

THE HIGH COURT

[2010 No.193 MCA]

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) AND IN THE MATTER OF
AN APPEAL FROM A FINDING OF THE FINANCIAL SERVICES
OMBUDSMAN

BETWEEN

PAUL AND MARY CLARK

APPELLANTS

V.

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ULSTER BANK LIMITED

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 20th day of July 2011

1. The appellants reside at the Old Post Office Farran, Co Cork. On the 14th January, 2010, the appellants made a complaint to the respondent concerning the notice party. The respondent is a statutory officer who deals independently with complaints from consumers about their individual dealings with all financial services providers. The notice party is a bank whose registered office is located at 11-16 Donegal Square East, Belfast

BT1 SUB.

2. The appellant seeks to appeal from a decision of the Ombudsman dated 11 January, 2011, in which the Ombudsman dismissed the appellant's claim that Ulster Bank failed in its duty of care towards them.

3.1 The appellants obtained a mortgage from Ulster Bank on the 26th January, 2000, which was used to refinance an existing mortgage with AIB previously registered on the title. On foot of this mortgage the appellant's solicitors Plunkett Taaffe & Co. provided an undertaking to Ulster Bank that they would register the banks mortgage over the property and as soon as practicable thereafter lodge the title deeds with the bank. In accordance with this undertaking Plunkett Taaffe & Co sent title deeds to the bank. The bank returned these on the 12th April, 2001, as a photocopy and not the original mortgage deed was forwarded to the bank. On a second occasion Plunkett Taaffe & Co sent the title deeds to the bank however the bank returned these on the 2nd May 2001, as the previous charge in favour of AIB had not been cancelled from the folio. On a third occasion Plunkett Taaffe & Co sent in the title deeds which the bank returned on the 6th November, 2001, as only three pages of the mortgage deeds were received. On a fourth occasion Plunkett Taaffe & Co sent in a further version of the mortgage deeds these were returned on the 6th March, 2002, as incomplete. From March 2002 onwards the bank sent reminders every six months to Plunkett Taaffe & Co to send in the title deeds.

3.2 Approximately seven years later the appellants decided to sell the property and in August, 2009 a prospective purchaser for the property was obtained. On the 24th August, 2009, Donal T. Ryan Solicitors acting for the purchaser wrote to the appellant's new solicitors Colm Burke & Co stating that they were awaiting contracts and title deeds. On the 27th August, 2009, the appellants asked the bank to release the title deeds to their solicitors. On 8th September, 2009 the bank wrote to the appellant's solicitors to say that according to their records Plunkett Taaffe & Co had the deeds. On the 9th September, 2009 the bank wrote to the appellants explaining that "...every six months since the beginning of the loan term we have sent out automatic tracking letters asking for the title deeds however we never received the deeds from them." On the 9th September, 2009, the bank wrote to Colm Burke Solicitors asking them to reconstitute the title deeds. On this date the bank also wrote to Plunkett Taaffe & Co asking them for the deeds. On the 9th September, 2009, Plunkett Taaffe & Co wrote to Colm Burke stating that on the appellant's instructions the file had been sent to Murphy & Long Solicitors and that Mary Clark had collected the entire file from Murphy & Long. Plunkett Taaffe & Co Solicitors and Murphy & Long Solicitors subsequently merged.

3.3 On the 10th September, 2009, Colm Burke & Co wrote to the appellants stating that Plunkett Taaffe & Co had informed them that they had forwarded their title deeds to Murphy Long Solicitors and that they had on file a signed receipt from Mary Clark confirming receipt of the entire file. On the 16th November, 2009, the Bank told the appellants that it had appointed their solicitors Colm Burke & Co to reconstitute the deeds. On the 30th November, 2009, the solicitor for the purchasers Donal T. Ryan noted

the planning issues and also expressed concern that the title deeds were not available. On the 21st December, 2009, Batt O'Keefe TD wrote to the appellants to say that he had been trying to secure a change of use exemption for them. On the 8th January, 2010, Donal T. Ryan Solicitors wrote to the appellant's solicitor stating "We refer to previous correspondence with regard to the above. We have spoken to our client about the contents of your letter of the 7th January, 2010, and notwithstanding same our client has decided that she no longer wishes to proceed with the purchase of the above property."

