

**THE SUPREME COURT**

**Appeal No. 2008/311 AND 332 OF 2008**

*Murray C.J.*  
*Denham J.*  
*Hardiman J.*  
*Geoghegan J.*  
*Finnegan J.*

**BETWEEN**

**J & E DAVY TRADING AS DAVY**

**APPLICANT/RESPONDENT**

**and**

**FINANCIAL SERVICES OMBUDSMAN**

**RESPONDENT/APPELLANT**

**and**

**ENFIELD CREDIT UNION**

**NOTICE PARTY**

**Judgment of Mr Justice Finnegan delivered on the 12th day of May 2010**

The applicant (hereinafter "Davy") is a stockbroker. The respondent is the Financial Services Ombudsman (hereinafter "the Ombudsman") appointed under the Central Bank Act 1942 Part VIIB(as inserted by section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) (hereinafter "the Act"). The notice party (hereinafter "the Credit Union") is a company incorporated with limited liability and operates as a Credit Union in the vicinity of Enfield, Co. Meath. At all material

times the Credit Union was a client of Davy. The Credit Union took no part in the proceedings.

On the 22<sup>nd</sup> August 2007 the Credit Union made a complaint against Davy to the Ombudsman concerning the investment by the Credit Union in three perpetual bonds issued by three banks, Nordea Bank, Jyske Bank and Oko Bank (hereinafter "the Bonds"). The Bonds in each case are perpetual subrogated Bonds which are unlikely to be redeemed by the issuer. It is not suggested that the issuing banks are other than stable. The market value of the Bonds had been subject to a significant decline. On 5<sup>th</sup> November 2007 the Deputy Ombudsman issued a report which upheld the complaint of the Credit Union and made certain directions. Further submissions were made by Davy and the Credit Union on this report. On the 21<sup>st</sup> January 2008 the Ombudsman issued a Final Decision ("the Decision") in which he found that the complaint made by the Credit Union was substantiated. He directed Davy:-

- (i) to pay the Credit Union the sum of €500,000 in exchange for the bonds;
- (ii) to refund the Credit Union all fees and commissions paid by it in relation to the purchase of the bonds;
- (iii) to complete these transactions or on before the 22<sup>nd</sup> February 2008.

Arising out of the foregoing Davy took the following steps:-

- (i) It appealed to the High Court pursuant to section 57CL of the Act.
- (ii) It instituted plenary proceedings challenging the constitutionality of the Act. In short Davy claims that the Ombudsman not being a judge appointed under Article 34.1 of the Constitution in exercising his statutory powers is exercising judicial functions and powers which are

not limited functions and powers of a judicial nature as provided for in Article 37 of the Constitution.

(iii) It instituted the present judicial review proceedings.

This appeal is concerned with the Judicial Review proceedings. Accordingly the court is not concerned with the correctness of the Ombudsman's Decision on the factual issues underlying the complaint nor with whether the Ombudsman was correct in upholding the complaint and directing the payment of compensation. The function of the court is exclusively to review the manner in which the Decision was made.

### **The High Court Proceedings**

By order of the 8<sup>th</sup> February 2008 Davy were given leave to apply for the following reliefs:-

1. An Order of Certiorari quashing the Decision.
2. A declaration that the Ombudsman in purporting to make the Decision acted *ultra vires* and/or without or in excess of jurisdiction.
3. A declaration that the Ombudsman in purporting to make the Decision acted in breach of fair procedures and/or in breach of natural and constitutional justice.
4. A declaration that the Ombudsman in purporting to make the Decision acted in breach of section 4 of the European Convention on Human Rights Act 2003.

The grounds upon which the Decision was challenged by Davy are as follows:-

1. The Ombudsman did not, as he was required to do under section 57CA of the Act, try to resolve the complaint made by the Credit Union by mediation.
2. The Ombudsman was not empowered to deal with the complaint in circumstances where the Financial Services Ombudsman Council had failed, as it is required under section 57BF of the Act, to make regulations prescribing the matters that the Ombudsman must take into account when investigating or adjudicating a complaint and prescribing the procedures to be followed in processing a complaint.
3. The Ombudsman adopted a two stage procedure for investigating and adjudicating upon the complaint made by the Credit Union, involving an appeal to him against his own decision, which is contrary to the provisions of Part VIIB of the Act, and which led him to prejudging the Decision.
4. The procedures adopted by the Ombudsman were unfair and he acted in breach of the requirements of natural and constitutional justice and in breach of section 3 of the European Convention on Human Rights Act 2003 in that:-
  - (a) he refused to make available to Davy documents that had been submitted to him by the Credit Union and on which he relied in reaching the Decision including, in particular, two expert reports submitted on its behalf. He also refused to direct the Credit Union to make documents available to Davy which it required in order to defend the complaint.



- (b) he refused to hold an oral hearing in relation to the complaint which was essential in order to resolve the conflicts of fact that were central to the issues that he had to decide.
5. The Ombudsman impermissibly relied on knowledge and experience of credit unions which he had obtained in the course of dealing with other complaints. He thereby:-
- (a) Adopted a procedure which was unfair because Davy was not afforded an opportunity to make submissions in relation to that experience.
  - (b) Prejudged a number of issues that arose.
6. The Ombudsman acted unlawfully and there is an error on the face of the record in that he purported to issue the Decision and make directions without finding the complaint to be substantiated against Davy on any of the grounds specified in section 57 CI(2) of the Act.

The Ombudsman in the statement of opposition dealt with each of the foregoing grounds as follows:-

1. Mediation.

The Ombudsman denied that he is required to try to resolve a complaint by mediation in circumstances where he considers that mediation has no real prospect of success. Both the Ombudsman and the Deputy Ombudsman concluded that the case was not an appropriate one for mediation. By considering the issue the Ombudsman complied with his obligations under section 57CA of the Act. The decision that the case was not an appropriate one for mediation is not challenged on the basis that it is irrational or wrong. Davy acquiesced in the decision.

2. Regulations.

Section 57BF of the Act provides that the Financial Services Ombudsman Council shall make regulations which are “necessary or convenient to be prescribed for the purposes of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred, on the Ombudsman by this part.” The failure to make regulations does not deprive the Ombudsman of jurisdiction to investigate and adjudicate upon complaints. Section 57BF is an enabling provision and not a condition precedent to the exercise by the Ombudsman of his functions under the Act. The Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 S.I. 190 of 2005 oblige the Ombudsman to have regard to the existing Terms of Reference of the Insurance Ombudsman of Ireland in respect of complaints regarding insurance matters and to the existing Terms of Reference of the Ombudsman for the Credit Institutions in respect of complaints regarding banking and building society matters which is a sufficient compliance with section 57BF. The procedures adopted were appropriate and were not objected to by Davy in previous cases in which complaint was made against them.

3. Two stage procedure.

The Act makes provision for a Deputy Ombudsman and provides that any act done by a Deputy Ombudsman is deemed to have been done by the Ombudsman. However this does not mean that the hearing by the Ombudsman of an appeal from a finding or decision of a Deputy Ombudsman amounts to his hearing an appeal from his own decision or adjudicating twice upon the complaint nor does it involve pre-judgment. The Ombudsman is entitled to adopt his own internal procedures. Davy were notified of the two-stage procedure. Davy first complained of the two-stage procedure after the Deputy Ombudsman made an adverse finding but nonetheless

participated in the appeal to the Ombudsman and accordingly are estopped from and/or have waived any entitlement to rely upon this ground.

4. Fair Procedures

(a) Davy were afforded the opportunity to make submissions and made copious submissions throughout the process. The procedure adopted was appropriate having regard to the provisions of section 57BB(c) which provides that an object of Part VIIB of the Act is to enable complaints to be dealt with in an informal and expeditious manner. The Ombudsman is entitled to request information or documents from parties and it is a matter for him to decide whether to furnish information or documents received from one party to the other.

(b) Oral hearing. The decision whether or not to hold an oral hearing is a matter for the Ombudsman in his discretion. In exercising the discretion he must have regard to the object that complaints be dealt with in an informal and expeditious manner. In the present case the Ombudsman deemed it unnecessary to hold an oral hearing.

5. The Ombudsman is entitled to rely upon his own expertise of credit unions. The Ombudsman did not prejudge any issues.

6. The Ombudsman denies that he did not find the complaint to be substantiated on any of the grounds specified in section 57CI(2) of the Act. In a meticulously detailed final decision, it was not necessary to expressly specify the exact grounds under section 57CI(2) of the Act under which the complaint was found to be substantiated.

**Judgment of the High Court**

Judgment was delivered in the High Court (Charleton J.) on the 30<sup>th</sup> July 2008. I propose to set out briefly the decision on each of the issues raised in the proceedings.

1. Mediation.

Section 57CA(1) of the Act provides that on receiving a complaint the Ombudsman shall, as far as possible, try to resolve the complaint by mediation. Subsection (2) provides that mediation is voluntary. Subsection (4) provides that if mediation is unsuccessful the matter should be dealt with by adjudication. Section 57BK(1) provides that the principal function of the Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication. The Ombudsman did not seek to deal with the Credit Union's complaint by mediation in the first instance but proceeded by way of investigation and adjudication. He determined that the complaint was not an appropriate one for mediation. The decision was in fact made by the Deputy Ombudsman following discussion with the Ombudsman and consideration of the complaint and the documents annexed thereto. This is recorded in the Decision of the Ombudsman as follows:

*"On 7<sup>th</sup> September 2007 the possibility of mediation was considered by the Deputy Ombudsman. He discussed the matter with me, as Financial Services Ombudsman. It was decided that this was not an appropriate case for mediation and accordingly a full investigation was to be carried out. This was noted on the file at that date by the Deputy Ombudsman."*

In his affidavit sworn on the 3<sup>rd</sup> April 2008 at paragraph 41 thereof the Ombudsman deposed as follows:-

*"I say that at no stage, either when the complaint was first notified to it or at any other stage during the investigation did the applicant ever suggest that*

*mediation might be appropriate until its submissions to me dated 11<sup>th</sup> December 2007. If there was the slightest reality to successfully resolving the case by mediation I would have expected the applicant to have adverted to this at an earlier stage rather than raising it for the first time after it had received an adverse finding from my Deputy."*

Davy in an affidavit of Tony Garry sworn on the 17<sup>th</sup> April 2008 responded. The Ombudsman did not ask either of the parties whether they wished to mediate the dispute. On none of the twenty previous complaints against Davy did the Ombudsman suggest mediation. The possibility of mediation was raised by the Credit Union.

