THE HIGH COURT

[2010 No. 256 MCA]

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

BETWEEN

THOMAS RYAN AND CLAIRE RYAN

APPELLANTS

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

IRISH LIFE AND PERMANENT PLC

(TRADING AS PERMANENT TSB)

NOTICE PARTY

JUDGMENT of Mr. Justice John MacMenamin delivered on the 23rd day of September, 2011

1. By notice of motion dated 6th September, 2010, the appellants herein sought an order setting aside the finding of the respondent ("the Ombudsman") dated 17th August, 2010, wherein he found that their complaint against the notice party ("PTSB" or "the Bank") was not substantiated under s. 57CI(2) of the Central Bank and Financial Services Authority of Ireland Act 2004. The central questions which arise in this case relate to the

power of the Ombudsman to order disclosure of relevant documentary material and the duties of financial service providers to provide such relevant documentation.

2. This judgment considers:-

(i) the facts and legal issues arising;

(ii) the question of admitting new evidence which came to light subsequent to the Ombudsman's finding;

(iii) the jurisdiction of a court to admit new evidence in the circumstances of an appeal from the Ombudsman's finding;

(iv) the remit of this Court in considering an appeal from the Ombudsman;

(v) the duties of parties in making disclosure of documents; and

(vi) if as a result of breach of statutory procedure, the decision was vitiated by error, what are the consequences?.

(I) The facts and legal issues arising

3. The appellants held a number of mortgage accounts with the PTSB. They say that up to 7th December, 2006, these were operating on an interest only tracker rate, varying in margins from 1.1% to 1.5% above ECB. On that date, in normal course, the mortgages were transferred to a three year fixed interest rate of 4.79% to run until 7th December, 2009. The combined value of the mortgages totalled in excess of €1m. The accounts concerned the appellants' family home in Wexford and a Dublin property.

4. In early January, 2009, the appellants were minded to inquire about whether they could "break out" of these fixed rate terms. They had heard media commentary that it might be of financial benefit to them in the then prevailing economic circumstances. The appellants had previously obtained the advice of mortgage brokers for their original

transactions with the PTSB. They did not seek advice on this new proposal. Nonetheless, on 13th January, 2009, a Saturday, the first named appellant (Mr. Ryan) personally contacted an "Open 24 customer information line", a telephone service operated by PTSB.

The central issue: the various contacts between the appellants and the Bank

5. While taking the matter somewhat out of sequence, it will be helpful to identify the core issue in the case. In its letter to the Financial Services Ombudsman dated 28th May, 2010, PTSB set out its account of what happened in the January 13th phone call.

6. Clearly, what transpired between Mr. Ryan and the Bank was relevant information. The matter was referred to the Ombudsman as will be seen. What had occurred was material to the decision making process on which the Ombudsman embarked. But neither the appellants nor their solicitor were made aware during the Ombudsman's procedure that the telephone call had been recorded by the PTSB. The recording formed the basis of the letter of 28th May, 2010 and other earlier letters. The Ombudsman was not made aware of this fact either, and proceeded only on the basis of written documentation provided to him by the parties. The fact that the conversation had been tape recorded emerged only after the Ombudsman had made his finding, but prior to this appeal being heard. The appellants' case is that a consideration of this recording, in its totality, puts a different complexion on what transpired between Mr. Ryan and the Bank, so that the decision, now appealed, was vitiated by error. Their case is that the mortgages in question provided for an election by the customer as to the subsequent type of mortgage rates that could apply, and, that in default of their making a choice, they would revert to the tracker rate previously applicable. The Bank strongly disputes this,

says that the appellants are entirely wrong in their contention, and that the fact is demonstrated by the explicit terms and conditions binding the parties.

The appellants' case

7. To summarise, the appellants' case was that, during the telephone conversation, Mr. Ryan believed that he secured a cheaper interest rate in respect of the mortgages, and that this cheaper, applicable rate (Loan To Value, or LTV) would apply until December, 2009, when it would be up for renegotiation, in accordance with the original mortgage agreements. PTSB contend that the telephone call, and a subsequent confirming fax sent by Mr. Ryan, had the result that the customers had broken the fixed rate agreement at their own request, and replaced it with an LTV *variable* rate which was not limited for a period of time, but rather would run for the balance of the mortgage terms.

8. In September, 2009, Mr. Ryan contacted the Bank to confirm with them that the mortgages would revert back to a tracker mortgage rate on 7th December, 2009. He was informed that this was not possible because of the decision which he and his wife had made in the previous January. Correspondence followed, leading to the matter being referred to the Ombudsman.

