



THE HIGH COURT

Record No.: 2010/ 262 M.C.A.

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

Between:-

BRIAN MCMANUS

Appellant

-AND-

AIB WEALTH MANAGEMENT

and

THE FINANCIAL SERVICES OMBUDSMAN

Respondents

EX TEMPORE judgment of Mr. Justice Garrett Sheehan delivered on the 28<sup>th</sup> day of  
July, 2011

[1.] Factual background

[1.1] The appellant challenges the decision made by the Financial Services Ombudsman (hereinafter referred to as “the second named respondent”) dated the 24<sup>th</sup> September 2010. This challenge is an appeal against the finding that the appellant’s complaint in respect of AIB Wealth Management (hereinafter referred to as “the first named respondent”) was not substantiated pursuant to s. 57 CI (2) of the Central Bank and Financial Services Authority of

Ireland Act 2004 (hereinafter referred to as “the Act of 2004”). The appellant is challenging the finding on the merits and does not raise any procedural challenge. The appellant’s solicitor asserts that the second named respondent was wrong in concluding that his client understood the nature of the financial instrument he was purchasing for pension purposes and in particular that he did not know that there was a possibility that he could stand to lose the entirety of his investment. It is the appellant’s submission that the second named respondent committed a serious error in so finding and also asserts that his failure to identify the conflict of interest between the financial advisor and the seller of the product contributed to a seriously flawed decision by the second named respondent. The appellant seeks to set aside the decision of the second named respondent in accordance with s. 57 CM (2) (b) and/or an Order remitting the finding to the second named respondent for review with directions in accordance with s. 57 CI (4) of the Central Bank and Financial Services Authority of Ireland Act 2004.

## **[2] Relevant Statutory Provisions**

[2.1] Relevant provisions of the Central Bank and Financial Services Authority of Ireland Act 2004 are set out herein.

[2.2] Section 57 CL (1) provides that:-

*“(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.*

*(2) The Financial Services Ombudsman can be made a party to an appeal under this section.*

*(3) An appeal under this section must be made—*

*(a) within such period and in such manner as is prescribed by rules of court of the High Court, or*

*(b) within such further period as that Court may allow.”*

**[2.3]** Section 57CM provides for the following:-

*“(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.*

*(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:*

*(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;*

*(b) an order setting aside that finding or any direction included in it;*

*(c) an order remitting that finding or any such direction to that Ombudsman for review.*

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

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

### **[3] Relevant Case Law**

[3.1] The test which is to be applied to appeals pursuant to s. 57CL of the Central Bank Act 1942 as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004 was established by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323. and followed by Hedigan J. in *Cagney v. Financial Services Ombudsman* (Unreported, High Court, 25th February, 2011). Hedigan J. sets out a synopsis of the law in relation to challenging the decision of the second named respondent and the test to be applied by the Court in determining whether to intervene in a particular case. This synopsis is as follows:-

*“The law in relation to that has been very well summed up by *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323, judgment of Finnegan P. to summarise the criteria that he set out in that judgment, one may say that, firstly, the burden of proof is on the appellant, secondly, the onus of proof is the civil standard, thirdly, the Court should not consider complaints about process or merits in isolation but rather should consider the adjudicative process as a whole. Fourthly, in the light of those principles the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors. Finally, in applying this test the Court is to adopt what is known as deferential stance and should have regard to the degree of expertise and specialist knowledge of the Ombudsman.”*

#### **[4] Submissions of the appellant**

[4.1] The appellant is a retired businessman. In the course of submissions advanced by Mr. Kennedy, solicitor on behalf of the appellant, it was submitted *inter alia* that (i) the appellant did not understand the nature of the investment which he purchased, and (ii) that there was a conflict of interest in that the seller and the advisor of the investment scheme were essentially one and the same.

[4.2] In relation to (i), it was the appellant's submission that he was an inherently vulnerable person in that he was 60 years old and looking to make an investment which would provide for him during his retirement. In relation to (ii), it was the appellant's submission that the second named respondent failed to take notice of this alleged conflict of interest and as a result was misinformed and, as was stated during oral submissions, "*got a completely wrong steer*" of the matter. The appellant also complained that the second named respondent accepted the statement of an advisor with the first named respondent, Mr. Brendan Muldowney, which indicated his general practice and method in advising clients instead of determining what exactly was said by Mr. Muldowney to him at the meeting in 2005.

**[5] Submissions of the first named respondent**

[5.1] Counsel submitted, *inter alia*, that the risk factors associated with the investment were fully disclosed to the appellant and referred to the Prospectus and the warnings contained therein. It was contended that the appellant received appropriate advice in relation to the investment and was made fully aware that it was a high risk investment.