The learned trial judge first addressed the question of whether the Ombudsman is entitled to reach a decision to proceed to investigation and adjudication without an attempt at mediation. He dealt with the matter as follows:-

*"But is (the Ombudsman) entitled to reach that decision before any attempt at mediation is embarked upon? I cannot ignore the clear statutory imperative in section 57CA that the duty of the Financial Services Ombudsman is, on receiving a complaint, to try to resolve it by mediation. Nor can I ignore the fact that the first among the principal functions conferred on the Financial Services Ombudsman by section 57BK is to deal with the complaint by mediation and, only where it is necessary, to proceed to investigation and adjudication."*

In this context he held "necessary" to mean "reasonably necessary". He concluded:-

*“In my view, however, mediation need only be embarked upon where that carries a reasonable prospect of achieving results. Investigation and adjudication may be preferred as a starting point where, in the context of the dispute as a whole, that is deemed to be necessary by the Financial Services Ombudsman. In that regard, I believe a court would be reluctant to interfere with the discretion which is clearly vested in him by the Act.”*

The Ombudsman was not in the circumstances of this case obliged to attempt mediation.

#### Absence of Regulations

The learned trial judge dealt with this issue as follows:-

*“Under section 57BF the Financial Services Ombudsman Council is obliged to make regulations where they are required under the Act. It is not necessary, under the Act, in my view to make regulations providing for the conduct of a hearing. In my view section 57BF is an empowering section. This is made clear by the juxtaposition of the words in section 57BF(1)(a) of regulations being ‘required or permitted to be prescribed’ under the Act. This is further made clear by section 57BF(1) giving a choice to the Council through the use of the word ‘or’ before allowing them to make such regulations where they are ‘necessary or convenient...for the purposes of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred...’ on him. Section 57BF(2) makes it clear that a regulation may prescribe what procedures are to be followed when processing a complaint. The word ‘may’ can mean ‘must’ where an Act sets out a series of*

*preconditions the fulfilment of which entitles, as a matter of statutory interpretation, a party to a benefit or remedy under legislation. The word 'may' can mean 'must', additionally, when entitlement is set up by statute and where to fail to interpret the word as imperative would mean that the legislative purpose underlying the statute is set at nought; see the judgment of Barron J. in **University of Limerick v Ryan & Ors** (unreported) High Court 21<sup>st</sup> February 1999."*

The Council is not obliged to make regulations prescribing the matters which the Ombudsman must take into account when investigating or adjudicating a complaint or prescribing the procedures to be followed in processing a complaint.

#### Two stage procedure

The Ombudsman delegated the investigation and adjudication of the complaint to a Deputy Ombudsman who issued a concise report dated 5<sup>th</sup> November 2007 upholding the complaint. He concluded that the Bonds were unsuitable investments for a credit union and that the bonds were not explained properly to the Credit Union and that, if they had been explained properly, the credit union would not have purchased them. A copy of the report was sent to Davy on the 6<sup>th</sup> November 2007. By letter dated 8<sup>th</sup> November 2007 Davy availed of the opportunity to make submissions on the report. The credit union made further submissions. The Ombudsman then considered the report and the submissions and issued the Decision. The learned trial judge concluded that the procedure adopted by the Ombudsman is not provided for by statute. He made available to the parties an appeal from the Deputy Ombudsman to himself. The effect of section 57BL(6) of the Act is that a ruling by the Deputy

Ombudsman to whom the matter has been delegated is a ruling by the Ombudsman.

The learned trial judge concluded as follows:-

*"In effect, therefore, the Financial Services Ombudsman is seeking to allow an appeal to himself. This is impermissible. The Financial Services Ombudsman is entitled within the terms of section 57BL(5) to delegate the authority of investigating and adjudicating on a complaint to a Deputy Financial Services Ombudsman. That individual, I understand that there are two, is required to perform their functions in an independent manner. I construe section 57BL(7) as indicating that the Financial Services Ombudsman may give directions as to such general matters as the time and place of hearing, and such specific matters as the general rules as to fair procedures that are to be applied as to the investigation and adjudication of all cases."*

The learned trial judge concluded that the procedure adopted by the Ombudsman is impermissible.

#### Fair Procedures

- (a) Failure to make available documents to Davy.

The learned trial judge referred to the provisions of the Act in section 57BK(2), section 57BX(8) and section 57CE. Davy complained of three matters:-

- (i) Davy contended that the relevant officials of the Credit Union had received a detailed explanation as to the nature of the Bonds and in this regard required for the purposes of submissions and cross-examination any relevant records of the Credit Union.



- (ii) appended to the original letter of complaint were twelve appendices containing letters and an expert report of Robert T. Moynihan.

Notwithstanding that the letters and report were sought they were never furnished to Davy.

- (iii) in submissions to the Ombudsman the Credit Union furnished a further report from Robert T. Moynihan and three short witness statements to the Ombudsman. These were not furnished to Davy.

The learned trial judge dealt with the second category of documents as follows:-

*"I take it as a basic principle, however, that where an Act indicates that a copy of a complaint ought to be furnished to a party statutorily required to answer it, that it is unfair that the letter of complaint is singled out as an indication of what has to be responded to and that the appendices, or exhibits in support, to that letter are excluded."*

In relation to the first and third categories of documents the learned trial judge held that where the documents are such as to potentially influence the Ombudsman in a decision which he might make on the complaint then there is an entitlement to the respondent to the complaint to see them.

For the Ombudsman it was argued that there was a limited requirement of fair procedures and that the entitlement to fair procedures would only arise where a party to a *quasi-judicial* hearing is in the position of an accused or has been charged with such wrongdoing as to potentially undermine its constitutional right to protect its good name. The learned trial judge noted that the Decision was published on the World Wide Web by the Ombudsman. The learned trial judge went on to say:-

*"I can also not fail to ignore the consequences of a finding being made against a financial service provider. Under the Act, these consequences can be drastic. If it were merely that the adjudication on a claim would lead for instance to an admission or recommendation that a brochure as to investments would be redrafted, no one could assert that the full panoply of fair procedures was mandated. The result for the party ruled against, and the nature of any conflict in evidence leading to the result, is what determines what level of procedure is necessary. In this instance, it was the repayment of the full sum of the bond, as a repurchase by the agent advising on same, with no allowance made in relation to the substantial interest earned by Enfield Credit Union, together with the repayment of commission earned."*

The learned trial judge held that there had been a breach of fair procedures.

5. Reliance by the Ombudsman on his own knowledge and experience of Credit Unions

Before the High Court it was submitted on behalf of Davy that reliance by the Ombudsman on his experience in dealing with credit unions and his assessment of their expertise in relation to investments and capital security constituted a breach of the principle of *audi alteram partem* in that the applicant was deprived of an opportunity to make any submissions in respect of the Ombudsman's views. The learned trial judge did not consider this submission in his judgment.

6. Failure to find complaints substantiated on statutory grounds

Section 57CI(2) provides as follows:-

*"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 was not given when it should have been given and*
- (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."*

A complaint may be found to be substantiated or partly substantiated only on one or more of the stipulated grounds. A finding shall include the reasons for the finding. The Ombudsman failed to state, by reference to section 57CI(2) the grounds on which he found the complaint to be substantiated. The error in question appears on

the face of the record. The learned trial judge held that the provisions of the Act are mandatory.

### **Order of the High Court**

The court granted an order of certiorari in respect of the Decision and further ordered that the Decision and all records and entries relating thereto be quashed. The matter was remitted to the Ombudsman for the purposes of the complaint of the Credit Union being investigated and adjudicated upon. It was ordered that the Ombudsman pay to Davy 5/6ths of the costs of the proceedings.

### **Notice of Appeal**

The Ombudsman appealed the judgment and order of the High Court save and except insofar as the same related to the issues raised of mediation and the absence of regulations. The relevant grounds of appeal are that the learned trial judge erred in law or in fact or on a mixed question of law and fact as follows:-

1. in failing to give due weight to the statutory obligation on the Ombudsman to act expeditiously and informally. He failed to have regard to the provisions of section 57BK(4) of the Act which provides 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."

2. in failing to have or due regard to the fact that the function performed by the Ombudsman is different to the function traditionally performed by the courts and by tribunals.

3. in failing to hold that Davy was not entitled to relief by reason of acquiescence.
4. in holding that the original letter of complaint was not made available to Davy.
5. in holding that Davy was not aware of the nature of the appendices attached to the original complaint of the notice party until discovery was made in the present case.
6. in holding that Davy should have reasonable notice of the nature of the complaint and yet holding that it was a mistake for the Ombudsman not to provide the documentation appended to the letter of complaint.
7. in holding that failure to hold an oral hearing was fatal to the decision.
8. in holding that the right to make submissions under the Act implies the right to have a view of the material that the Ombudsman may rely upon, in factual terms, in grounding his decision.
9. in failing to properly apply the reasoning in *National Maternity Hospital v Information Commission* [2007] 3 I.R. 643.
10. in holding that Davy had an entitlement to see documents which had the potential to influence the Ombudsman in his decision.
11. in holding that statements furnished by witnesses from the Credit Union must be made available to Davy.
12. in holding that documents of a contemporaneous or later time that concerned the relationship between the Credit Union and Davy in the possession of the Credit Union must be made available to Davy.
13. in failing to hold that the Ombudsman gave Davy a sufficient opportunity to make submissions in relation to the conduct complained of.