The chronology of the dispute

9. It is now necessary to describe the relevant events in more detail.

10. I preface what follows with some observations which should be self evident. First, negotiations which take place in relation to mortgage conditions are important to both parties. It is essential that there should be clarity, and that both parties should understand precisely what is being negotiated, and agreed. Borrowers must be clear what

they are seeking, wish to obtain and have obtained. Lenders have duties to borrowers. One of those is to explain, in clear terms, what the result of a re-negotiation will be.

11. After the phone call, Mr. Ryan sent a fax to the PTSB. He wrote:-

> "Having spoken with Eimear from PSTB today, this is confirmation of our wish for immediate switch on all the above (mortgages) to your LTV variable rate (currently 4.65%). As agreed there is no penalty for this...." (I have inserted the word mortgages for ease of understanding).

It is clear from the fax that the appellants thought that they would effect some saving in their monthly mortgage fee payments. They say they understood that the arrangement would be again reviewed on 7th December, 2009.

12. The initial effect of this call, was in fact a drop in the interest rates referable from 4.79% fixed to 4.15% variable. The appellants could have had no initial complaint. They may well have felt affirmed in the rightness of their move. But they contend that at no stage had they been told either orally or in writing that one implication of their move would be that a reversion to the tracker rate would no longer be available to them at any time in the future. Mr. Ryan says that on 3rd September, 2009, he contacted PTSB and requested that the mortgages revert back to the tracker rate in the following December, in accordance with what he and his wife understood to be the terms and conditions of the mortgage. He was informed that they would not be able to revert to a tracker rate because of their move to the LTV variable rate in January, 2009. They were told that the choice of reverting to the tracker rate no longer applied. The appellants say they understood that the LTV variable rate was only temporary. They say that they were led to this belief by the phone call. Their contention is that that they only found out what

was the Bank's position on 3rd September, 2009, when an official said that they had no choice of reverting to the tracker rate. The correspondence which followed illustrates, if such illustration were needed, the extent to which there should be absolute clarity between borrowers and lenders regarding the terms and conditions negotiated, or any re-negotiated. It may be thought this applies, *a fortiori* in relation to any steps taken without professional advice on foot of information obtained from a phone information line.

13. The fact that such confusion can arise is easily illustrated. In writing a response to the Ryans in early September, 2009, the Bank itself made a mistake. On 7th September, 2009, it wrote indicating that the option which the appellants were seeking was not available to them and referring them, to a "Condition H" of their loan approval. This Condition stated:-

> "H. 'Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform Permanent TSB, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter."

14. This letter from the PTSB added:-

> "As this condition states you must contact us to inform us you wish to revert back to a tracker before or on the fixed rate expiry date. I refer to your letter dated 13th January, 2009, where it clearly states you wish to avail of a variable rate and we

in turn arrange this and issued a letter of confirmation when this was done. So under the conditions of the original loan offer we will be unable to amend your loan back to a tracker rate."

15. But very soon afterwards the Bank said the reference to "Condition H" was not correct. In fact, it had intended to rely on a different condition, that is to say a "General Mortgage Loan Approval Condition 5". The Bank wrote to correct itself in a letter dated 10th September, 2009, to the following effect:-

> "General Mortgage Loan Approval Condition 5 Conditions Relating To Fixed Rate Loans applies in this case. The interest rate specified above may vary before the date of issue of the loan. *On expiry of the fixed rate period*, and where the *applicant chooses the option of a tracker mortgage interest rate*, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixe (*sic*) rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as may be varied in accordance with variations to the European Central Bank refinancing rate." (Emphasis added).

16. The reference to the *expiry* of the fixed rate period was essential to the Bank's case. PTSB sought to explain that *in the absence of instructions*, the loan would revert to the tracker rate applicable, but this was on *expiry* of the fixed rate. It contended that the term had not "*expired*", but rather the appellants had opted to "break out of it". It said that in the appellants' letter of 13th January, 2009, they had stated that they wished to

convert all their loans to the variable rate, and this had been done. But it claimed as this was a *breaking* of the fixed rate agreement, as opposed to an expiry, the tracker rate was not applicable to what was now a variable rate loan.

17. The appellant retained solicitors. On 10th September, 2009, Messrs. McEntee Solicitors wrote seeking confirmation that the tracker rate option would be available at the end of the fixed rate term. PTSB again rejected this proposition in a letter of the following day.

18. On 21st September, 2009, the appellants' solicitors responded making the following points:-

(a) That general mortgage condition 5 provided that the tracker rate would apply on the expiry of the fixed rate period. It indicated the situation which would exist in the absence of instructions on the expiry of such a period.

(b) That the switch made in January, 2009, was temporary in nature, and on the assumption it would allow to revert the appellants to their "usual terms" on expiry of what was the fixed rate period.

