THE HIGH COURT

[2008 No. 122 MCA]

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

BETWEEN

SQUARE CAPITAL LIMITED

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

MARY GALLAGHER

NOTICE PARTY

JUDGMENT of Mr. Justice Bryan McMahon delivered on 27th day of August, 2009

Introduction

On the advice of a friend Mary Gallagher, the notice party, contacted the appellant (Square Capital Limited). She indicated to the appellant that she had €60,000 to invest and sought guidance from the appellant. By occupation, the notice party was a nurse. She had benefited from an inheritance and was seeking an appropriate investment. After a couple of meetings with a Mr. Enda Hunston, a director of the appellant, she purchased two apartments in Darlington in the United Kingdom, in 2004. She took out

two mortgages on the properties. She alleges she was told by the appellant company that she would be able to sell one within six months, making a turn around profit of STG£10,000 and that she could let the other apartment.

Without going into the details at this juncture, the notice party was disappointed in the investments. The sale of one apartment did not happen and there was some difficulty with renting the other apartment. She next began to question the appellant about its interest in the apartments which she had bought. When she did not get a satisfactory response, she eventually complained to the Ombudsman. After some further probing by the Ombudsman, the Ombudsman extracted, with some difficulty, an admission from the appellant that it in fact owned the apartments it sold to Ms. Gallagher.

In his decision of 13th June 2008, the Deputy Ombudsman awarded a sum of STG£25,000 to Ms. Gallagher. On review this was upheld by the Ombudsman on 21st July, 2008.

The appellant brings this appeal against these decisions. In support of this appeal, which is on affidavit, the appellant claims, *inter alia*:-

(i) that the notice party did not come to it for financial advice but came to buy property. In its dealings with the notice party, therefore, the appellant says that it was acting as a vendor of property, and was not subject to the Central Bank and Financial Services Authority of Ireland Act 2004, that is the statutory basis for the regulatory authority of the Ombudsman. In short, it did not provide a financial service as required by the Act.

(ii) that the notice party was aware of the capacity in which the appellant was acting since the deed of conveyance clearly indicated that the appellant was the vendor of each of the apartments.

The appellant makes no apparent challenge to the procedures followed either by the Deputy Ombudsman or the Ombudsman and so the focus of this Court will be on whether the decision makers made any serious and significant error, or series of errors in reaching their decisions.

Section 57CL(1) of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004 provides that a complainant or regulated financial service provider may appeal to the High Court against the finding of the Financial Services Ombudsman. Section 57CM states that having heard the appeal the High Court may affirm, set aside or remit to the Ombudsman for review any such finding.

While there are two decisions at issue the fact is that the Ombudsman affirmed the decision of the Deputy Ombudsman and in doing so relied on and adopted the reasoning of his Deputy. For this reason, the reasoning of the Deputy Ombudsman is the basis of both decisions and will be the focus of this Court's deliberation.

The Financial Services Ombudsman: his functions and powers

Section 57BB of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004 sets up the Financial Services Ombudsman as an independent officer:-

"to investigate, mediate and adjudicate complaints made in accordance with this Part [of the Act] about the conduct of regulated financial service providers

involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service…and to enable such complaints to be dealt with in an informal and expeditious manner…"

Section 57BK, states that the principal function of the Financial Services Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication. Subsection 4 of the same section states that the Ombudsman "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."

Section 57BX makes provision for a complaint:-

"(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.

(2) Except in the case of a complaint that may be within the jurisdiction of the Pensions Ombudsman, the Financial Services Ombudsman has sole responsibility for deciding whether or not a complaint is within that Ombudsman's jurisdiction."

Once the Financial Services Ombudsman is satisfied that the complaint is within his/her jurisdiction, he is obliged to investigate the complaint.

With regard to the adjudication of complaints and the remedies available to the Ombudsman, s. 57CI is the relevant provision and I reproduce the relevant portion here:-

"(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.

(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."

It is clear from the above that the functions of the Ombudsman are different from that of the ordinary courts of the land in that, not only is he able to investigate and adjudicate, but he has also power to mediate. Moreover, complaints have to be dealt with in an informal and expeditious manner and to this end he "is required to act in an

informal manner and according to equity, good conscious and the substantial merits of the complaint without regard to technicality or legal form".

Moreover, a complaint may be upheld even if the conduct complained of was in accordance with a law or an established practice, if it is unreasonable and unjust or oppressive; or if an explanation for the conduct complained of was not given when it should have been given; or where the conduct complained of was otherwise improper. Finally, by way of remedy, the Ombudsman may, in appropriate circumstances, direct the financial service provider to review, rectify, mitigate or change the conduct complained of or change a practice relating to that conduct, *etc.* These are remedies which might not always be available to a court of law.