14. in holding that the Ombudsman cannot operate a two step process in effect allowing an appeal to himself.
15. in failing to have any due regard to the entitlement of the Ombudsman to adopt his own internal procedures.
16. in holding that a mutuality of discovery is required.
17. in holding that the Act allows for disclosure of documents in appropriate cases.
18. in placing requirements on the appellant that are contrary to a statutory obligation to act expeditiously and informally.
19. in mandating a level of fair procedures that is not justified by the statutory role of the Ombudsman and the nature of the decisions which he makes.
20. in holding that mediation should be considered as a first step.
21. in holding that an oral hearing is required where there is an issue of fact which cannot be fairly resolved without hearing the parties.
22. in holding that the appellant is required to state what parts of section 57 CI(2) of the Act constitute his finding or findings.
23. in failing to pay due or any regard to the discretionary nature of judicial review.
24. in failing to consider if any of the procedural errors identified were such as would have been likely to affect the outcome of the process.
25. in failing to consider whether any of the errors found to have occurred were errors made within jurisdiction.
26. in correctly recognising that "the Act contains a definite emphasis in the favour of the Ombudsman not being set up as a kind of *quasi* court or as a Tribunal, with the inevitable result of voluminous discovery, widespread disclosure

and lengthy hearings,” but nonetheless then mandating procedures that will have that result.

27. in exercising his discretion in relation to costs in awarding the applicant five sixths of the costs of an incidental to the proceedings or in failing to make no order as to costs.

**Notice to Vary**

Davy filed a Notice to Vary on the following grounds;

1. The learned trial judge erred in law in finding that the Ombudsman was not obliged to attempt mediation of the complaint and that mediation need only be embarked upon where there is a reasonable prospect of achieving results.
2. The learned trial judge erred in law in finding that section 57BF of the Act is merely an empowering section and that the Ombudsman was empowered to deal with the complaint notwithstanding the failure of the Financial Services Ombudsman Council to make regulations prescribing the matters that the Ombudsman must take into account when investigating or adjudicating a complaint and prescribing procedures to be followed in processing a complaint.
3. The learned trial judge failed to consider whether the Ombudsman had impermissibly relied on his knowledge and experience of Credit Unions and which was an unfair procedure because Davy was not afforded an opportunity to make submissions in relation thereto and the Ombudsman thereby prejudged a number of the issues that arose.
4. The learned trial judge erred in law or in fact in finding that the Ombudsman carried out his function with a high level of skill it being outside the function of the

learned trial judge on an application for judicial review to form a view as to the merits of the decision of the respondent, the merits of the decision being properly the subject matter of a statutory appeal.

### **The Issues on the Appeal**

The issues which arise on the Notice of Appeal are as follows:-

1. The two-stage procedure.
2. Fair procedures:
  - (a) disclosure of documents and the original complaint
  - (b) oral hearing.
3. Reliance by the Ombudsman on his own knowledge and experience of Credit Unions.
4. Failure to the Ombudsman to specify the statutory grounds upon which the complaint was substantiated in whole or in part.
5. The costs order.
6. Miscellaneous:
  - (i) acquiescence by Davy in the procedures.
  - (ii) the exercise of discretion in judicial review.
  - (iii) guidance by the learned trial judge as to appropriate procedures.

The issues which arise on the Notice to Vary are as follows:-

1. Mediation.
2. Absence of Regulations.



3. Finding that the Ombudsman carried out his functions with a high level of skill.

It is proposed to deal with each of these issues in turn, but dealing first with those arising on the Notice to Vary.

### **The Statutory Provisions**

The relevant provisions of Part VIIB of the Act are as follows.

57BB. The objects of this Part are as follows:-

- (a) to enable such complaints to be dealt with in an informal and expeditious manner.

57BF(1). The Council shall make regulations for or with respect to matters –

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

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

- (a) prescribe matters that the Financial Services Ombudsman must take into account when investigating or adjudicating a complaint.
- (b) prescribe procedures to be followed in processing a complaint.

- (c) specify circumstances in which the Financial Services Ombudsman can dismiss a complaint without considering its merits;
- (d) specify the place or places at which the Financial Services Ombudsman is required to make available copies of any report that the Ombudsman is, by a provision of this Part, required to prepare or publish.

(3) Regulations under this section can be made either on the initiative of the Council or at the request of the Financial Services Ombudsman, but they do not take effect until the Minister has consented to them in writing.

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 the 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.

57BL (5) Within the scope of the authority conferred by the Financial Services Ombudsman, a Deputy Financial Services Ombudsman may perform any of the functions, or exercise any of the powers, of the Financial Services Ombudsman imposed or conferred on the Financial Services Ombudsman by this or any other Act.

(6) Any act done or omitted to be done in accordance with subsection (5) is taken to have been done or omitted to have been done by the Financial Services Ombudsman.

(7) A Deputy Financial Services Ombudsman is entitled to perform the functions and exercise the powers under subsection (5) free from interference by any other person, except that that Ombudsman shall –

- (a) comply with directions given by the Financial Services Ombudsman, and
- (b) keep the Financial Services Ombudsman informed about the progress made with respect to dealing with complaints that are assigned to the Deputy Financial Services Ombudsman.

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 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 the Ombudsman's jurisdiction.

(3) A consumer is not entitled to make a complaint if the conduct complained of –

(a) is or has been the subject of legal proceedings before a court or tribunal, or

(b) occurred more than 6 years before the complaint is made, or

(c) relates to a matter that is within the jurisdiction of the Pensions Ombudsman, or

(d) is of a class prescribed by Council Regulations.

(6) A consumer is not entitled to make a complaint unless the consumer has previously communicated its substance to the regulated financial service provider concerned and has given the financial service provider reasonable opportunity to deal with it.

(8) As soon as practicable after receiving a complaint about the conduct of a regulated financial service provider, the Financial Services Ombudsman shall provide the financial service provider with a copy of the complaint.

57BY(1). The Financial Services Ombudsman shall investigate a complaint if satisfied that the complaint is within the jurisdiction of the Financial Services Ombudsman.

57BZ(2) The Financial Services Ombudsman may make preliminary enquiries for the purpose of deciding whether a complaint shall be investigated under

this Part and may request the complainant to provide further written particulars of the complaint within a period specified by that Ombudsman.

57CA(1) On receiving a complaint the Financial Services Ombudsman shall, as far as possible, try to resolve the complaint by mediation.

(2) Participation in the mediation by the parties to a complaint is voluntary, and a party may withdraw at any time. The Financial Services Ombudsman may abandon an attempt to resolve a complaint by mediation on forming the view that the attempt is not likely to succeed.

(3) Evidence of anything said or admitted during a mediation, or an attempted mediation, of a complaint, and any document prepared for the purposes of the mediation, are not admissible –

(a) in any subsequent investigation, under this Part, of the complaint (unless the person who made the admission, or to whom the document relates, consents to its admission), or

(b) in any proceedings before a court or a tribunal.

(4) If an attempt to resolve a complaint by mediation is unsuccessful, the Financial Services Ombudsman shall –

(a) deal with the complaint by adjudication, and

(b) notify the parties accordingly.

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.

57CD. The Financial Services Ombudsman may, in the course of investigating a complaint, periodically report to the complainant on the progress of the investigation and, in so doing, may make such comments to the complainant on the investigation and its consequences and implications as that Ombudsman thinks fit.

57CE. (1) To enable a complaint to be investigated, the Financial Services Ombudsman may require the regulated financial service provider concerned and any associated entity of that financial service provider-

- (a) to provide information either orally or in writing, or
- (b) to produce any document or other thing, or
- (c) to provide a copy of any document,

that appears to that Ombudsman to be relevant to the investigation. However, this subsection does not authorise the Financial Services Ombudsman to require the provision of information, or the production of a document or copy of a document, the communication of which is subject to legal professional privilege.

(2) A requirement under this section may be made orally or be in writing but must specify or describe the information, document or thing required, and must fix a time and specify a place for compliance.

(3) The power conferred by subsection (1) can be exercised in relation to a regulated financial service provider, or an associated entity of the financial service provider, irrespective of whether the Financial Services Ombudsman has entered the premises of the financial service provider in accordance with section 57CF.

(4) For the purpose of obtaining information relevant to investigating or adjudicating a complaint about the conduct of a regulated financial service provider, the Financial Services Ombudsman may -

- (a) summon any officer, member, agent or employee of the financial service provider to attend before the Ombudsman, and
- (b) examine on oath any such officer, member, agent or employee in relation to any matter that appears to that Ombudsman to be relevant to the investigation or adjudication.

(5) Without limiting subsection (4), the Financial Services Ombudsman has the same powers that a judge of the High Court has when hearing civil proceedings that are before that Court with respect to the examination of witnesses (including witnesses who are outside the State).

(6) A person who is summoned to appear before the Financial Services Ombudsman under this section is entitled to the same rights and privileges as a witness appearing in civil proceedings before the High Court.

(7) Information provided by a person in response to a requirement made under subsection (1), or an answer to a question put to a person in the course of an examination conducted under subsection (4), is not admissible as evidence against the person in criminal proceedings, other than proceedings for-

- (a) if the information or answer was provided on oath, perjury, or
- (b) an offence against section 57CH.

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.

(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.

(6) A direction requiring a regulated financial service provider to pay an amount of compensation may provide for interest to be paid at a specified rate if the amount is not paid by a date specified in the direction.

(7) The Financial Services Ombudsman shall give a copy of a finding under this section-

- (a) to the complainant, and
- (b) to the regulated financial service provider to which the complaint relates.

(8) If a finding under this section contains a direction under subsection (4), the financial service provider concerned-

- (a) shall comply with the direction within such period as is specified in the direction, or within such extended period as the Financial Services Ombudsman allows, and
- (b) shall within 14 days after the end of that period or extended period, notify in writing the Financial Services Ombudsman of action taken or proposed to be taken in consequence of the direction.

(9) Subject to the outcome of any appeal against a finding of the Financial Services Ombudsman in respect of a complaint, the finding is binding on the complainant, the regulated financial service provider concerned and every other person who is a party to the complaint.

Chapter 6 of Part VIIB contains provisions relating to appeals to the High Court and the Supreme Court.

