

THE HIGH COURT

COMMERCIAL

[2008 No. 140 J.R.]

BETWEEN

J. AND E. DAVY TRADING AS DAVY

APPLICANT

AND

FINANCIAL SERVICES OMBUDSMAN, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ENFIELD CREDIT UNION

NOTICE PARTY

[2008 No. 17 MCA]

AND

**IN THE MATTER OF AN APPEAL PURSUANT TO 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

J. AND E. DAVY TRADING AS DAVY

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ENFIELD CREDIT UNION

NOTICE PARTY

Judgment of Mr. Justice Kelly delivered the 13th day of March, 2008

There are two separate pieces of litigation before the court. They both arise out of a final decision of the Financial Services Ombudsman (the Ombudsman) made on the 21st January, 2008. That decision was in respect of a complaint to the Ombudsman from Enfield Credit Union (Enfield) in respect of three perpetual bank bonds sold to Enfield by the Appellant (Davy).

Enfield's complaint alleged, *inter alia*, that Davy had breached its duty of care to Enfield by, *inter alia*, failing to make clear that the bonds did not have a fixed maturity date which was alleged to be fundamental to the manner in which Enfield administered its investment portfolio. The complaint also alleged that Davy failed to explain in an adequate way the features of the proposed investment structures and factors likely to influence the market value of the bonds throughout their lifetime.

Enfield's complaint was upheld by the Ombudsman. Davy was directed to pay Enfield the sum of €500,000 in exchange for the bonds sold and to refund all fees and commissions paid in relation to the purchase of the bonds. Davy was directed to complete those transactions on or before the 22nd February, 2008 subject of course, to its statutory entitlement to appeal to this court.

That appeal is one of the two pieces of litigation before me at present.

The other is an application by Davy for judicial review in respect of the Ombudsman's decision. Leave to apply for judicial review was granted ex-parte by O'Neill J. on 8th February, 2008.

On the application of the Ombudsman I transferred both pieces of litigation to the Commercial List by orders which I made on 3rd March, 2008.

A dispute arose between the parties as to the order in which this litigation ought to be dealt with by the court. The matter was stood over until Friday the 7th March, 2008 to enable instructions to be taken and full argument to be made on the topic. This is my judgment on that issue.

There is one matter in respect of which there was agreement. It relates to that part of Davy's judicial review application which seeks to have certain provisions of the Central Bank Act, 1942 as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004 (the Act) declared to be contrary to the provisions of the Constitution. It was because of this claim that it was necessary to join Ireland and the Attorney General as co-respondents with the Ombudsman in the judicial review proceedings. All parties agree that that claim should not be adjudicated upon until such time as the judicial review application on conventional grounds against the Ombudsman and the appeal under s. 57 CL of the Act are disposed of. Only in the event of Davy being

unsuccessful in respect of those two matters will the question of the constitutional validity of the legislation fall to be decided.

Davy wish to have the judicial review application heard first while the Ombudsman wishes to have the merits of the matter adjudicated upon by the court. Whether that is done by hearing the appeal under the Act first or concurrently with the judicial review application is left to the discretion of the court. The principal argument for having the merits addressed in this fashion was based on provisions of the Act which it was said require the Ombudsman to adopt a 'merit based' approach.

The thrust of Davy's case on judicial review is that there was no legally valid decision made by the Ombudsman. It follows logically that if that be correct then there is no decision from which an appeal can be brought under s. 57 CL of the Act. That being so there is little point in my view in proceeding to entertain the appeal on the merits until such time as the validity of the decision appealed from has been adjudicated upon. In logic, therefore, the judicial review application should proceed first. Only in the event of the court deciding that the Ombudsman's decision is not legally flawed should it proceed to consider an appeal on the merits.

I am satisfied that such a course it is not merely recommended by logic but also supported by considerations of cost and time.

The judicial review application will be heard on affidavit, will not involve discovery being made and will be heard over a period of a few days. The appeal on the merits on the other hand is, I am told, likely to take of the order of two weeks to be heard, will involve an application for discovery and is likely to require *viva voce* evidence to be given. It would make little sense to embark upon that procedure either prior to or concurrently with the judicial review application if it should transpire that Davys are correct and that the decision of the Ombudsman is invalid.

Whilst I appreciate the desire of the Ombudsman and indeed Enfield to have the court embark upon a consideration of the merits of the case against Davys, such a course could not be justified having regard to the additional cost and expense and public time that would be involved in such an exercise which might ultimately prove to be otiose.

If Davy succeed in their judicial review application then the decision of the Ombudsman will be set aside and the court will have to consider remittal of the matter back for consideration in accordance with the law as determined by the court. If Davys are not successful then the court will proceed to hear their appeal on the merits. In either event the merits of the case will not be lost sight of, albeit that their consideration will have to be deferred for a relatively short period of time. I say that because as the judicial review is now being dealt with in the Commercial

List it will be possible to have a hearing of the application in a matter of weeks.

I therefore adjudge that the judicial review application should proceed to be heard first and I will give appropriate directions to achieve an early hearing of that matter.

Approved

Peter Kelly

18. iii. 2008