From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions. In this connection, I agree with the views advanced by MacMenamin J. in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008) where he described the Ombudsman's office in the following language:-

> "What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.
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> The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which 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 a law, it is unreasonable, or is otherwise improper (see s. 57CI(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction." (p. 14)

The informal procedures of the Ombudsman were also noted by Kelly J. in *Murray v. Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, where he observed that:-

"...the procedures of the Ombudsman are undoubtedly less formal than those of a court" (p. 21)

The *Concise Oxford Dictionary* (11th Ed.) Revised; 2006 at p. 729 defines "informal" as "relaxed and unofficial".

For these reasons it is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the Court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition

for the expertise of the Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas.

Turning to the role of this Court in an appeal from the Ombudsman, it seems to me that the appropriate standard to be applied by this Court is that set out by Finnegan P. in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman & Ors* [2006] IEHC 323 where he adopted the following test for an appeal pursuant to s. 57CL of the Central Bank Act 1942, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004:-

> "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. Director of Telecommunications Regulation and Anor* and not that in *The State (Keegan) v. Stardust Compensation Tribunal*." (p. 9)

I have been informed by counsel for the respondent that the *Ulster Bank* decision is under appeal to the Supreme Court, but I understand it is a test that has been applied in other similar areas and in the absence of any authority from the Supreme Court to the contrary, I am happy to adopt the test recommended by Finnegan P. in *Ulster Bank.* Moreover, in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008), MacMenamin J. describes the approach of Finnegan P. in the *Ulster Bank* case as "a well established and accepted test" (p. 12). He continued:-

"...while a statutory appeal (such as this) is not a judicial review, and where the decision maker is acting within his own area of professional expertise, the test set out by Finnegan P. suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as that error falls short of being one which is serious and significant." (p. 13)

The decision of the Deputy Ombudsman dated 13th June, 2008

When the notice party failed to sell one of the apartments and had difficulty renting the second apartment, the appellant offered to assist her in arranging for her to switch to a euro mortgage rather than the mortgage she was on. The appellant acknowledges that this was the provision of a financial service, but argued that since it was subsequent to the purchase of the apartments it was separate and it did not provide jurisdiction for the Ombudsman to interfere.

In all, the third party made six complaints to the Ombudsman, only one of which was upheld by the Deputy Ombudsman in June, 2008. The unsuccessful grounds of complaint were as follows:-

(1) The complainant was dissatisfied with the advice given to her by Square Capital Limited, the appellant, in relation to her acquiring a euro mortgage instead of having to make repayments in sterling. The Deputy Ombudsman did not consider that the evidence surrounding the proposed conversion to a euro mortgage disclosed any breach of duty on the part of the appellant.

(2) The complainant asserted that the entire investment in properties was imprudent to the extent that the appellant breached its duty of care to her in recommending such an investment. The Deputy Ombudsman concluded that the complainant, of her own volition, chose to purchase two apartments in the Darlington development and that there was a complete absence of clear evidence that the appellant in some way wrongly took advantage of her to offload properties at an inflated price. He concluded that the complainant must have known what she was doing and made her decision to purchase the properties on an informed basis.

(3) The notice party also complained that the appellant wrongly misrepresented to her that she would be able to sell one of the apartments in the development on its completion. In the Deputy Ombudsman's view, this was a risk which the notice party must be deemed to have accepted when she purchased the property.

(4) The Deputy Ombudsman also rejected the notice party's complaint that the appellant (Square Capital Limited) advised her that she would make a profit of STG£20,000 on completion of the sale of the apartments.

(5) The notice party also complained that the appellant (Square Capital Limited) made insufficient efforts to sell the apartments on her behalf when she instructed it to do so. The Deputy Ombudsman rejected this complaint concluding that the appellant did not act wrongly or in breach of duty in relation to the efforts it made to sell the apartments.

The Deputy Ombudsman also rejected a preliminary objection made by the appellant as to the jurisdiction of the Ombudsman to investigate the notice party's complaint. This complaint by the appellant was addressed in correspondence by solicitors acting for the respondent in a letter dated 25th March, 2008 in which he concluded that the preliminary objection as to jurisdiction was not well founded. I will deal with this matter in more detail below.