### **Mediation**

The relevant statutory provisions are as follows:-

Section 57BB. The objects of this Part are as follows:

- (a) to establish the Financial Services Ombudsman as an independent officer –
  - (i) to investigate, mediate and adjudicate complaints made in accordance with this Part about the conduct of regulated financial service providers involving the provision of a financial service, an offer

to provide such a service or a failure or refusal to provide such a service.

Section 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.

Section 57BK(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.

Section 57CA(1). On receiving a complaint the Financial Services Ombudsman shall as far as possible, try to resolve the complaint by mediation.

Section 57CA (2) Participation in the mediation by the parties to a complaint is voluntary, and a party may withdraw at any time. The Financial Services Ombudsman may abandon an attempt to resolve a complaint by mediation on forming the view that the attempt is not likely to succeed.

Section 57CA(4) If an attempt to resolve a complaint by mediation is unsuccessful, the Financial Services Ombudsman shall –

- (a) deal with the complaint by adjudication, and notify the parties accordingly.

#### Submissions of Davy

On behalf of Davy it is submitted that the Ombudsman did not have jurisdiction to adjudicate upon the complaint in circumstances where he did not make

any attempt whatsoever to resolve the complaint by way of mediation. Reliance is placed on the terms of section 57 BK(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.”*

This section imposes a duty on the Ombudsman to try and deal with complaints by mediation before proceeding to investigation and adjudication and he should only so proceed where he has been unable to deal with the complaint by mediation. Section 57 C is even more explicit in that it requires the Ombudsman on receipt of a complaint to try to resolve the complaint by mediation. Section 57BK(4) reinforces this – only if an attempt to resolve a complaint by mediation is unsuccessful should the Ombudsman proceed to deal with the complaint by adjudication. The provisions are mandatory and mediation is a statutory pre-condition to the investigation and adjudication process. The use of the word “shall” in section 57BK(1) is a clear indication that the provision is obligatory. Reliance is placed on the decisions of this court in *Monaghan UDC v Alf-a-Bet Promotions Limited* (1980) I.L.R.M. 64 and *The State (Elm Developments Limited) v An Bórd Pleanála* 1981 I.L.R.M. 108 as to the construction to be given to “shall”. Mandatory mediation, it is submitted, is central to the statutory scheme. It is only where the requirement cannot be complied with, an attempt to resolve the complaint by mediation being unsuccessful, that the Ombudsman may proceed to investigation and adjudication. In the present case no attempt whatsoever to deal with the complaint by mediation was made. The statutory obligation is not discharged by the Ombudsman considering mediation and concluding that the case is not one suitable for mediation. The requirement of the Ombudsman that he shall as far as possible try

to resolve the complaint by mediation has not being fulfilled. The Ombudsman did not ask the parties whether they wished to engage in mediation. In his report of 6<sup>th</sup> January 2008 Mr Moynihan on behalf of the Credit Union actually suggested mediation. In failing to discharge a statutory duty to try, as far as possible, to resolve the complaint by mediation the Ombudsman acted *ultra vires* in proceeding to an adjudication of the complaint.

#### Submissions of the Ombudsman

In this case the Ombudsman and Deputy Ombudsman, having considered whether the case was appropriate for mediation, came to the conclusion that the case was not an appropriate one for mediation and accordingly the matter proceeded to a full investigation. It is submitted that by adverting to the issue as to whether mediation was appropriate the Ombudsman complied with his obligations under section 57CA of the Act. The Credit Union made it clear to the Ombudsman that they had had a number of meetings with Davy and that they now wished the matter to proceed to investigation and adjudication. In twenty previous cases Davy had not requested mediation. Regard should be had to the obligation of the Ombudsman to act expeditiously and informally and where he considers that to proceed to mediation would be futile it is appropriate that he proceed, in the interests of expedition if nothing else, to investigation and adjudication. While section 57 CA(1) provides that the Ombudsman shall try to resolve the complaint by mediation the requirement is qualified by the words "as far as possible". Having regard to the attitude of the Credit Union and to the fact that in twenty previous cases Davy had not sought to have the matter dealt with by mediation the Ombudsman was justified in acting as he did.

## Discussion and Decision

Having regard to the express provisions of the statute contained in section 57 BB(a) and in section 57BK(1) and (4) central in the statutory scheme is that the Ombudsman should endeavour to deal with complaints by mediation and only where necessary to proceed by investigation and adjudication. In addition however regard should be had to the object that complaints be dealt with in an informal and expeditious manner. Can it be said that this object enables the Ombudsman to proceed to investigation and adjudication where he considers that mediation would be futile?

The Credit Unions' letter of complaint is dated 27<sup>th</sup> August 2007 and it was forwarded to Davy on the 25<sup>th</sup> September 2007. Davy furnished a detailed reply on the 23<sup>rd</sup> October 2007. Before receipt of that reply on the 7<sup>th</sup> September 2007 the Ombudsman and the Deputy Ombudsman discussed the complaint and decided that this was not an appropriate case for mediation and that a full investigation should be opened. The Credit Union's letter of complaint contains nothing to suggest that the Credit Union was unwilling to have the matter dealt with by mediation except perhaps the following. Page one of the letter contains the following sentence:-

*"We have exhausted Davy's internal complaints handling procedures, and Davy have advised in writing that if we remained dissatisfied at this time we should refer the matter to your office."*

The last line of the letter reads as follows:-

*"In summary we found the response to our complaint quite unconvincing and look forward to an authoritative ruling from you on this matter."*

I do not consider the foregoing to be a rejection of mediation.

The parties were not offered the possibility of mediation. As of the date of the decision to proceed to investigation and adjudication other than as quoted above I can find nothing to indicate that the Credit Union would not agree to mediation had an offer been made. In previous cases involving Davy, some twenty in all, mediation was not considered by the Ombudsman but no objection to this was raised by Davy. Davy first suggested mediation in submissions made after receipt of the Deputy Ombudsman's report. These being the circumstances it seems to me that the decision to proceed to investigation and adjudication was premature. Other than that Davy had not sought mediation in previous cases there is nothing to suggest that if made available mediation would not have been availed of. To comply with the statute I am satisfied that the Ombudsman ought at least in every case to offer the facility of mediation to the parties: section 57CA(2) provides that participation in mediation is voluntary. Section 57BK(1) provides that the principal function of the Ombudsman is to deal with complaints by mediation. He must try to resolve the complaint by mediation. Only if an attempt to resolve a complaint by mediation is unsuccessful should the matter proceed to adjudication. Section 57CA(2) provides that the Ombudsman may abandon an attempt to resolve a complaint by mediation: "abandon" at least envisages an attempt being made. To comply with the scheme of the Act the Ombudsman must offer to or explore with the parties the possibility of mediation.

While the courts may construe "shall" as "may" the approach to be adopted is that set out by Henchy J. in *The State (Elm Developments Limited) v An Bórd Pleanála* [1981] I.L.R.M 108:-

*"Whether a provision in a statute or statutory instrument, which on the face of it is obligatory (for example) by the use of the word 'shall' should be treated by*

*the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the court will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."*

See also *Monaghan U.D.C. v Alf-a-Bet Promotions Limited* [1980] I.L.R.M. 64.

Having regard to the express terms of the statute and the several references to mediation I am satisfied that the requirement is mandatory. At the point at which the decision was made to proceed to investigation and adjudication there was nothing before the Ombudsman other than the original letter of complaint which did not at all deal with the question of mediation. There had been no response from Davy at that time. Other than the Ombudsman's previous experience with Davy on other complaints in which mediation did not occur there is nothing to suggest that mediation was impossible. I can see no basis for the decision made in this case. There was no attempt to resolve the complaint by mediation and it cannot be said that an attempt was unsuccessful as required by section 57 CA(4). In these circumstances I am satisfied that the Ombudsman failed to comply with the statute.

The remedies available on an application for judicial review are discretionary. The procedures for investigating and adjudicating on the complaint have progressed to an advanced stage both parties having made detailed submissions to the Deputy



Ombudsman, the Deputy Ombudsman having furnished a report and recommendations and the parties having made further submissions to the Ombudsman. I would have regard to the statutory requirement of expedition. To resort to mediation at this stage will further delay the Ombudsman's adjudication. Further with some twenty previous complaints having been processed in relation to Davy and Davy, being familiar with the Ombudsman's procedures, it is relevant that Davy did not require or suggest mediation. Mediation was first suggested by the Credit Union at the stage of submissions to the Ombudsman. In regard to the foregoing notwithstanding the Act requiring mediation as the first response to a complaint in exercise of discretion I would refuse relief on this ground.

#### **Absence of Regulations**

The Act in section BF(1) provides as follows:-

"57BF(1) The Council shall make regulations for or with respect to matters –

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

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

- (a) prescribe matters that the Financial Services Ombudsman must take into account when investigating or adjudicating a complaint
- (b) prescribe procedures to be followed in processing a complaint

- (c) specify circumstances in which the Financial Services Ombudsman can dismiss a complaint without considering its merits;
- (d) specify the place or places at which the Financial Services Ombudsman is required to make available copies of any report that the Ombudsman is, by a provision of this Part, required to prepare or publish.

#### Submissions of Davy

For Davy it is simply submitted that in the absence of regulations having regard to the terms of section 57BF the learned trial judge was in error and the Ombudsman, in the absence of regulations "necessary or convenient" for the purpose of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred, on him is not empowered to deal with the complaint.