(c) That PTSB had failed to advise the Ryans that making this switch would constitute either an entirely new loan offer, or an amendment to the existing offer, and without advising them to seek advice, or providing them with a new letter of offer to sign.

(d) That, even if the appellants had "accelerated" the expiry of the fixed rate period, it had been clear that offering a variable rate was in breach of the terms of their loan. At that point, it had been clearly incumbent on PTSB

to advise the Ryans as to the new terms and conditions which would apply. The only point at which the mortgages could revert to variable rate was in accordance with Condition H which clearly did not apply.

19. On 14th September, 2009, Mr. Ryan again personally outlined his complaints in a fax to the customer relations department of PTSB. He made the following points:-

(i) That in January, 2009, he listened to a public representative, who was very experienced in financial matters, informing the public that PTSB were allowing mortgage holders to break out of fixed term rates for a period without penalty;

(ii) That he rang the Open 24 line to explore this idea, and was advised then that reverting to his tracker rate was not available at that time, but that, in the interim, the PTSB could offer an LTV variable rate which would save the appellant some money as the rate was lower. He added that the PTSB advised him to move to this rate and duly requested a fax to this effect.

It will be noted that this contention is subtly, but importantly different from saying that the tracker rate *would* be available in the future.

20. On 2nd November, 2009, the PTSB responded. Again, to summarise, and at some risk of repetition, it contended that:-

(a) "The original agreements in relation to the interest rates applicable to the loans and as set out in the Letters of Approval clearly stated that the move to the tracker rate would take place *on expiry of* the fixed rate period. The fixed rate agreement was, at (the appellants') request, replaced with a different payment arrangement, whereby they agreed to repay the Loans at

the LTV variable rate, and this was to apply for the balance of the term of the Loan (unless they sought to fix the rate for a further period)".

(b) "(The appellants) request to change the rate to a variable rate was not limited to a period of time. When they changed to a variable rate, the fixed rate period no longer applied ... Once (the appellants) wished to depart from that arrangement, the condition already referred to could no longer apply".

(c) A reference by the appellants' solicitors to "accelerating the expiry of the fixed rate period" was not understood. That period could only expire through lapse of time. The appellants had written to the Bank seeking a change to their interest rate. The PTSB had acceded to the request, and in doing so, acted in accordance with their wishes.

(d) That the PTSB had not solicited any calls from the appellants, nor made any suggestion to them to switch mortgage products.

(e) That as the appellants were by then variable rate account holders, the tracker rate option would no longer be available to them. The options available were to change from their present rate to then current fixed rate options.

21. On 20th November, 2009, Mr. Ryan wrote to his solicitor. In this letter, later provided to the Ombudsman, he made the point that tracker rates are lower than variable, so that would have made no sense for a customer to change, unless such changes were of a temporary nature. He referred to a newspaper article of 4th September, 2009, where it was suggested that members of the Irish Brokers Association had come across a number

of cases where banks had moved existing customers onto variable rates when their fixed rate period ended, even though their original loan offer provided that they were entitled to a tracker rate. He accused the PTSB of "sharp practice" and opportunism.

22. On 16th December, 2009, Messrs. McEntee, the appellants' solicitors, wrote to the Financial Ombudsman enclosing a complaint form. They identified their clients' grievances as being:-

(i) That when Mr. Ryan had called the Open 24 centre, he was not advised as to the consequences of changing to an LTV variable rate in the interim.

(ii) That the consequences of new terms and conditions were never put in writing to him or his wife.

(iii) That Permanent TSB was now attempting unilaterally to change the terms and conditions of the agreements reached on the drawdown.

(iv) That the appellants would suffer significant financial loss should the mortgage not revert to a tracker rate on 7th December, 2009. The claimed losses were €1,400 per month.

23. Messrs. McEntee followed up the next day by informing the Financial Services Ombudsman that their clients were available for any mediation or oral hearing process.

24. On 4th January, 2010, the Ombudsman's office replied, outlining the nature of the mediation procedure available. The appellants were requested to provide any other relevant documentation. On 12th January, 2010, Messrs. McEntee Solicitors responded, again confirming that the appellants were prepared to participate in a mediation process, and enclosing additional correspondence, but indicating the loan offers for each of the seven accounts were not included as they were identical. On 13th January, 2010, the

Ombudsman's office wrote indicating that the PTSB had declined to enter into any mediation process.