3.4 On the 14th January, 2010, the appellants made a complaint to the Ombudsman that Ulster Bank were negligent in not notifying them that they had a problem getting their title deeds. The appellants also complained to the Law Society that their solicitors had never sent the title deed's to the bank. The Law Society advised the appellants by letter dated the 16th February, 2010 that "as the service was provided more than five years ago you will note from the society's leaflet that the society can only investigate a complaint of a provision of inadequate professional service where that service was provided within five years of making the complaint." The appellants believe that it was the problems with the title deeds which caused the purchaser to withdraw from the sale. The appellants complain that they were precluded from obtaining any redress from the Law Society due to the negligence of the bank in not notifying the appellant that there was a problem with Plunkett Taaffe & Co. not lodging the deeds.

Appellants Submissions

4.1 The appellant seeks to challenge the decision of the Financial Services Ombudsman of the 11th January, 2011, on a number of grounds. In page 6 of his finding the Ombudsman states “I do not believe that the complainants can show any loss in this matter.” The appellants complain that they furnished the Ombudsman with fully detailed financial losses with vouching receipts showing the payment of €9,341.49 in expenses with a further €5,309.50 outstanding that the appellants are unable to discharge. The appellants further submit that their property has depreciated by approximately €100,000.00 since the sale fell through. The Ombudsman went on to state at page 6 “there was no complete contract in respect of the sale of the property.” The appellants submit that the bank was advised that a sale had been agreed and was to be concluded in September 2009, however completion was not possible due to the lack of title deeds.

4.2 At page 5 of the Ombudsman’s finding it is stated that the bank decided as a good will gesture to pay all costs incurred in reconstituting the title deeds. The appellants complain that in fact they themselves paid Colm Burke Solicitors the full costs of all work done by them in reconstituting the deeds and have receipts, which prove this fact. They appellants state that they have received no payment for the reconstituting of the title deeds from the bank. At page seven of his finding the Ombudsman states that “It seems to me from the evidence provided to this office that the deeds were reconstituted in November 2009.” The appellants are at a loss to understand this statement as at page 3 of his finding the Ombudsman quotes from a letter from Donal T Ryan Solicitors of the 30th

of November, 2009, stating “it is quite serious that we are only now being made aware that the title deeds are not available.” If these title deeds were fully reconstituted by Colm Burke Solicitors in November 2009, why were the purchaser’s solicitors made aware of the missing deeds at the end of November 2009? The Ombudsman is in possession of a letter from First Active PLC dated 22nd December, 2009 which states “Our securities department have confirmed that they have been in contact with your solicitor Colm Burke who is arranging the replacement of your title deeds for your convenience.” Why would the bank be notifying the appellant that the deeds were still being arranged to be replaced when the Ombudsman states the deeds were reconstituted in November? The sale fell through on 8th January, 2010. The appellant argues that this was because of a lack of title documents. The replacement documents were still not completed three months later as evidenced from a letter from the bank dated the 9th March, 2010, stating “we can confirm that your title deeds are being reconstituted and you will be contacted in due course.”

4.3 The main focus of the appellant’s complaint to the Ombudsman is that the bank never notified the appellant’s that Plunkett Taaffe & Co Solicitors had not lodged the title deeds with the bank. The appellant’s argue that they, as consumers, engaged Plunkett Taaffe & Co Solicitors to provide them with a professional service. The appellants were unaware that the title deeds were not lodged with the bank. The bank was aware that there was a problem with Plunkett Taaffe & Co Solicitors but did not inform the appellants who were their customers. This failure prevented the appellants pursuing their solicitors through the Law Society as the Law Society will not hear complaints that are

more than five years old. The Bank withheld this information for a period of nearly ten years.