#### Submissions of the Ombudsman

The Ombudsman submits that the learned trial judge dealt correctly with this issue which he dealt with as follows:-

*"Under section 57BF the Financial Services Ombudsman Council is obliged to make regulations where they are required under the Act. It is not necessary, under the Act, in my view, to make regulations providing for the conduct of a hearing. In my view section 57BF is an empowering section. This is made clear by the juxtaposition of the words in section 57BF(1)(a) of regulations being "required or permitted to be prescribed" under the Act. This is further made clear by section 57BF(1) giving a choice to the Council by the use of the*

word 'or' before allowing them to make such regulations where they are "necessary or convenient...for the purposes of enabling the Financial Services Ombudsman to perform the functions imposed, and to exercise the powers conferred..." on him. Section 57BF(2) makes it clear that a regulation may prescribe what procedures are to be followed when processing a complaint. The word "may" can mean "must" where an Act sets out a series of pre-conditions the fulfilment of which entitles, as a matter of statutory interpretation, a party to a benefit or remedy under legislation. The word "may" can mean "must" additionally, when entitlement is set up by statute and where to fail to interpret the word as imperative would mean that the legislative purpose underlying the statute is set at nought; see the judgment of Barron J. in *University of Limerick v Ryan and Others*, unreported, High Court, 21<sup>st</sup> February 1999."

The making of regulations in respect of the matters set out in section 57BF(2) is not mandatory and is not a pre-condition to the Ombudsman dealing with and adjudicating on a complaint. Insofar as section 57BF(1) provides that the Council shall make regulations for or with respect to matters that are necessary or convenient to be prescribed for the purpose of enabling the Ombudsman to perform the functions imposed, and to exercise the powers conferred, on him it is submitted that the failure to make such regulations is not a pre-condition to the exercise by the Ombudsman to the performance of the functions or the exercise of the powers conferred upon him: *State (Sheehan) v Ireland* [1987] I.R. 550. There "shall" was read as being an enabling provision.

The Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 S.I. 190 of 2005 obliged the Ombudsman to have regard to the existing terms of reference of the Insurance Ombudsman of Ireland in respect of complaints regarding insurance matters and to the existing terms of reference of the Ombudsman for Credit Institutions in respect of complaints regarding banking and building society matters; this is sufficient compliance with section 57BF(1).

#### Discussion and Decision

It is necessary to consider both subsections (1) and (2) of section 57BF. Subsection (2)(b) provides that a regulation under subsection (1) may prescribe matters that the Ombudsman must take into account when investigating and the procedures to be followed in processing a complaint. Clearly such regulations, having regard to the use of "may" in subsection (2), are permitted to be prescribed. Such regulations may well be convenient within the terms of subsection (1)(b). However I am not satisfied that the use of "shall" in subsection (1) having regard to the use of "may" in subsection (2) makes mandatory such regulations. The Ombudsman's procedures are available on the internet and Davy were aware of the same. In construing section 57BF regard must also be had to section 57BB(c) which envisages complaints being dealt with in an informal and expeditious manner: subject to the obligation to comply with basic fairness, flexibility in the approach to the investigation and adjudication of complaints may well be that the most appropriate means of achieving informality and expedition.

Having regard to the foregoing I am satisfied that the absence of regulations prescribing matters which must be taken into account and procedures to be followed in processing a complaint, having regard to the terms of section 57BF and section 57BB

which I have cited, does not deprive the Ombudsman of jurisdiction to investigate and adjudicate upon complaints. I would dismiss Davy's appeal on this ground. ✓

**Finding that the Ombudsman carried out his functions with a high level of skill**

No submissions were addressed to this court on this ground. Judicial review is not concerned with the decision but with the decision making process. The comment of the learned trial judge is related to the process. It is not material to the issues on this appeal. In making the comment I do not consider that the learned trial judge trespassed into an area appropriate only to the statutory appeal. I would make no order on this issue.

**Two stage Procedure**

**Submissions of the Ombudsman**

Upon receipt of the complaint of the Credit Union a copy of the same was sent to Davy on the 3<sup>rd</sup> September 2007: the documents annexed to the complaint were not forwarded. On the 25<sup>th</sup> September 2007 Davy was sent a summary of the complaint, a schedule of questions, a schedule of evidence, a complaint form and a further copy of the letter of complaint. Davy duly responded to the schedule of questions and furnished a schedule of evidence: the response ran in total to one hundred and forty four pages. The investigation of the complaint was carried out by a Deputy Ombudsman following which he prepared a report. The report was forwarded to Davy on the 6<sup>th</sup> November 2007 under cover of a letter which reads as follows:-

*"I have now concluded my investigation in the above case and I have decided to make a recommendation in the matter.*

*I enclose herewith my report, a copy of which is also being sent to the complainant credit union.*

*Either party may make a submission in relation to this report within fifteen working days from the date of this report to the Financial Services Ombudsman."*

Davy replied to that letter on the 8<sup>th</sup> November 2007 in the following terms:-  
*"I wish to acknowledge receipt of a recommendation in the above referenced matter. We are reviewing the report and recommendation with a view to making a submission to the Financial Services Ombudsman. On the basis that the covering letter issued to us is dated 6<sup>th</sup> November we are aware that we are required to make any submission no later than 27<sup>th</sup> November."*

The first occasion on which the submission to the Ombudsman was described as "an appeal" was in a letter of 13<sup>th</sup> November 2007 from the Ombudsman to the Credit Union dated 13<sup>th</sup> November 2007 acknowledging their acceptance of the Deputy Ombudsman's findings and advising of an "appeal to the Financial Services Ombudsman from Davy". On behalf of Davy, William Fry Solicitors wrote to the Ombudsman on the 21<sup>st</sup> November 2007 requesting the Ombudsman to review the finding of the Deputy Ombudsman. William Fry requested a copy of the procedure governing the making of submissions and the role and functions to be discharged by the Ombudsman. The Ombudsman replied that the procedures for dealing with complaints are available on his web site and continued as follows:-

*"The final decision on any complaint is made by me. Each party has been given the opportunity to appeal the Deputy Ombudsman's finding and your client is now exercising that right."*

William Fry responded to this letter on the 30<sup>th</sup> November 2007 as follows:-

*"You seem to have misunderstood the contents of a letter of the 26<sup>th</sup> November. We were not asking about the procedures for dealing with complaints as published on your web site; we are familiar with the contents of that web site.*

*Our query related to the procedure governing what the Deputy Financial Services Ombudsman described as a submission and what you describe as an appeal and which is not described on the web site."*

William Fry made a request for documents which request was declined. The Credit Union made a submission of some fifty two pages. On the 21<sup>st</sup> January 2008 the Ombudsman wrote to Davy in the following terms:-

*"I refer to previous correspondence in relation to the above matter, and in particular to the submission received from William Fry and Company solicitors on behalf of Davy Stockbrokers arising from the finding of the Deputy Ombudsman dated 6<sup>th</sup> November 2007. Having now had the opportunity of reviewing the file on the case and having considered all submissions on the relevant file, I enclose herewith my final decision on the matter, which may be appealed to the High Court by either party within twenty one days from the date of this decision."*

On the 17<sup>th</sup> July 2007 the Ombudsman circularised details of changes to the published complaints procedure in relation to time limits. Time limits are not an issue on this appeal.

#### Submissions of the Ombudsman

The Ombudsman is entitled to provide his own internal procedures. Davy availed of the procedures and exercised the right of appeal from the Deputy Ombudsman seeking a final decision from the regulator. The procedures should be evaluated in the light of the availability of a statutory appeal to the High Court from a decision of the Ombudsman. The provision of an internal appeal increases the level of fair procedures. Similar procedures were approved of in *Heather Moore and Edgecomb Limited v Financial Ombudsman Service* [2008] E.W.C.A. CIV 642. Section 57BL(6) of the Act which provides that any act done by a Deputy Ombudsman is deemed to have been done by the Ombudsman does not have the effect of making a review of the Deputy Ombudsman's report by the Ombudsman the hearing of an appeal from his own decision nor does it incorporate an element of pre-judgment. The procedures were published in June 2005 and had worked satisfactorily and had been availed of in the past by Davy without objection. The Ombudsman took no part in the investigation and determination by the Deputy Ombudsman.

#### Submissions of Davy

A two stage procedure is not provided for in the Act. Such a provision is expressly provided for in a number of statutes e.g. section 87 of the Environmental Protection Agency Act 1992 (as substituted by section 15 of the Protection of the Environment Act 2003). The effect of the statutory provisions in the case of the



Ombudsman is that he heard an appeal from his own decision breaching the principle of *nemo iudex*. It is well established that a decision maker should not sit as part of an appellate body to hear an appeal against his own decision: *O'Neill v Irish Hereford Breed Society Limited* [1992] 1 I.R. 431. It is submitted that the learned trial judge was correct.

#### Discussion and decision

An object of the Act is that complaints be dealt with informally and expeditiously. The Act does not prescribe the procedures to be followed by the Ombudsman. Section 57BF empowers the Council to make regulations that are necessary or convenient to be prescribed for the purpose of enabling the Ombudsman to perform his functions and exercise his powers. It permits Regulations to be made by the Council prescribing procedures to be followed in processing a complaint and no such regulations have been made. Section 57BK provides that the Ombudsman may authorise any Deputy Ombudsman or other Bureau staff member to perform any of the functions, or exercise any of the powers imposed or conferred, on the Ombudsman. There is no objection to the Ombudsman delegating the investigation of a complaint to a Deputy Ombudsman while retaining to himself the adjudication and final decision on the complaint. In doing so he reviews all the material before the Deputy Ombudsman together with additional submissions, if any, furnished by the parties to the complaint. The parties to the complaint had the opportunity of accepting the decision of the Deputy Ombudsman or of seeking a final decision from the Ombudsman.

In the present case the Deputy Ombudsman investigated the complaint and reached a conclusion that the Bonds were unsuitable investments for a Credit Union and that Davy did not alert the Credit Union adequately or at all to the risks inherent in

the Bonds. He concluded that the Credit Union would not have purchased the Bonds if their true nature had been fully explained and that Davy had acted in breach of duty to the Credit Union. His findings are embodied in his report. He made a recommendation having regard to findings in the report. It was clear that he made no more than findings and recommendations reviewable by the Ombudsman and which the parties were free to accept or reject and that in the event of rejection the matter would go to the Ombudsman for a final decision and this is what in fact occurred. The decision was that of the Ombudsman.