25. There was further correspondence; ultimately on 22nd April, 2010, the FSO wrote to the appellants' solicitor indicating that the investigation procedure had commenced, that a summary of the complaint had been sent to the PTSB raising certain questions and seeking documentary evidence from the Bank; that the PTSB had been asked to furnish its response within a period of 20 working days; that upon receipt of this, the Ombudsman's office would provide a copy of the papers received and allow the appellants' solicitors the opportunity of making further submissions.

The Financial Services Ombudsman's letter to the Bank of 22nd April, 2010

26. It is necessary now to deal with the complaint which the Ombudsman's office sent to the PTSB and then identify in detail the accompanying evidence requested from the Bank. This request letter was not made by the present Ombudsman but by another official in the office.

27. The summary of complaints first narrated the appellants' contention that it would be open to them to revert to the tracker rate on 7th December, 2009. The complaints were put this way:-

(i) The Bank, in breach of the duty of care owed to the Complainants, unilaterally changed the terms and conditions of their mortgage contracts.

(ii) The Bank, in breach of the duty of care owed to the Complainants, failed to warn them of the repercussions of changing to an LTV variable rate of interest during the fixed rate term. Had the Complainants been advised

that this change would effectively deprive them of the tracker rate, they would never have agreed to the change.

(iii) The Bank failed to furnish the Complainants with new terms and conditions pertaining to their new loan agreements and/or failed to notify the Complainants as to which terms and conditions, as set out in their original loan offers, would no longer apply. In particular, the bank failed to advise the Complainants that general Condition 5 would no longer imply.

28. Contrary to submissions made on behalf of the applicants, I do not consider there was anything unfair or inappropriate about this account. It was a fair synopsis. It was followed by a schedule of questions, which again I paraphrase:-

(i) Whether the appellants were told of the repercussions of transferring to a variable interest rate prior to expiration of the fixed rate term?

(ii) Whether the appellants were told that if they changed to the LTV rate during the fixed rate term that they would not be able to avail of the tracker rate in December, 2009?

(iii) Whether if the above information did not relate to the appellants why this "crucial information" was withheld?

(iv) Whether general Condition 5 no longer applied to the complainant's mortgage contracts. Why were the complainants unable to avail of tracker rate?

(v) Whether the Bank had been guilty of sharp practice and had been opportunistic.

(vi) Whether the Bank had anything to add to the Final Response Letter it sent to the Complainants on 2nd November, 2009.

The request for disclosure of documents and evidence

29. But a third heading in the 22nd April letter is of central importance. It is necessary to quote it directly. It was headed "Schedule of Evidence required". Under this, there was the following:-

"(i) Please furnish any documentary evidence *which the bank considers relevant,* to include copies of the complainant's mortgage agreements and/or Letters of Loan Offer together with copies of all Letters sent to the Complainants regarding their switch to the LTV variable interest rate in early 2009.

(ii) Please supply any additional documentation which the bank wishes to rely upon or which it considers desirable to put before the Financial Services Ombudsman by way of response to this complaint". (Emphasis added)

The phraseology of this request is highly important as the *Bank* was thereby cast in the role of decision-maker as to the "relevance" of available documented evidence. I consider this was in error. This adjudicating function was vested by statute in the Ombudsman, not the Bank. This will be explained later in greater detail.

30. The bank ultimately responded on 28th May, 2010. In response to questions (i) and (ii) Mr. John O'Grady of the Bank's Customers Relations Department wrote:-

"When Mr. Ryan contacted our Open 24 customer information line he advised that he had 7 loans, each on a fixed rate and enquired as to what the interest rate would be on the expiry of the fixed rate term. Mr. Ryan was informed that as the

loans did not carry 'a price promise' on the expiry of the fixed term, the interest rate applicable would be dependent on the tracker rate at the expiry of the fixed rate period. Mr. Ryan questioned if there was a penalty to break from the fixed rate and was advised that no penalty was applicable at that time but could change from day to day. Mr. Ryan was advised that a tracker rate was no longer available."

31. He continued:-

"Mr. Ryan asked the Official if he wished to break out of the fixed rate how he would go about it and was informed that as he would be breaking the fixed rate contract with the Bank, to write to the Mortgage Centre advising that he wished to break out of the fixed rate and switch to the LTV variable rate. Mr. Ryan asked if the tracker rate would ever come back and was informed that the Bank had removed the tracker option and reduced the fixed rate options available but could not predict if the tracker would return as an option. Mr. Ryan requested the address and was informed to write directly to the Accounts Maintenance Dept, permanent tsb, 56-59 St. Stephen's Green, Dublin 2. Mr. Ryan again rechecked if a penalty applied and was assured that a penalty was not applicable at that particular time and was advised that the penalty at zero could be saved pending receipt of the written instructions."