**[6] Submissions of the second named respondent**

[6.1] Counsel for the second named respondent submitted that the function performed by the second named respondent is different to the function performed by the Courts and noted that s. 57 BB of the Central Bank and Financial Services Authority of Ireland Act 2004 provides that the objects of Part VIIB of the Act include the object "*to enable...complaints to be dealt with in an informal and expeditious manner*". The second named respondent uses criteria that would not normally be used by the Courts to resolve disputes and is also empowered to make orders of a type that a Court would not normally be able to make. It was submitted that the second named respondent possesses a type a supervisory jurisdiction that a Court generally does not. Counsel on behalf of the second named respondent highlighted the effect

of s. 57 BK (4) of the Act of 2004 in that it puts the office of the second named respondent upon a unique statutory footing. The finding of the second named respondent clearly sets out the case made by each party; both by the appellant in the nature of his complaint and the first respondent in their reply to that complaint. The second named respondent explains why the complaint was not in fact substantiated. The finding of the second named respondent is not as detailed or formal as one would expect a Court judgment to be and in this regard counsel relied upon the judgment of Hedigan J. in *Cagney v. Financial Services Ombudsman* (Unreported, High Court, 25<sup>th</sup> February, 2011).

[6.2] It was also submitted that the second named respondent was entitled to take the investment experience of the appellant into account when assessing the manner in which the first named respondent acted. The second named respondent was aware that the appellant had retired from his retail business and also noted that “*the Bank states that his main business thereafter was managing his property portfolio*”. Furthermore, the second named respondent did have regard to, and noted, a letter from the first named respondent in which it said that the appellant had been advised that he was investing too large an amount of his pension in one option.

[6.3] Counsel also submitted that the second named respondent had regard to the fact that the Prospectus for the product set out the risk factors and stated that “*investment in the Commercial Property Market in the UK is speculative and involves a high degree of financial and commercial and other risks*”. The application form contained an express declaration that the appellant had read the Prospectus and application form and was fully aware of the time frame and risk factors and costs entailed in investing in the company.

[6.4] The appellant also complained that the second named respondent accepted Mr. Muldowney’s statement of what his practice is. It was submitted that there is nothing unusual

in this and there is no legal bar to such evidence being considered. The weight which is to be given to such evidence of this nature is, of course, a matter which falls within the discretion of the second named respondent. The meeting took place in 2005 and it was 2009 before a complaint was made to the second named respondent and subsequent to that the responses from the appellant and the first named respondent followed.

### [7] Decision

[7.1] This Court adopts the well established test enunciated by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323 as subsequently endorsed by Hedigan J. in *Cagney v. Financial Services Ombudsman* (Unreported, High Court, 25<sup>th</sup> February, 2011).

[7.2] In determining the matter before this Court, it is abundantly clear that the function of this Court is to decide whether the decision of the second named respondent was vitiated by a serious error or a series of such errors. This Court must, on the basis of the written and oral submissions put before the Court, conclude that the plaintiff has not established as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. This Court is also cognisant of the deferential standard to be applied in such matters as has been consistently reiterated throughout the jurisprudence on this matter; *Orange v. The Director of Telecommunications Regulation & Anor.* [1999] I.E.H.C. 254 and *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 relied upon in this regard.

[7.3] It is this Court's view that the second named respondent was entitled to conclude as he did on the basis of the correspondence provided by the first named respondent and the appellant. Notwithstanding the appellant's contention that he did not understand the nature of

the investment which he purchased, the documentary evidence provided to this Court discloses that he was a discerning investor.

[7.4] Without ruling on the admissibility of Mr. Kennedy's submission regarding the alleged conflict of interest, it seems to me in the first instance that the second named respondent can not be deemed to have made a significant error for not taking on board some matter he was not asked to address. It is also important to note that the Prospectus was considered by the second named respondent and the appellant in his signed application form acknowledged that he had read the Prospectus. The Prospectus disclosed the roles of the parties involved and that Goodbody Stockbrokers was a subsidiary of A.I.B. It is also relevant to note that no reference was made to this alleged conflict of interest by the appellant in either his grounding affidavit or supplemental affidavit filed in these proceedings. Accordingly, I reject this submission.

[7.5] This Court is required to consider the adjudicative process adopted by the second named respondent as a whole to see if the decision made was vitiated by a serious and significant error. This Court concludes that there is no sufficient basis made out by the appellant which would merit intervention by this Court in respect of the decision made.

*approved*  
*Janett Meekins*  
*16/1/2012*