Notwithstanding that functions of investigation were carried out by a Deputy Ombudsman exercising powers of the Ombudsman the report is not in fact that of the Ombudsman who had no input into the same. On receipt of further submissions in accordance with the published procedures it was open to the Ombudsman to agree or disagree with all or any part of the report, both findings and recommendation. In considering the matter for this purpose the Ombudsman had available to him all that was before the Deputy Ombudsman and in addition the further submissions of both parties. I do not consider the Ombudsman in so proceeding to be hearing an appeal from himself. He took no part in the consideration of the complaint up to the point where the Deputy Ombudsman reported. Further submissions on that report were then obtained from both parties to the complaint and considered by the Ombudsman. I see no lack of fair procedures here. If anything the procedure adopted allowed for an additional layer of fair procedures for the parties to the complaint.

I do note the confusion in terminology which attends the process. The Ombudsman is variously described as conducting an appeal or requiring submissions on the report. It is inaccurate to describe the Ombudsman as performing an appellate function: no decision was made by the Deputy Ombudsman in this case he merely

preparing a report and issuing recommendations which the Ombudsman could accept or reject. Likewise the parties to the complaint could accept or reject the report on recommendations. The procedure adopted reflects section 57BB of the Act which establishes the Ombudsman to investigate, mediate and adjudicate complaints: the initial investigation was carried out by the Deputy Ombudsman who made recommendations which were reviewed by the Ombudsman who made the adjudication by way of a final decision. I would allow the Ombudsman's appeal on this ground. ✓

### **Fair Procedures**

- (a) Disclosure of documents and the original complaint.

A number of issues arose in relation to documents. Firstly appended to the complaint were eighteen appendices. While the letter of complaint was furnished to Davy the appendices were not. The appendices are voluminous. Included in the appendices was an expert report. Davy were furnished in addition with a summary of the complaint and a schedule of questions which illuminated the complaint. By letter of the 10<sup>th</sup> December 2007 William Fry sought a copy of attachment 8 to the letter of complaint but they were not furnished with the same. Secondly in connection with the submission to the Ombudsman William Fry requested from the Credit Union all documents then or formerly in their possession, custody, control or power of procurement including all notes, memoranda, diary entries, e-mails and electronically stored data relevant to the matters the subject matter of the Deputy Ombudsman's report. In addition they sought all annual reports of the Credit Union from 2001 up-to-date, all documentary records relating to the Credit Union's investment policy or practice and all documentary records including minutes and notes of the Credit

Union's board meetings and investment committee meetings in relation to bonds, perpetual bonds and in particular the Bonds and the bonds of Credit Agricole: such documentation to include specific reference to the nature and particular features of the Bonds, the consideration given to investment in the Bonds, the proposals made by Davy to the investment committee in relation to investing in the Bonds and the decisions taken to invest in the Bonds. Also sought were records and correspondence with advisers including Davy, records dealing with all investments in bonds and perpetual bonds made by the Credit Union and records relating to investments in Scottish Legal Life and Royal Liver. The Credit Union declined to provide the documentation. William Fry then requested the Ombudsman to provide for an opportunity to cross-examine relevant individuals within the Credit Union on the ground that there existed a conflict of evidence which could only be resolved by an oral hearing with cross-examination. They requested the Ombudsman to direct that the documentation which they had sought be furnished by the Credit Union. The Ombudsman responded that when he received Davy's submission he would consider whether an oral hearing is required, whether he requires further information from either party and whether he would direct the Credit Union to furnish further documentation. Following his receipt of Davy's submission the Ombudsman requested further information from the Credit Union and in response received forty eight pages of documentation. This included statements from committee members of the Credit Union upon which the Ombudsman reached a conclusion as to their expertise. Also included was a further expert's report. This documentation was not furnished to Davy. The Ombudsman issued his final decision on the 21<sup>st</sup> January 2008.

### Submission of the Ombudsman

The learned trial judge in the course of his judgment said:-

*"In my view, the right to make submissions under the Act implies the right to have a view of the material that the Financial Services Ombudsman may rely upon, in factual terms, in grounding his decision."*

The Deputy Ombudsman in his report set out all the relevant facts, issues and arguments on which the decision is based and the parties could make submissions to the Ombudsman in relation to the same. Davy were fully aware of the case being made. The two stage procedure ensures that a party is not taken by surprise in that it will know the case that it has to meet. The requirements of natural justice will vary with the nature of the case and the procedures adopted in this case complied with those requirements. Davy were afforded a sufficient opportunity to make submissions in relation to the complaint. Section 57CB of the Act was complied with in that Davy was provided with an opportunity to make submissions with regard to the conduct complained of and indeed made substantial submissions on two occasions and had the benefit of the report of the Deputy Ombudsman. Having regard to the requirement to act informally and expeditiously the Ombudsman is not required to mimic court procedures.

### Submissions of Davy

The learned trial judge was correct in holding as follows:-

*"A procedure cannot be fair if the party against whom a complaint is made is not enabled to make a response. Central to the ability to make a response is that a party should have reasonable notice of the nature of the complaint. In providing for the right to make submissions, and in providing for the financial*

*service provider to be given a copy of the complaint, the Act upholds the principle of fairness of procedure. It is argued, however, that these provisions should be taken literally and not construed beyond the express words of the statute so as to imply any further need for additional exchanges of documents. I take it as a basic principle, however, that where an Act indicates that a copy of a complaint ought to be furnished to a party statutorily entitled to answer it, that it is unfair that the letter of complaint is singled out as an indication of what has to be responded to and that the appendices, or exhibits in support, to that letter are excluded...it was therefore a mistake for the Financial Services Ombudsman not to provide the documentation appended to the letter of complaint from Enfield Credit Union since this constituted, as a whole, the complaint within the meaning of the Act."*

The learned trial judge further concluded that the additional factual material submitted to the Ombudsman by the Credit Union, after receipt of Davy's submissions, ought to have been disclosed to Davy. The learned trial judge distinguished submissions in the form of argument and which there is no need to exchange and new material in respect of which the other party does not have a chance to make submissions. He further held, in relation to documentation required by Davy of the Credit Union, that the Ombudsman could require the Credit Union to furnish the same in appropriate cases. All the categories of documents mentioned, having regard to the seriousness of the consequences of the Decision for Davy, ought to have been furnished by the Ombudsman.

### Discussion and decision

The Ombudsman was, of course, required to have regard to the statutory object and deal with the complaint in an informal and expeditious manner. He must also have regard to the requirements of natural justice.

The requirement to afford fair procedures arises under Article 40.3 of the Constitution. A basic requirement of fair procedures is to be made aware of the complaint which is being made and to have an opportunity to present a defence. This requirement, in the present case, is recognised by the Act in section 57BX(8) which requires the Ombudsman to provide the Financial Service Provider with a copy of the complaint. The seriousness of the matter being considered and of the consequences of the same are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case. There can be no doubting the seriousness for Davy of the complaint in terms of its reputation and the seriousness of the consequences having regard to the nature of the order made requiring Davy to purchase the Bonds from the Credit Union.

In the present case having regard to the serious nature of the complaint and the serious consequences likely to flow from the same and having regard to the express statutory provision I am satisfied that Davy ought to have been furnished not just with the letter of the complaint but with the appendices attached to the same. However diligently a complaint is summarised there is a real danger that some nuances may not be apparent from the summary or that the tone of the complaint will be lost and that in consequence any reply may be inadequate. I am not satisfied that to furnish the letter of complaint but not the appendices meets the requirements of the Act or of fairness.

Somewhat different considerations apply to the request by Davy to the Credit Union for documents and on the Credit Union declining to furnish the same to the

request to the Ombudsman to require the Credit Union to furnish the same.

Procedures before the Ombudsman are to be informal. The discovery process of the courts is not to be imported into these procedures. However access to documents may be necessary in the interest of fairness to enable a party to establish or answer a complaint. It is within the Ombudsman's power to require a complainant to produce documents. He should consider a request for documents in the light of the information before him and determine whether the documents are necessary to enable a financial service provider to deal with the complaint. In the present case the request was couched in very wide terms: none, some or indeed all of the documents may be necessary if Davy is not to be unfairly disadvantaged. The Ombudsman must consider the request in this light and where fairness so demands he should direct that documents be furnished. He is not, however, required to mimic court procedures. Finally the submission of the Credit Union on the report of the Deputy Ombudsman should have been furnished to Davy. Included with this submission were witness statements which were the basis of the Ombudsman's assessment of the expertise of the members of the Credit Union's investment committee and board. Also included was a further expert report. It is necessary that any factual matters which are before a decision maker and which form part of the material upon which he will base his decision should be made available to the parties to the procedures. I would dismiss the Ombudsman's appeal on this ground.

### Oral hearing

Section 57BK(1) and (2) deal with the functions and powers of the Ombudsman. Subsection (1) provides that his principal function is to deal with complaints by mediation, investigation and adjudication. Subsection (2) provides that



the Ombudsman has such powers as are necessary to enable him to perform that function. The scheme of the Act, however, does not contemplate a full oral hearing. Section 57CE(1) enables the Ombudsman for the purposes of investigation to require a financial service provider to provide information orally or in writing. Section 57CE(4) provides that for the purposes of investigating or adjudicating a complaint the Ombudsman may summon any officer, member, agent or employee of the financial service provider and examine him on oath. There are no corresponding provisions directed towards a complainant. Section BZ(2) provides that the Ombudsman may request the complainant to provide further written particulars of the complaint. Section 57CE(5) provides that the Ombudsman has the same powers that a judge of the High Court has when hearing civil proceedings with respect to the examination of witnesses.