The only ground which the Deputy Ombudsman upheld was the notice party's complaint that the appellant (Square Capital Limited) should have disclosed to the notice party the fact that it owned the apartments which the notice party eventually purchased in Darlington. His conclusion on this matter was expressed in the following language:-

> "On this basis, I conclude that the respondent failed in its overall duty of care to the complainant. Best practice dictates that the respondent should have been utterly transparent about the precise nature of its interest in the apartments. Clear records should have been kept to demonstrate that same was expressly communicated to the complainant prior to her investment.
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> The respondent should not have left itself open to the charge subsequently made by the complainant – either expressly or impliedly – that the apartments were recommended on some improper basis and/or that the respondent could not advise on, and/or facilitate, her purchase of same in a disinterested manner."

The appellant appeals against this finding by the Deputy Ombudsman (confirmed by the Ombudsman) and also appeals on the jurisdictional issue. I will deal with the jurisdictional problem first.

The jurisdictional argument advanced by the appellant

The essence of the appellant's arguments under this heading is that it never acted as a financial service provider to the notice party in respect of the purchase of these two properties. The appellant states that it merely acted as a vendor of property, just as a real estate agent might, and that such an activity is not within the provisions of the Act as being a financial service.

As already indicated, s. 57BB establishes:-

"the Financial Services Ombudsman...to investigate...complaints...about the conduct of regulated financial service providers involving the provision of a financial service..." (s. 57BB(a)(i))

A complaint is defined as "a complaint made by a consumer under this Part about the conduct of a regulated financial service provider" (s. 57BA). An eligible consumer is defined as a consumer:-

"(a) who is a customer of the financial service provider, or

(b) to whom the financial service provider has offered to provide a financial service, or

(c) who has sought the provision of a financial service from the financial service provider[.]"

To assess the jurisdictional argument further other definitions must be furnished. Section 2 of the Central Bank Act 1942 as substituted by s. 3 of the Central Bank and Financial Services Authority of Ireland Act 2003, provides that "'financial services' include financial products". Section 2 of the Central Bank and Financial Services Authority of Ireland Act 2004, further amends s. 2 of the Act of 1942 so as to provide

that "'financial service provider' means a person who carries on a business of providing one or more financial services". It also provides that a regulated financial service provider means, *inter alia*, a financial service provider whose business is subject to regulation by the Bank or the Regulatory Authority.

Section 57BX(2) of the Act provides that:-

"Except in the case of a complaint that may be within the jurisdiction of the Pensions Ombudsman, the Financial Services Ombudsman has sole responsibility for deciding whether or not a complaint is within that Ombudsman's jurisdiction."

Section 57BY(1) of the Act provides that:-

"The Financial Services Ombudsman shall investigate a complaint if satisfied that the complaint is within the jurisdiction of the Financial Services Ombudsman."

It follows from these definitions that the decision as to whether or not a complaint falls within his jurisdiction is one that falls to the Ombudsman to determine. This is not to suggest that the court never has a role to play in interpreting the Act, but it should intervene only in clear cut cases and then, only if such a case contains a serious and significant error.

It is significant to note that the appellant has not brought judicial review proceedings to quash the decision for want of jurisdiction. On this issue, all the grounding affidavit avers is that the Ombudsman should have revisited the issue of jurisdiction. It will be recalled that the Ombudsman entertained the jurisdiction as a preliminary matter and rejected the argument in correspondence. This can be seen in a letter of 25th March, 2008 to the appellant's solicitors where he states:-

"In regard to the submission that this complaint does not relate to the provision of a financial service, we are satisfied that investment advice in relation to the purchase of UK property is a financial service within the meaning of the Act."

At p. 2 of his finding, the Deputy Ombudsman referred to his earlier ruling on jurisdiction and stated at p. 3:-

"I note at the outset that the respondent contends that the nature of the relationship between the parties was that of vendor and purchaser. I am satisfied, however, that *there appears to have been somewhat more to it than that* and, indeed, that the respondent provided financial advice to the complainant. This advice apparently did not attract any charges or commission for the respondent." (Emphasis added).

The Ombudsman fully agreed with the manner in which his deputy dealt with this issue.