4.4 The appellants complain that the negligence of the bank was not addressed in the Ombudsman's finding. At page six of his finding the Ombudsman states "The Complainant's believe that the bank were negligent and in breach of their duty in failing to advise them that the title deeds had not been sent to the bank by the Complainants solicitors, Plunkett Taaffe & Company." The Ombudsman then goes on to decide there was a failure to show loss however he failed to engage with the issue of negligence in his finding. The appellants argue that if they had been aware of the problem they could have had the title deeds reconstituted before they put their house on the market. For all these reasons the appellants wish to appeal the decision of the Ombudsman.

Respondents Submissions

5.1 The appellants challenge the finding made by the Ombudsman dated 11 January, 2011, in which their complaint against the notice party Ulster Bank was not upheld. In essence the appeal amounts to a challenge to the merits of the finding that was made. In *Ulster Bank v Financial Services Ombudsman & Ors* [2006] IEHC 323 Finnegan P (as he then was) stated:-

"To succeed on this appeal the Plaintiff must establish 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."

The test requires the Court to take the adjudicative process as a whole to see if the decision made was vitiated by a serious and significant error or a series of such errors. It is submitted that when one considers the present case as a whole there is no sufficient basis made out for this Court to intervene in respect of the decision made.

5.2 The respondent submits that as Ulster Bank did not hold the title deeds in question it cannot be criticised for having lost or mislaid them. Ulster Bank sought the deeds from the appellant's solicitors at regular intervals but were not furnished with them. Upon learning of the problem Ulster Bank went above and beyond their obligations by arranging to have the deeds reconstituted at its expense as a goodwill gesture. Thus the only complaint that the appellants could ever have had against Ulster Bank was in relation to the fact that Ulster Bank did not directly communicate to them the fact that it had not received the deeds from Plunkett Taaffe & Co.

5.3 The respondent argues that it is unclear on what basis it could be said that the Bank must have assumed that Plunkett Taaffe & Co were not communicating with their own clients. Therefore it is unclear on what basis it can be said that the bank should have taken on the responsibility for communicating the situation to the appellants itself. That would seem to be a significant extension of the duty of care that a bank owes its customers. In the normal course of events one would expect to be able to rely on the fact that a firm of solicitors is communicating with its clients. In so far as it may be suggested that the firm was not properly communicating with its clients it is hard to see how that issue can be laid at the door of the bank especially in circumstances where there is

nothing to suggest that the bank was aware of this. Equally any suggestion that the bank owed a duty to the appellants to make a complaint to the Law Society about their solicitors would amount to a significant extension of the duty of care and would raise obvious public policy issues. In any event, as the bank pointed out, because it had the benefit of the solicitors undertaking at all times, its position was secure and so the solicitors could hold onto the title deeds until whenever they felt that all of the documents were ready. In the meantime the bank would issue automatic six-monthly reminders.

5.5 Aside from the absence of a duty of care it is also far from clear that the failure to reconstitute the title in time was the reason why the intended purchasers pulled out of the sale. The letter of 8th January, 2010, from the purchaser's solicitor does not say that the reason that his clients are not proceeding with the purchase is because of the delay in dealing with the title deeds issue. There was a planning issue with the property (which in its submission to the Ombudsman the bank suggested the appellants must have become aware of in 1999/2000 when they purchased the property). Moreover the bank said that, as far as it knew, the planning issue was resolved the day before the purchasers pulled out of the sale. There are all sorts of reasons why purchasers might decide not to proceed with a sale. It remains unclear as to where the title deeds were at the relevant time. As the bank has pointed out, the correspondence seems to suggest that the deeds had been passed on to a new set of solicitor's and/or were given to the appellants. The location of the deeds is a matter that only the various firms of solicitors would be able to resolve. This is not a matter for which the bank can be held responsible. The respondent submits

that the appellants have failed to show that taking the adjudicative process as a whole, the finding was vitiated by a serious and significant error or a series of such errors.