#### Submissions of the Ombudsman

The Ombudsman relies on the statutory requirement of informality and expedition. This explains the want of mutuality in the Ombudsman's powers for dealing with the complainant and the financial service provider. The Ombudsman, however, did not dispute that an oral hearing is possible but argued that in this case it was unnecessary. The learned trial judge carried out the correct analysis when he said:-

*"The power to order procedures is expressly conferred upon the Financial Services Ombudsman by the Act. It is within his discretion as to whether an oral hearing is necessary; and as to whether there should be discovery; as to whether there should be a search; as to whether a complaint should be dismissed because of lack of co-operation from a complainant. All of these*

*matters are decisions which he can make within his jurisdiction. In appealing those decisions therefore judicial review is available only if there was such a want of fairness in the procedures adopted as to amount to a denial of constitutional justice. In that regard, the Act contains a definite emphasis in favour of the Financial Services Ombudsman not being set up as a kind of quasi court or as a Tribunal with the inevitable result of voluminous discovery, widespread disclosure and lengthy hearings."*

However the learned trial judge failed to give effect to this analysis in his decision. There was a conflict of evidence as to the advice given to the Credit Union and in order to resolve the same oral evidence with cross-examination is required. Expert evidence as to the suitability of the Bonds was proffered by both sides and in respect of this cross-examination may be required also. Oral evidence was necessary fairly to determine the dispute.

In the present case the Ombudsman was entitled to focus on the documentation before him and on that basis to determine whether it did or did not properly describe the Bonds. Even if it is alleged that an oral explanation was provided to the Credit Union it is still open to the Ombudsman to determine the complaint on the basis of inaccurate documentation and to find a complaint substantiated on one of the statutory grounds. An oral hearing with cross-examination and most likely professional representation would defeat the object of informality and expedition.

It is submitted that the correct question for consideration is whether the decision not to hold an oral hearing was irrational. In the present case an oral hearing was not necessary fairly to determine the dispute in question. Contrary to the submission of Davy it is not the Ombudsman's policy not to hold oral hearings.

### Submission of Davy

It is apparent from the decision and from the documents submitted by Davy and the Credit Union that there is a conflict of evidence in relation to matters. In particular conflict on the advice given by Davy to the Credit Union could only be resolved by an oral hearing with cross-examination. Much of the documentation which was before the Ombudsman had not been given to Davy. Reliance is placed on *Flanagan v University College Dublin* [1989] I.L.R.M. where it was held that the applicant should have been entitled to hear evidence against her and to challenge that evidence on cross-examination. Again in *Galvin v Minister for Social Welfare* [1997] 3 I.R. 240, on a social welfare appeal, Costello P. held that oral evidence was required and it was inappropriate to rely on departmental records. Oral evidence was necessary on two matters, that is the oral explanations given to the Credit Union in relation to the Bonds and factual assertions made in expert reports as to the nature of the Bonds. A basis for refusing to hold an oral hearing relied upon by the Ombudsman both in the High Court and on appeal is that to hold an oral hearing would not be consistent with section 57BB(c) of the Act or with section 57CC of the Act which stipulates that investigations be conducted in private: an oral hearing would not affect privacy. The Ombudsman has a general policy not to hold oral hearings and so fettered his discretion and to fetter the exercise of his discretion in that way is unlawful: *Re Na Solicitor*, Finlay P. unreported, the High Court 30<sup>th</sup> June 1980.

### Discussion and decision

Section 57BF of the Act enables the Financial Services Ombudsman Council to make Regulations *inter alia* prescribing procedures to be followed in processing a complaint: there were no such regulations. Section 57CC of the Act requires

investigations to be conducted in private: this would not prevent an oral hearing which could be heard in private.

The scheme of the Act however does not contemplate a full oral hearing. Section 57CE(1) gives the Ombudsman power to require a Financial Service Provider to provide information orally or in writing. Subsection (4) empowers him to summon an officer, member, agent or employee of the financial service provider to attend before him and to examine him. There are no corresponding powers in relation to a complainant. However under section 57BZ(2) and (3) the Ombudsman may request from the complainant further written particulars of the complaint and if the complainant fails to comply with the request he may decide not to continue to investigate the complaint. Section 57BB of the Act requires the Ombudsman to deal with complaints in an informal and expeditious manner. Assuming, as conceded by the Ombudsman, that there is power to direct an oral hearing then it will be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact. There is here such conflict in relation to the oral advice given by Davy to the Credit Union and also in relation to the expert evidence as to the nature of the Bonds. In *Galvin v Chief Appeals Officer* [1997] 3 I.R. 240 Costello P. held it was not possible on the records available to determine that the applicant's wages for the relevant period exceeded the insurable limit. In the course of his judgment Costello P. said:-

*"There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and*

*the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide in **State (Boyle) .v General Medical Services (Payments) Board** [1981] I.L.R.M. 14 is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined under oath before the appeals officer).*

*I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case."*

In the present case the learned trial judge concluded as follows:-

*"In my judgment it is inescapable that a fair determination of the dispute as to what explanation, if any, was given by J & E Davy to the relevant officers in Enfield Credit Union, requires that there should be an oral hearing limited to those officers of J & E Davy who claim to have given the explanation, and limited to those to whom the explanation was said to have been given.*

*A further dispute has arisen as to whether there shall be an oral hearing and the issue as to whether investment in perpetual bonds is a suitable investment for a Credit Union. People are at liberty to make any investment they wish. Where they retain an adviser, they are entitled to be fairly advised as to the nature of the investment and the risks attendant upon it. As to whether such investment is suitable or unsuitable for a Credit Union, may be regarded as a foundation upon which a decision could be made as to whether a reasonable level of expert advice was proffered by J & E Davy to Enfield Credit Union. The calling of experts on each side is an undesirable feature of a proceeding which is designed by an Act of the Oireachtas to be informal and expeditious. At times, however, it may be inescapable and it seems to me that this may be one of them."*

I agree with those conclusions. Section 57CE(5) of the Act confers on the Ombudsman the powers of a High Court judge when hearing civil proceedings with respect to the examination of witnesses. While the Ombudsman's power to provide for the examination of witnesses was not an issue on this appeal I am satisfied that section 57CE(5) empowers the Ombudsman to proceed by way of examination and cross-examination of witnesses where that is appropriate. The Ombudsman, may of course restrict cross-examination to those issues on which there is a conflict. Central to the Ombudsman's decision was his finding on the expertise of the members of the investment committee of the Credit Union. He formed this finding on the basis of witness statements which were not made available to Davy. Fair procedures required that those officers of the Credit Union to whom Davy gave oral advice should be produced for cross-examination. Likewise in relation to the nature and suitability of

the Bonds, the expert who reported to the Credit Union and whose reports were before the Ombudsman (although not furnished to Davy) should be made available for cross-examination.

A corollary to the foregoing is this. It will be recalled that a request for documents was made by Davy. They were not provided with the documents. In addition documents were appended to the original complaint and to the submission on the report of the Deputy Ombudsman made by the Credit Union which were not made available to Davy. In considering a request for documents the Ombudsman should have regard to their necessity in relation to cross-examination; see *O'Callaghan v Mahon* [2006] 2 I.R. 32.

I would dismiss the appeal on this ground.

### **Reliance by the Ombudsman on his own knowledge and experience of Credit**

#### **Unions**

In the course of the decision the Ombudsman had this to say:-

*"I am also conscious of the great work that the members of Credit Unions, both on the boards and sub-committees, do on a voluntary basis. It is fair comment to say that they give on a voluntary basis of their time to assist members and to run the Credit Unions as they see fit. Of course they have engaged office personnel but many of the major decisions have to be approved by the boards of Credit Unions. In my view, and having dealt with Credit Unions since I became Financial Services Ombudsman on 16<sup>th</sup> May 2005, I am aware that they are ordinary people, intelligent, conscientious and considerate, but generally they are not experts on the finer points of financial investments. Indeed this is borne out by the statements furnished to me in January 2008 by*

*Enfield Credit Union staff members who had their dealings with Davy since 2003."*

To this Davy objects. True the Ombudsman referred to his own experience of credit unions but, most importantly, that experience he held to be borne out by the statements furnished to him by staff members who had dealings with Davy since 2003. Thus I am satisfied that his conclusion in relation to the experience of Credit Union investment committee and board members is one derived from the evidence. Had the statements displayed expertise above and beyond that to be expected from ordinary members of society, thus conflicting with the Ombudsman's experience, there is no reason to think that this would not have been reflected in his decision. For this reason alone I would find against Davy on this ground.

I note that sections 57BI and 57BK, dealing with the appointment of the Ombudsman and a Deputy Ombudsman respectively, provide that the Council shall appoint in each case a suitably qualified person, presumably a person with knowledge and experience of the financial services sector. It must be presumed that in each case in carrying out their functions they will avail of such knowledge and experience and if they do so any decision they reach would not automatically be condemned as a breach of fair procedures. In the present case I am satisfied that there was no breach of fair procedures the Ombudsman having reached his conclusion on the evidence before him.



**Failure to specify the statutory grounds upon which the complaint was substantiated**

Section 57CI(2) provides that a complaint may be found to be substantiated or partly substantiated only on one or more of seven specified grounds:-

- (a) the conduct complained of was contrary to law;
- (b) the conduct complained was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
- (c) although the conduct complained of was in accordance with law or an established practice or regulatory standard, the law or 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) the explanation of the conduct complained was not given when it should have been given;
- (g) the conduct complained of was otherwise improper.

The learned trial judge held that in making an adjudication, having regard to the terms of section 57CL and in providing for a right of appeal to the High Court in the event of dissatisfaction with a finding, the Ombudsman is required to stipulate the part of section 57CI(2) upon which his finding is based.

### Submissions of the Ombudsman

The Ombudsman submits that he did find the complaint to be substantiated on grounds specified in section 57CI(2). In the context of a meticulously detailed final decision, it was not necessary to expressly specify the exact grounds under section 57CI(2) of the Act under which the complaint is found to be substantiated. If the Ombudsman was in error, the error is not such as should vitiate the decision. Reliance is based on the learned trial judge's observation in the course of his judgment that the decision was a careful one, well reasoned and conscientiously arrived at. The learned trial judge had no difficulty in ascertaining the basis upon which the finding was made, namely that the nature of the perpetual bond should have been spelt out in writing in far greater detail, that the maturity date and callable date might have been thought by the Credit Union to have been interchangeable terms, that in referring to the Bond as guaranteeing capital there was a failure to explain that the purchase of the Bonds by the issuer was entirely at its discretion, that the right to call not having been exercised a realistic market for the purchase of the bonds did not exist as of the date of the Decision and finally that the documents failed to contain appropriate warnings.