From this, it is clear that the jurisdiction argument advanced by the appellant was fully considered by the Deputy Ombudsman and by the Ombudsman himself and was rejected. I can find no fault with this conclusion. In fact, there was much evidence before the Ombudsman which would justify such a conclusion. The original complaint form submitted to the Ombudsman on behalf of the notice party stated "I feel that I was ill advised by Hunston Financial Planning (the appellant's predecessor in title) when I went to invest my money". From the outset it is clear that the notice party was maintaining that she was badly advised with respect to financial investments. Further when writing to the notice party shortly after the sale, the note paper used by the appellant gave the name of the company as "Hunston Financial Planning". A further

letter from Stuart Edwards Estate Agents in Darlington dated 3rd December, 2004, in respect of the possible sale of a third flat, is addressed also to "Hunston Financial Planning Limited". More significantly, in a letter dated 31st March, 2006, the appellant wrote to Mason Hayes and Curran, Solicitors, Dublin (relating to the sale of one of the apartments for the notice party) stating "please note that Hunston Financial Planning acting as Ms. Gallagher's financial advisers" and in the same letter stated that "as her financial advisers we will monitor the progress of this sale through to completion".

It is difficult to reconcile this evidence with the version of events advanced by the appellant to the effect that they merely sold her two properties and subsequently provided some *ad hoc* advice on a goodwill or almost charitable basis when she was having some problems in meeting her mortgage payments.

It is true that other letters written in 2006 used note paper which described the appellants as "Hunston Group International Property Consultants Limited" and it is unclear why different note paper is used from time to time. A perusal of the correspondence between the appellant and the notice party during the period of 2004 to 2006, nowhere suggests that the appellants are merely providing free advice on an *ad hoc* or goodwill basis. One would suspect such a declaration if the appellant's case was true. Finally, in the sale brochure relating to "St. George's Court, Middleton St. George, Darlington", reluctantly discovered to the Ombudsman by the appellant, the front cover carries the appellants name as "Hunston Financial Planning".

Mr. Hunston in his affidavit avers that when his company provides financial advice, it would have completed a detailed fact find and would have issued a "terms of business" letter to the client. One cannot conclude, as Mr. Hunston suggests, however,

that the absence of such a letter means that it was not providing financial advice to the notice party on this occassion. Indeed, Mr. Hunston in the same affidavit concedes that subsequent to the sale, although it did provide a financial service regarding the euro mortgage to the notice party, that in that case no "terms of business" letter issued to the notice party. In these circumstances, failure to provide a "terms of business" letter proves nothing.

Where the appellant company is providing a variety of services and operating in different capacities, it would seem reasonable to assume that it should clearly identify which hat it was wearing at any given time to ensure that the client does not labour under any misconception. Failure to do so clearly invites the conclusion in this case that the notice party's version of events is to be preferred and justifies the Deputy Ombudman's conclusion to that effect.

Looking at the above evidence, it is not surprising that the Deputy Ombudsman came to the conclusion that what was involved was not a mere sale of property but rather something more akin to providing a financial service. At p. 3 of his decision he stated explicitly "there appears to have been somewhat more to it than that" and he went on to say :-

> "There is something unusual and unconvincing about the respondents repeated assertion that, although the complainant (the notice party) was not formally its client, it was happy to help her insure that things worked out for her. I note, however, that in this regard the respondent has stated that providing subsequent advice and assistance encourages good customer relations and leads to repeat business." (At p. 9 of Deputy Ombudsman's decision)

He further went on to state that a service provider cannot seek to artificially divide a transaction up into parts that did not involve financial advice and parts that did in circumstances where all of the evidence point to the fact that it was the same continuing relationship between the parties at all times.

Given his finding, based on an objective analysis of the evidence before him, that the transactions involved more than a mere sale of property and constituted the giving of financial advice, the jurisdictional argument is unsustainable.

The merits of the decision

The position with regard to the appellant's failure to disclose to the notice party, the fact that it owned the properties which it sold to the complainant is as follows. When the notice party became dissatisfied with the purchase of the two apartments she began to write to the appellant with her complaints. In a letter dated 2nd June, 2006, the notice party expressly inquired of the appellant whether it had any proprietary interest in the Darlington development or in the management company of the development. The respondents reply, dated 13th June, 2006, flatly and strongly repudiated the complainant's general assertions and complaints but significantly was silent on the issue of the respondent's interest in the properties. Again, in a letter dated 6th November, 2006, the issue of ownership was raised and the appellant once more avoided a direct response when it replied to the notice party on 21st November, 2006. In this letter it simply stated that "our client did not act for you and was not your adviser". The reply also ends up somewhat abruptly and in a somewhat intimidatory fashion with the following words:-

> "We have been instructed by our clients to issue proceedings against you. Please nominate a firm of solicitors to accept service of proceedings."

Why such an innocent question regarding ownership, which the appellant says the notice party should have known in any event from the contracts, should invite such a response is puzzling to say the least.