Decision of the Court

6.1 This case concerns an appeal from a decision of the Ombudsman dated 11 January, 2011, to dismiss the appellant's claim that Ulster Bank failed in its duty towards them. The appellants obtained a mortgage from Ulster Bank in January 2000 in order to refinance an existing mortgage over their property at Farran Co. Cork. In 2009 the appellants decided to sell that property and they secured a buyer for it in August, 2009. When the appellants were at the stage of issuing contracts they requested the title deeds from Ulster Bank. The bank advised that they had never received the title deeds from the appellant's then solicitors Plunkett Taaffe & Co. The purchasers withdrew from the sale on the 8th January, 2010, and the appellants claim that it was the issues surrounding the title deeds that caused the purchaser to withdraw from the sale. The appellants argue that the bank was negligent in that it wrote to Plunkett Taaffe & Co Solicitors, every six months seeking the title deeds to satisfy the undertaking given by them. The bank however never informed the appellants directly that their solicitors had failed to provide deeds to the bank so that they could have taken steps to either have the deed's reconstituted at that stage or seek recourse from the Law Society against their solicitor. Such recourse became impossible as the complaint was more than five years old.

6.2 Section 57 BB of the Central Bank Act 1942 (as amended by the Central Bank and Financial Services Authority of Ireland Act 2004) provides that one of the functions of

the Ombudsman is “to enable... complaints to be dealt with in an informal and expeditious manner”. Once his investigation is complete the Ombudsman makes a finding that the complaint is either substantiated not substantiated or partly substantiated. A complaint may be found to be substantiated where the conduct complained of was, *inter alia*, not in accordance with law or an established regulatory practice or was unjust, oppressive or improper. Under section 57 CL of the Act a right of appeal to the High Court is given either to the complainant or the regulated service provider. The nature of such an appeal was addressed in *Orange v The Director of Telecommunications Regulation & Anor*, [2000] 4 IR 159 where Keane CJ stated at p 184:-

“ In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed culminating, it may be, in the substitution by the High Court of its adjudication for that of the first Defendant. It is accepted at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first Defendant was being challenged by way of judicial review... an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole the decision reached is vitiated by a serious and significant error or a series of such errors.”

It is clear therefore that in order for the appellants to succeed in this appeal they must establish that the Ombudsman’s decision was vitiated by a significant error or series of such errors.

6.3 The issue for the Ombudsman to determine was whether on the basis of the evidence in front of him he could conclude that the bank had fallen below the standard of care required. It is well established that banks owe a duty of care to customers in certain circumstances. In *ACC Bank PLC -v- Fairlee Properties Ltd & Ors* [2009] IEHC 45 Finlay Geoghegan J. found that the ACC Bank owed a duty of care to the defendants to take care with the custody of deposited title deeds and in particular to file and store the deposited title deeds. It was held that the bank had breached this duty by losing title deeds to certain properties and the plaintiff was awarded damages due to the losses suffered because of the bank's negligence. It is not difficult to see how a bank could be said to have fallen below the standard of care required in circumstances where it loses deeds, however those are not the circumstances which existed in this case.

6.4 In this case the appellant's complaint is that the bank did not communicate to them directly the fact that it was seeking the deeds from their solicitors Plunkett Taaffe & Co. The bank was not on notice that the appellants solicitors were not communicating with them. In the normal course of events a firm of solicitors will communicate with their clients. Had there been a departure from the normal course of events such as the solicitors engaging in some sort of egregious behaviour then it could be argued that the bank would be put on notice that there was a problem. However nothing like that occurred in this case. Plunkett Taaffe & Co sent the title deeds to the bank on four occasions however the bank returned the deeds on the 12 April 2001, on the 2nd May 2001, on the 6th November 2001, and again on the 6th March 2002, due to various discrepancies with them.