32. Mr. O'Grady concluded:-

"No information was withheld from Mr. Ryan and on receipt of the Complainant's written instructions, the Bank acted on their wishes. Changes to the interest rates were effected solely at the behest of Mr. and Mrs. Ryan."

In response to question (iii), the Bank responded that the General Mortgage Loan Approval Condition 5 no longer applied to the mortgage loans held by Mr. and Mrs. Ryan, as the fixed rate contracts had been terminated by them. In response to question (iv), the Bank denied any form of wrongdoing. It contended that it had not coerced or instigated the appellants; that they had acted on their own initiative; and that the Ryans' decision to terminate the fixed rate agreement before the specified three year period violated the terms of special Condition 5 recited earlier. In hindsight, the extent of the detail provided in response to queries (i) and (ii) might have prompted the appellants or their solicitors to ask themselves how, at that remove, the Bank was able to provide such a detailed record of a phone call which had taken place eighteen months previously.

The documents and evidence disclosed by the Bank

33. In an appendix to this letter the Bank provided a "schedule of evidence" containing:-

(i) "Copy of Letters of Loan Approval along with signed copies of acceptance of each loan offer.

(ii) Copy of instructions from Mr. and Mrs. Ryan to switch all mortgage loans to LTV variable rate.

(iii) Copy correspondence.

(iv) Extract from general mortgage loan approval conditions".

It also supplied a series of letters written to the appellants in early February, 2007, confirming terms of the amended mortgages. None dealt with any question of an optional "fall back" to a tracker rate, however.

34. In what follows I am critical of the Bank. This criticism is in no way directed at its counsel who presented the case as well as it could be presented. But I also pause here to reemphasise that what the Bank failed to disclose was even the existence of the tape recording of the telephone call of 13th January, 2009, not to mind indicating that it formed the basis of its response of 28th May, 2010, particularly in relation to questions (i) and (ii) and also to the earlier responses. This essential, evidential fact was never disclosed to the Financial Services Ombudsman before his decision. I consider it should have been, and that the Bank was under a duty to disclose it. I do not think that this duty was in any way mitigated by the rather loose form of the request for documentation. As will also be shown later, the statutory duty of policing and monitoring the disclosure process, fundamental to the procedure, falls upon the Ombudsman; not upon a financial services provider. But, however the questions were framed, I find it impossible to identify any cogent reason why the Bank thought the transcript of the tape-recording was not *relevant*. This omission has not ever been satisfactorily explained. In fact at this hearing the Bank's case went further. It advanced the surprising argument that it was not under *any* duty of good faith in the disclosure process; even though, in law, a complainant is under such a duty. I reject this submission entirely. It is tantamount to saying there is one rule for a complainer and another for a financial services provider.

35. The FSO provided this material, but clearly not the tape recording. The appellants were given the documentation. On 14th June, 2010, they furnished what they termed "their final submission letter". There, they made the following points:-

(i) That the bank had not addressed the fact that its representatives did not explain the implications of breaking the fixed rate for a period.

(ii) That it did not address the fact that its representatives did not advise them to take independent advice for the change.

(iii) That the appellants had not been issued with a new loan offer or new terms; they were being charged interest in the sum of €4,290.38 per month in comparison to what they contended would have been tracker rate of €2,090.63 per month.

(iv) They had been advised that a tracker rate was no longer available, however, the Bank were obliged to quote a prevailing tracker rate and refused to do so when requested, citing unavailability and discontinuance of the product. Their belief was that when the LTV rate terminated, the default position was to have been to the original tracker rate, an average of 1.3% over ECB.

36. I note that there has been a significant variation in the losses claimed by the appellants, from the outset of the case, up to the hearing of this appeal.

37. While this final letter appears to have been written by the appellants themselves, they clearly continued to avail of legal advice up to the time when the matter was forwarded to the present Financial Services Ombudsman for adjudication.

The Ombudsman's decision

38. The Ombudsman's finding was issued on 17th August, 2010. Having outlined the parties' submissions, he set out his finding. He pointed out that banks owed their customers a duty of care. He dealt with each of the three questions posed in the letter from his office to the Bank separately. For convenience, I will summarise them here together with a synopsis of his findings.

