the 2012 Code, which is far more rigorous, but these latter provisions cannot be applied retrospectively.

86. The findings themselves are not unreasonable on the evidence and are within the jurisdiction of the respondent to make. This is no reflection on the truthfulness of the appellant – I do not think that her honesty has been in question at any stage of the process. It is a judgment made by the respondent as to whether, on the facts as they presented themselves to EBS, a duty to advise her arose. His decision that it did not is one entirely within his province.

87. The next issue is the alleged failure to consider all aspects of the case presented in relation to the main mortgage account.

88. I consider that the obligation of the respondent to give the "broad gist" of his reasons in a written finding means that he is not obliged to deal on a point-by-point basis with every argument made by a complainant. This was a case with extensive written submissions. The respondent is, within his discretion and relying on his own expertise in the area, entitled to select and determine those issues that appear to him to be relevant.

89. The issue relating to the top-up loan was raised by the complainant after the substantive determination of the appellant's complaint had been issued. The respondent was correct to consider that it was not appropriate to enter upon it at that stage. In a case where the each side had made several submissions to the respondent over a considerable period of time it was not unfair to expect that all material points should have been put before him before he issued a finding.

90. The appellant complains that the respondent failed to reply to a direct request for a "face-to-face" meeting or to hold an oral hearing to consider aspects of the evidence despite the existence of a dispute of fact.

91. If by "face-to-face meeting" the appellant meant a meeting in private with the respondent, because she did not want to disclose details of her health to EBS, that would have been in breach of the respondent's obligation to be fair to EBS. A complainant cannot expect a determination to be made on the basis of information

which is not provided to the other side so that they may challenge it. However the appellant also expressly says that the respondent should have held an oral hearing, by which she presumably means one attended by both parties.

92. Having regard to the discretion enjoyed by the respondent on this issue I do not consider that he erred in his assessment that there was no dispute such as would require the holding of an oral hearing. Further, there was no direct request for such a hearing, merely the statement that medical information would be available "on request" or at a "face to face meeting". There was no attack on the credibility of the appellant. Alternative views on how the evidence should be interpreted were put forward but there was no real dispute as to what the evidence was. The core issue, that of the conduct of EBS, was, on the facts of this case, always going to be determined on the correspondence.

93. The appellant's main concern in relation to the possibility of an oral hearing seems to be the opportunity to give evidence about her health. I have serious doubts as to whether, as a matter of law, the respondent had anything more than a very limited jurisdiction to consider this aspect at all.

94. The respondent's power to direct the payment of compensation is, to begin with, one of a wide range of options that he has when considering redress. He is not obliged to award compensation upon proof of loss, as a court generally would be. Secondly, the terminology used in the Act – "compensation for loss, expense and inconvenience" – is not apt to cover a claim for significant damages for personal injury, such as is raised in this case. Thirdly, the nature of the respondent's role under the Act is

underpinned by the specialist expertise of the respondent and his staff in the particular area of financial services. They have no such expertise, or indeed qualifications of any relevant sort that I am aware of, to deal with this sort of claim.

95. It may be that in certain types of claim – particularly in relation to health insurance – medical evidence may need to be taken but that is likely to arise where there is, for example, a dispute as to eligibility for cover. What was put forward here was the contention that, by its conduct in relation to the appellant's financial affairs, EBS caused the appellant personal injury.

96. The standard of deference that the courts display in relation to the processes of specialist decision-making bodies would be misplaced if they engaged in adjudication of matters so far beyond their remit. It seems to me, therefore, that while the practice of the respondent in awarding relatively small amounts of compensation, as in this case, for stress or distress under the heading "inconvenience" is in general appropriate, there is no jurisdiction to deal with substantive personal injury claims.

97. This jurisdictional issue was not really canvassed before me, other than perhaps in the submission by counsel for the respondent that the Ombudsman does not measure damages in the way that a court would. Further, I have to accept that the information given by the respondent to the appellant about the complaint process did not alert her to any such limitation. I also accept that in his supplemental finding the respondent appears to have considered that he had jurisdiction to consider the matter, finding, as he did, that he was not "satisfied" that the losses claimed arose

from the conduct of EBS and that there were other factors involved. I will therefore consider the contention that the appellant was entitled to an oral hearing on this aspect of the evidence.

98. In my view the appellant is in error when she says that her credibility was in issue in relation to the cause of her ill-health. Her truthfulness was not challenged. However in general a lay person's assessment of their own condition and its causes will rarely be accepted as authoritative in any form of proceeding, in the absence of supporting expert medical evidence. It seems that the appellant had available to her the potential evidence of her G.P. and her therapist. The reference to the possibility that her MABS advisor could give evidence is in my view misconceived – it is not the role of MABS personnel to give evidence on medical matters. No report was submitted to the respondent from either of the professional persons, apparently because of privacy concerns. In those circumstances the respondent was not obliged to call for the evidence and was entitled to find that the appellant had not satisfied him as to the cause of her illness.

99. Before putting in her written submissions in relation to redress the appellant telephoned the office of the respondent seeking guidance as to what matters could be considered relevant. The respondent was correct, in my view, in not engaging in a discussion with her at that stage – he could have laid himself open to charges of impropriety from EBS had he done so. However, I think that it is unfortunate that no general guidance was available to persons such as the appellant. It is obvious that she put significant time and effort into preparing her submission, without having been made aware that much of it was simply unrealistic in terms of what would be

taken into account. For example, it appears that the appellant did not know that there was a limit of 250,000 on any potential award. Her claim is for multiples of that figure. Again, a large element of the claim is for the time spent by the appellant in dealing with the case, calculated in terms of billable hours charged at her professional rate as an architect. There is no basis on which such a claim could be allowed. However, the absence of such general guidance does not invalidate the respondent's decision.

100. Similarly, the criticism made by the appellant of the fact that the finding was delivered outside the time-scale aspired to by the respondent does not in any way affect its validity.

101. Having regard to the criteria set out in the authorities cited above and having considered the adjudicative process leading to the decision, I am satisfied that the respondent was entitled to find that EBS acted reasonably in its response to the appellant's original request and that he did not err in any identifiably serious or significant manner in reaching his conclusions on redress.