Reliance is placed on *Faulkner v Minister for Industry and Commerce* [1997] E.L.R. 107 where at p.111 O'Flaherty J. said:-

*"When reasons are required from administrative Tribunals they should be required to give only the broad gist of the basis of the decision. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative Tribunal to minute analysis."*

Reliance is based on the concept of error within jurisdiction.

### Submission of Davy

Davy submits that the learned trial judge was correct. Failure to specify the statutory ground or grounds is an error of law on the face of the record. Section 57C1(3) requires that the reasons for a finding be included. This also requires a reference to the provision of subsection (2) to be stated. The failure to specify the particular ground or grounds is prejudicial in that in exercising the right of appeal the financial service provider will not know which of the statutory grounds was relied on. To the extent that an error within jurisdiction is involved Davy submits that the decision ought to be quashed on the basis that it contains an error on the face of the record: *R. v Northumberland Appeal Compensation Tribunal, ex P. Shaw* [1993] 1 I.R. 500.

### Discussion and decision

Section 57C1(2) sets out seven grounds and a complaint may be found to be substantiated only on one or more of such grounds. Subsection (3) provides that the Ombudsman shall include in a finding reasons for the finding; it does not require in express terms that the ground relied upon by the Ombudsman be set out. The factual reasons for the Decision are clearly set out but they are not related by the Ombudsman to any of the specified permissible grounds. Relating the reasons to the grounds in the present case is difficult. The reasons would not appear to relate to any of the grounds set out in subsection (2) at (a) to (f). That leaves ground (g). The reasons may well have been found by the Ombudsman to justify his finding on ground (g) but this is not stated.

In *McCormack v Garda Síochána Complaints Board* [1997] 2 I.L.R.M. 321

Costello P. said:-

*“Constitutional justice imposed a constitutional duty on a decision-making authority to apply fair procedures in the exercise of his statutory powers and functions. If it could be shown that the duty includes in a particular case the duty to give reasons for its decision then a failure to fulfil this duty may justify the court in quashing the decision as being ultra vires. It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decision. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision, the court will be required to consider (a) the nature of the statutory function which the decision-maker is carrying out (b) the statutory framework in which it is to be found and (c) the possible detriment that the complainant may suffer arising from the failure to state reasons. To give an example of a possible detriment; if a statute permitted an appeal to the court from the decision of a administrative authority on a point of law, the failure to give reasons for the decision may well amount to a breach of a duty to apply fair procedures if it could be shown that their absence rendered ineffectual a statutory right of appeal. There may also be circumstances in which (a) no unfairness arose by a failure to give reasons when the decision was made but (b) the concept of fair procedures might require that reasons should subsequently be given in response to a bona fide request for them. Therefore, in such cases the court would not grant an order of certiorari (because the decision itself was not an ultra vires one) but it would have jurisdiction to grant an order of mandamus directing the decision-*

*making authority to carry out its constitutional duty (which the court had found existed) to provide reasons when asked. Finally there may be circumstances in which the duty to apply fair procedures may not apply to a decision-making authority to state reasons for its decision at the time or after it has made it, but which might oblige the authority to explain to an affected person the material on which the decision was based."*

Costello P. went on to say:-

*"There is no appeal (either on a point of law or on the merits) from the Board's conclusion following its deliberations on the results of the investigation into a complaint made under the Act. The Board's reasons are therefore not required to make effective any statutory right of appeal. What remains to be considered therefore, is whether in this case the failure to state a reason in some way renders ineffectual or otherwise prejudices his right to apply to the court for an order of certiorari or mandamus.*

*It was held in the **International Fishing Vessels Limited v Minister for the Marine** that the refusal to give reasons deprived the applicant in the circumstances of that case of the ability to form a view whether grounds existed on which the Minister's decision might be quashed, that the applicant was therefore placed at a disadvantage and that procedures which produced such a result were constitutionally unfair."*

It is clear that in the present case there was no prejudice to Davy: they were in a position to avail of their right of appeal pursuant to section 57CL of the Act, to

institute plenary proceedings challenging the constitutionality of the Act and to institute the present judicial review proceedings. They did not apply to the Ombudsman in relation to which ground under section 57CI(2) had been relied upon. In the circumstances I am not satisfied that Davy have been prejudiced by the omission in the particular circumstances of the case.

It remains to be considered whether on the true construction of section 57CI there is a mandatory requirement to relate the findings to a particular provision of subsection (2). Subsection (3) requires the reasons to be stated but not a ground. Regard should be had to the requirement for informality. For this reason I am of the view that while it most desirable that the grounds should be stipulated in any decision if the ground is apparent from the reasons and no prejudice is otherwise suffered and particularly where here only one ground is relevant the court has a discretion on a judicial review application. I would exercise that discretion. This being so I would allow the Ombudsman's appeal on this ground.

### **The Costs Order**

The learned trial judge ordered that the Ombudsman pay to Davy five sixths of the costs when taxed and ascertained. The Ombudsman's written submissions do not deal with this ground of appeal and it is not dealt with in the Davy's submissions. No submissions were made in the course of the hearing before this court. The costs order made may be considered in the context of the order which this court will make on this appeal at which time the submissions of the parties will be sought.

### **Miscellaneous**

(1) Acquiescence by Davy in the Procedures

#### Submission of the Ombudsman

The Ombudsman submits that as Davy had been the subject of a number of previous complaints in which the Ombudsman adopted identical procedures they are estopped or have waived the right to object to the same. The learned trial judge rejected this submission.

In relation to the holding of an oral hearing and the furnishing of documents it is submitted that acquiescence in these procedures in relation to previous cases disentitles Davy to relief. Having regard to the decision in *Maguire v Ardagh* [2002] 1 I.R. 385 if objection is taken to the Ombudsman's published procedures an application for judicial review once the procedures were outlined would not be premature. Reliance is also placed in *B v The Fitness to Practice Committee of the Medical Council* [2004] 1 I.R. 103.

#### Submission of Davy

Davy rely on the statement by Phillips J. in *Youell v Blanche Walsh & Co.* [1990] 2 Lloyd's Rep. 431 at 449:-

*"Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representative thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so."*

None of these requirements are satisfied in the present case. The jurisdictional objections raised by Davy were raised after the Deputy Ombudsman's report and prior to the Decision. Davy's submissions to the Ombudsman were made without prejudice to the objections. Having raised the objections there was no obligation to bring judicial review proceedings in the course of the procedures before the Deputy Ombudsman and Ombudsman. Reliance is placed on *The State (Gallagher, Shatter and Company) v de Valera* [1986] I.L.R.M. 3 where McCarthy J. said:-

*"It may be that the prosecutors may have brought an immediate application for an Order of Prohibition and, as I have sought to indicate in this judgment, should have succeed in that application, but it does not appear to me that justice is served by determining a case of this kind against the solicitor because, whilst maintaining his objection, he thought it more practicable to allow the taxation to proceed, in the hope that the result would, in any event be satisfactory. When far from being short of satisfactory, it held him guilty of making a gross overcharge, in my view he is not to be defeated by a plea of waiver."*

#### Discussion and decision

The Ombudsman places reliance upon previous complaints made to and adjudicated upon by the Ombudsman in relation to Davy. In considering the weight to be attached to this the court is disadvantaged it that it has no detailed knowledge of the nature of the proceedings or the likely level of penalty. I have already noted that an adverse finding on a complaint such as the present can have serious adverse effect on the reputation of the financial service provider and, as in the present case, may result in significant financial liability. In these circumstances I do not feel it appropriate to



have regard to the manner in which previous complaints investigated by the Ombudsman were dealt with. In the present case objection was made to the procedures after the Deputy Ombudsman's report and persisted in throughout thereafter. In these circumstances I am satisfied that there was no acquiescence and that estoppel and waiver have no relevance. I would dismiss the Ombudsman's appeal on this ground.

### Miscellaneous

(i) The exercise of discretion on judicial review

I do not consider it necessary to deal separately with this submission. Where I considered it appropriate to exercise a discretion in relation to any of the grounds raised on the appeal or on the notice to vary I have so stated.

(ii) Guidance by the learned trial judge as to appropriate procedures

The learned trial judge suggested procedures which might be adopted by the Ombudsman.

The procedures to be adopted are a matter for the Ombudsman or for regulations to be made by the Council and I would be anxious not to restrict the Ombudsman in the procedures which he adopts he being aware of the necessity to observe fair procedures. I apprehend that every complaint will be different: the issues arising may be simple or complex and may be issues of fact or law. It would be inappropriate to inhibit the Ombudsman from adopting procedures to the circumstances of an individual case and the learned trial judge did not intend to do so. The issues may admit of ready determination on the basis of written submissions. Conflicting evidence of fact however generally does not admit of resolution on written

submissions and will generally require some form of oral hearing appropriate to the issues which arise. The Ombudsman is acutely aware of the requirement to act informally and expeditiously but, of course, this requirement will not justify a denial of fair procedures. It must be remembered that for a complaint to be substantiated may have significant reputational and financial consequences for the financial service provider and indeed, if the complaint is not substantiated, significant financial consequences for the complainant.

In short it was not inappropriate for the learned trial judge to make suggestions as to procedures. The Ombudsman, however, has discretion, subject to the requirements of the Act and the requirements of fairness, to adopt procedures.

1. On the appeal

I would allow the Ombudsman's appeal on the issue of the two stage procedure and the issue concerning his reliance on his knowledge and experience. On the remaining issues raised on the ombudsman's appeal, namely fair procedures, failure to specify statutory grounds and the miscellaneous issues raised by him I would dismiss the appeal.

2. On the notice to vary

On the issue of mediation while Davy succeeded on the legal issue in the exercise of my discretion for the reasons given I would refuse to grant the relief sought. On the issues of absence of regulations and the finding that the Ombudsman carried out his functions with a high level of skill I would dismiss the appeal. (Davy, appeal)

??  
conflict