(i) **Had the Bank unilaterally changed the terms and conditions of the loans?**

39. The first question addressed was whether the Bank had unilaterally changed the terms and conditions of the loan. Here the Ombudsman found against the Ryans. He did not consider that the changes had been initiated by the Bank. He found that the Ryans had been on written notice of the fact that, if they broke out of the fixed rate term prior to the expiration of the three years period, the tracker interest rate would no longer be available. He referred to each of the complainants' seven mortgage contracts, and in particular special Condition F which, he concluded, made it clear that the mortgages only reverted to the tracker interest rate on the natural *expiry* of the fixed rate period. He took the view that when the appellants opted to break out of the fixed rate term, prior to the expiration of the three year period, they had effectively breached the special Condition. He observed that none of the letters of approval contained any indication to the effect that the tracker rate would remain available if the borrower broke out of the fixed rate prematurely. He pointed out that what is known as a European Standardised Information Sheet was included in each of the letters of approval. This specifically drew attention to the fact that the interest rate was fixed to three years, and that at *the end of the fixed rate period* it would be open to the borrower to exercise an option to revert to a standard variable rate, a tracker rate.

(ii) **Did the Bank fail to warn the appellants of the repercussions of moving to an LTV rate?**

40. The Ombudsman then moved to the second question. This was subdivided in two; first, whether the Bank had failed to warn the appellants of the repercussions of

changing to a LTV variable rate during the fixed rate term; and second, whether they had been advised this change would effectively deprive them of the tracker rate?

41. He concluded that the appellants had been adequately warned of the repercussions of changing to the LTV variable rate during the fixed rate term. He again referred to special Condition F and the European Standardised Information Sheet enclosed with all the letters of approval.

42. He wrote:-

> "So, I find the Complainants were indeed warned of the repercussions of switching to a variable interest rate during the fixed rate term, through the documentation furnished to them at mortgage inception."

43. The next part of his determination was crucial. He concluded:-

> "...While the Complainants may not have been *verbally* warned that they would be deprived of the tracker rate if they broke out of the fixed term when they contacted the Bank's Open 24 customer information line, I believe this information was adequately relayed to them through their mortgage Terms and Conditions. I accept the Bank's submission that the conversation about breaking out of the fixed rate term was initiated by the First Named Complainant. I am also satisfied that any questions posed by the First Named Complainant in relation to the fixed rate term were sufficiently answered by the Bank. On the evidence before me, it seems that the First Named Complainant did not directly enquire as to whether the tracker rate would be available following a switch to the LTV variable interest rate. As this particular question was not asked, the Open 24 official did not specifically advise the First Named Complainant that by breaking

a fixed rate term, he would be prevented from availing of the tracker rate in the future. The Bank has confirmed, however, that the First Named Complainant was advised that if he decided to switch to the LTV variable interest rate he would breaking the fixed rate contract for the Bank."

44. Clearly in making this finding the Ombudsman relied on the remarkably detailed answer to his questions (I) and (II) as set out in the Bank's response of 28th May, 2010. I do not think he is in any way to be criticised for not ordering further disclosure; the parties to a hearing are not passive by-standers. The FSO has a substantial caseload. The appellants were legally advised. It does not appear to have occurred either to the appellants, or to their legal advisors that the degree of detail in the Bank's response might suggest that the telephone call had been recorded, transcribed and thenused as one of the Bank's evidential foundation stones.

(iii) **Did the Bank fail to provide new terms and conditions?**

45. The Ombudsman then turned to the third question, again subdivided, which was first whether the bank had failed to supply the appellants with new terms and conditions pertaining to the loan agreements, and, second, whether, in particular it had advised the appellants that general Condition F would no longer apply. Here he again referred to the terms of Condition F. He found that there had been no unilateral change by the bank. He also referred to a series of letters written by the bank on 3rd and 4th February, 2009, indicating that the mortgages had been amended and setting out the details.

The losses claimed

46. Prior to a consideration of the legal principles I think it necessary to touch again on the separate issue of the appellants' claimed losses. To place matters in context it is

necessary to refer to an averment sworn by Cathal McCarthy, the Bank's Chief Legal Officer in one of the Bank's affidavits.

47. There, he draws attention to the losses which the appellants claim. They claimed that their "rate difference" or loss was approximately €34,600 per year in interest. However, Mr. McCarthy contends that this estimate was quite incorrect; he says it appeared to be based on just one of the seven mortgages; in particular one which had been effected prior to December, 2006. This was also a tracker mortgage but subject to different terms. The rate *then* prevailing on this mortgage differed from the other six. Mr. McCarthy says that, had the fixed period been allowed to run its course, the tracker rate then prevailing on the other six mortgages, on 7th December, 2009, was 4.35% being the then EC rate of 1% plus 3.5%. The variable LTV rate which the appellants had on 7th December, 2009, was 4.5%. Thus, he says the difference between the tracker rate actually applicable to the other six mortgages, and the variable LTV rate was no more than 0.1%. I refrain from making any other comment as this is not part of the Ombudsman's finding. It may well be a very relevant issue in light of the order which the court will make on foot of this judgment.