The true position about the ownership of the apartments did not emerge until the matter was placed in the hands of the Ombudsman. When Circuit Court proceedings were threatened by the Ombudsman, the appellant finally came clean with the brief and terse statement on ownership. To the Ombudman's query on ownership, the appellant replied: "In short, Hunston owned the properties".

In his report, the Deputy Ombudsman in considering this issue noted that even though the appellant was not charging the complainant any direct commission or fees, this was not dispositive of the complaint. Moreover, a conclusion that the notice party must also have been aware that the appellant was in some sense involved in or connected with the development was not in his view determinative. In spite of such findings, however, he still felt obliged to conclude that:-

> "On balance, however, I consider that best practice should be adhered to by financial service providers such as the respondent.
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> I am satisfied that this would ordinarily require, as an absolute minimum, that full and frank disclosure be made by a company such as the respondent when selling property."
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> He added:-
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> "On this basis, I conclude that the respondent failed in its overall duty of care to the complainant. Best practice dictates that the respondent should have been utterly transparent about the precise nature of its interest in the apartments. Clear

records should have been kept to demonstrate that same was expressly communicated to the complainant prior to her involvement."

In its argument before this Court, the appellant points out that the notice party should have been aware that the appellant was the owner from the executed contracts of sale signed by the notice party. On this issue, I agree with the respondent's submission that the fact that the notice party might have been able to work out the ownership issue from the documentation does not in any way address the gravamen of the Deputy Ombudsman's finding which was that the appellant should have been "upfront and explicit" about the ownership issue. The obvious reluctance by the appellant to answer the explicit questions raised by the notice party on the ownership issue in 2006, and the eventual disclosure only at the insistence of a statutory officer, clearly justifies the Deputy Ombudsman's finding.

In his affidavit to the Court, the Ombudsman explains that part of the function of his office is to ensure that best practice is maintained among financial service providers and the provisions of s. 57CI(2) are sufficiently broad to accommodate such a ground.

It is my view that the Deputy Ombudsman and the Ombudsman were entitled to express their disapproval of the appellant's failure in this regard and conclude that the complaint should be upheld on this ground.

The award of compensation

In considering what the appropriate remedy should be in this case, the Deputy Ombudsman directed the appellant to pay the notice party a sum of €25,000 by way of

compensation. Although he considered ordering the appellant to buy back the properties or pay a significant percentage of the total amount paid by the notice party for the properties, he eventually reached the conclusion that such a remedy would be utterly disproportionate.

The appellant suggests that the award of compensation is not justified because the notice party has not proved any loss and that in any event the loss was not causally connected to the failure by the appellant to disclose its ownership.

Section 57CI(4)(b) provides that if the complaint is found to be wholly or partly substantiated, the Ombudsman may, *inter alia*, order the respondent

> "(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;"

It is my view that the notice party falls within the provisions of this subsection insofar as it is clear that she suffered considerable inconvenience by virtue of the failure of the appellant to disclose his interest before the sale, or within a reasonable period after being requested to do so by the notice party. Under the terms of the sub-section compensation can be awarded even if there is no "loss". It can be ordered if there is "expense or inconvenience". As noted above, some two years after the sale was completed the notice party was still writing to the appellant expressing her concern and disquiet in relation to the interest of the appellant in the properties concerned. The failure by the appellant to make explicit disclosure naturally aroused suspicion which the notice party was entitled to express. The continued failure to address the issue increased her suspicion further, eventually leading to her decision to refer the matter to the

Ombudsman. It is my view that this inconvenience was clearly caused by the appellant's failure to disclose in a timely fashion his interest in the properties.

It must also be recorded that the office of the Ombudsman is different from an ordinary court of law and the provisions of the legislation, already noted, mean that the Ombudsman has greater flexibility and choice in fashioning an appropriate remedy in the cases that come before him. The relevant provision enables him, for example, to mitigate or change the conduct complained of or a practice relating to that conduct. In my view, it is important, therefore, that appropriate latitude should be given to the Ombudsman in determining what the appropriate remedy is in the circumstances of each individual case.

The sum of €25,000 was selected by the Deputy Ombudsman after careful consideration and indeed the Ombudsman himself observed in his confirmation of the award that "the award by the Deputy Ombudsman could be classed as being on the low side". In the circumstances, I am not disposed to find that the award was unfair or disproportionate.

Looking at the Ombudsman's decision in the round, I am not satisfied that the appellant has shown to the satisfaction of the Court that the decision was vitiated by a serious and significant error or by a series of errors. For this reason, I refuse the appeal.