Thereafter the bank sent reminders every six months to Plunkett Taaffe & Co to send in

the title deeds. Banks are entitled to ensure that everything is exactly as it should be with regard to the title deeds. If this takes time they are secured in the interim by the solicitors undertaking. Plunkett Taaffe & Co were the solicitors that the appellants engaged. It seems to me that except in the most unusual of circumstances such as egregious behaviour on the part of the solicitors, it would not be appropriate to hold that the bank had a duty to go behind the solicitor client relationship and communicate directly with the clients. To hold otherwise would be to significantly extend the duty of care that a bank owes its customers and to interfere with a strictly confidential relationship.

6.5 The Ombudsman considered whether the appellant's suffered any loss. He found that there was no completed contract in respect of the property and therefore there was no loss suffered. From the correspondence it seemed that the issue of concern to the purchasers at the time was whether the property had proper planning permission. The land in question was registered land therefore title deeds should not have been an issue at contract stage, this is clear from the Law Society of Ireland Conveyancing Manual which states at 34:-

“In terms of the documentation that should be produced at the initial stage of the transaction, i.e. when contracts are being prepared and issued, the recommended practice of the Conveyancing Committee of the Law Society is that the only documents at that stage that should be produced are the root of title, any document from which title is being deduced, any document referred to in the special conditions and planning documentation, if there are no documents referred to in the special conditions which are required to be produced, then the only documents that

should be listed and produced at the contract stage are the root of title, the document from which title is being deduced and the planning documentation. In the case of a registered title a copy of the folio with the map or file plan is the relevant document. It is only after contracts have been signed and exchanged and become binding that the balance of title is furnished.”

Given the recommended practice of the Conveyancing Committee of the Law Society as outlined above it was difficult to see why an issue arose as to the original deeds at that stage.

6.6 The appellant had sought to rely on the letter from the prospective purchasers solicitors of the 30th November, 2009 in arguing that it was due to the lack of title documents that the sale fell through. In that letter from Donal T Ryan Solicitors it is stated that:-

“What we are more worried about is that it is only now coming to light that your clients title deeds are in fact not available. Despite the fact that it appears to be First Active who have mislaid the title deeds it is quite serious that we are only now made aware that the original title deeds are not available. We understand from our conversation with your John Coughlan, that it is the original planning documentation and requisitions on title that cannot be located and it is noted that there is no land certificate issued.”

Thus while the prospective purchaser expressed concern regarding the title on the 30th November, 2009, it was not however until the 8th January 2010, that the sale fell through.

It is by no means clear from the correspondence of the latter date that the reason for the

sale falling through was due to any problems with the title deeds. In the letter from Donal T Ryan Solicitors of the 8th January, 2010, it's stated that:-

“We have spoken to our clients about the contents of your letter of the 7th January and notwithstanding same our client has decided that she no longer wishes to proceed with the purchase of the above property”.

The Ombudsman sought to ascertain the reason why the sale fell through and on the 18th August, 2010 the Ombudsman wrote to the appellants asking them to furnish a letter from their solicitor setting out the reasons why the sale of the property fell through in January 2010. No such letter was ever furnished. Also while the letter from the purchaser's solicitor dated the 8th January, 2010, refers to a letter from the appellants solicitors dated the 7th January, 2010, that letter has not been produced. It seems to me that the Ombudsman was entitled to conclude that there was insufficient documentary evidence to prove that the sale fell through due to the problems with the title deeds. The correspondence indicates that it could equally have been the case that the sale fell through due to planning issues. In truth there are all sorts of reasons why purchasers might decide not to proceed with a sale. I am not satisfied that the appellants have demonstrated that it was the failure to reconstitute the title deeds in time that was the reason why the purchasers pulled out. That being so no loss attributable to Ulster Bank has been established. That finding was open to the Ombudsman on the evidence before him. No error is to be found in the way the Ombudsman resolved this complaint. Thus I am not satisfied that the appellants have discharged the duty on them to show that the Ombudsman's decision was vitiated by a serious error or a series of such errors.

Therefore pursuant to section 57 CL (2) I will make an order affirming the finding of the Financial Services Ombudsman without modification.