(II) <u>The question of admitting new evidence</u>

48. The appellants' appeal was brought by way of notice of motion dated 6th September, 2010. In the succeeding months there was an exchange of affidavits. On 14th March, 2011, the appellants filed a further supplemental affidavit. What followed was new, although presaged by an averment in the appellants' grounding affidavit. Pursuant to a data protection request in the intervening period, they received a copy of the telephone recording in respect of the conversation which took place on 13th January,

2009. It is unclear when the appellants actually received this transcript. If they had it in their possession when the appeal was initiated I consider that it should have been exhibited in the grounding affidavit.

49. On foot of this, the appellants' contention was that the Ombudsman had been misled by the Bank as to the nature and content of the exchanges which took place. They said that the Bank had misled them as to the nature of the existing products; that it was clear from the transcript that they were misled about the availability of a tracker loan; that the phone adviser, named Eimear, inaccurately explained the type of products; never explained the consequences of changing product, and that the conversation was "peppered" with contradictory statements and misleading and or inadequate responses to direct questions. They said they agreed to switch to an LTV variable rate on misleading information, and that any reading of the exchange conveyed an air of confusion created by the Bank, whether deliberately or not. They stated that they requested that their solicitor obtain copies of the letter of loan offer in June, 2009, and only then had become aware that the original terms of their loans provided that in the absence of instructions, on the expiry of the fixed rate period the loans would revert to a tracker mortgage. On foot of this they contended that the change to the variable interest rate should have obtained for the duration of the fixed rate term and that the special conditions to the loan offers should have been read *contra proferentem*. They contended that nowhere in the letter of loan offer was it clearly and unambiguously stated that the tracker rate was no longer available at the end of the fixed rate period where the customer switched to a variable interest rate during the fixed rate period. They argued that the Ombudsman erred within jurisdiction in not directing an oral hearing when there was a conflict of fact in relation to

the telephone call. They now asserted that the Bank had actual or constructive notice that the appellants had been misled on foot of the correspondence and on foot of the telephone call; and had failed to impart this information to the Ombudsman. They stated that they had made themselves available for an oral hearing and mediation.

50. In response, the Financial Services Ombudsman makes the point that at no stage had the appellant sought the transcript, nor had they at any stage applied formally for an oral hearing. He draws attention to the fact the issue of the recording was first raised in the appellants' grounding affidavit in the appeal. He also fairly points out, that the appellants had the benefit of legal representation; that there was no reference to the want of an oral hearing in either the notice of motion or the grounding affidavit; that this was never identified as a ground of appeal; and that the point appears to have occurred to the appellants only belatedly. I think these are all fair comments.

51. In the hearing before this Court, counsel for the appellants sought to have the transcript admitted as new evidence, to be considered as part of the case. Counsel for each the parties made submissions of the question of its admissibility, and also referred to what occurred in the transcript of the telephone conversation of 13th January, 2009.

52. I held that this new evidence should be admitted on this appeal. Accordingly, I will deal here with a number of excerpts from the transcript. The quotations are necessarily very selective, as the phone conversation was in excess of eleven minutes duration. The quotes are by way of illustration of the nature of the exchanges. I emphasise that the identification and selection is not intended to be binding on any party. It may very well be that *all* the parties may wish to refer to the transcript on remittal.

53. Quite early in the conversation, the first appellant asked the telephone adviser, Eimear, "... when the end of the fixed term [mortgage] comes up what rate will I then go on? Its, I think all a tracker as far as I am aware." He was apparently referring to all their accounts.

54. After a number of further exchanges Eimear pointed out that there was what was termed "no second price promise" on these accounts so consequently the mortgage accounts would revert to a percentage above the ECB rate. She stated that at the end of the term there was "no agreed margin" and the applicable rate would "depend on what the tracker rate at the time is..."

55. Eimear later referred to the applicable rate as being a "Loan to Value variable rate" standing at 4.65%, slightly under the rate which the appellants were paying at the time. Later, she was asked whether there was a penalty for "breaking out of the fixed term". She responded that:-

> "...it depends, it can change from day to day, like, as of today there will be no penalty on that account..."

56. Later again, when asked whether the accounts would "revert to a tracker", she replied: "No, the tracker is not on offer anymore..." and indicated it would only have been available if there had been a "fixed price promise" on the account. However, the appellants' mortgage broker had not negotiated such a promise.

57. When the first appellant asked whether the rate of 4.65% was "in all likelihood", "coming down the ways" Eimear responded:-

> "Em, yeah, it has dropped with every ECB cut that has gone through, so if it does drop again, you know I am sure that variable rate will come down again. Like

obviously, in December rates could be lower than they are now, you know what I mean..."

She told the first named appellant that she "could not give him a definite answer as to what the actual rates were going to be in December".

When she was asked whether there was "any chance" that the tracker rate would come back, she answered that it "may do" but this would depend on the market, that it had been taken away "in September" as had a number of other fixed rates. When the first named appellant questioned if, "in a nutshell" he could avail of a 4.65% rate instead of the 4.79% which he was then paying "if he was to write in", Eimear responded "exactly, yeah". Later the first appellant asked whether what he was doing was in his own words "a mad thing". To this Eimear responded that it was not, in the current climate, but that rates could rise as well as fall.

58. I wish to make it absolutely plain that in selecting the quotations I am not in any way entering into an adjudicatory role. Specifically, I make no comment on whether the transcript when read either in whole or in part portrayed a want of consensus, or confusion; or whether it was conclusive, determinative, or would inevitably have altered the outcome of the finding; it may have been one, many, all or none of these, but it was undoubtedly highly relevant. I rely on the following authorities as setting out the principles applicable to the admission of new evidence and which were applied here.

(III) <u>The jurisdiction of a court to admit new evidence</u>

59. In *Murphy v. Minister for Defence* [1991] 2 I.R. 161 a personal injury case, the High Court had dismissed proceedings brought by the plaintiff. On appeal, it came to light that there had been in existence an army circular in connection with the medical

examination which was carried out on the plaintiff. The Supreme Court reaffirmed the principles identified in *Lynagh v. Mackin* [1970] I.R. 181. It emphasised, at p. 164, those principles which governed the admission of new evidence:-

> (i) "The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;
>
> (ii) The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;
>
> (iii) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible".

60. There is no doubt here that the "evidence", that is to say the tape-recording and a transcript, was "in existence" at the time of the hearing before the Ombudsman. It goes much too far to say it could have been obtained with reasonable diligence. It undoubtedly would have had an important influence in the case. I do not in any sense say that the availability of the transcript *would* have been decisive in the hearing; I simply take the view that it would have had an important influence in the case. Self evidently as the "evidence" is in the form of the transcript it is credible. There has been no dispute as to its accuracy.

61. I am re-enforced in the conclusion that this evidence should be admitted by the remarks of O'Flaherty J. in *Murphy v. The Minister for Defence* [1991] 2 I.R. 161 where he held, at p. 167, that the failure to seek documents by a plaintiff and the failure to

provide documents by a defendant was a mutual inadvertence by the parties to ensure that potentially important evidence was before the court. O'Flaherty J. stated:-

> "Failure of a procedural requirement must not be used to bring about or acquiesce in a possible injustice..."

62. In the instant case, the Bank, and the Bank alone, knew of the existence of the telephone recording. While, of course, this Court may affirm or set aside the Ombudsman's findings, I do not think the first would be the appropriate course here. The statutory intent of the Act is that, insofar as possible, the role of decision making should be that of the Ombudsman. The intention of the Oireachtas in setting up that important office was to provide for an expeditious and informal decision-making procedure to redress grievances. That legislative intent would not be fulfilled by unnecessarily supplanting the role of the primary, statutorily identified, decision maker. For this reason, I refrain from seeking to place any interpretation or inference on the passages that I have quoted, on the entire transcript. I do not think that it should be the role of this Court here. This is an exceptional case, where there is no direct precedent on the precise point. In *Murray v. Trustees of Irish Airlines, (General Employees Superannuation Scheme) and the Pensions Ombudsman,* [2007] IEHC 27 (Unreported, High Court, Kelly J., 25th January, 2007), Kelly J. held that, while there was a general rule that the court in hearing an appeal was confined to material before the Ombudsman, such rule was open to exceptions in certain circumstances such as those identified in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 , referred to earlier, subject to the criteria which were be set out in the decision of *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323 (Unreported, High Court, Finnegan P., 1st November,

2006). In *Murray*, the court refused relief because the appellant could have availed himself of the opportunity of adducing the additional evidence before the respondent. Kelly J. found the evidence to be inadmissible and was not satisfied it would have had an important influence on the result.

63. Here I think different considerations arise. There is here a very important point of principle on the issue of disclosure. This principle has a bearing on this case, and perhaps on many others with which the Ombudsman will have to deal in the future. The transcript evidence was admissible, relevant evidence. Although the appellants did have legal advice here, I do not think that the contents of the Bank's letters were so self evidently drawn from a taped transcript as to be a warning either for the appellants' legal advisors, or still less the Ombudsman. There was no want of reasonable diligence on the part of the appellants. While the power of this Court is wide on appeal, the role of the Ombudsman in the performance of his essential function will not be assisted by excessive judicial interventionism, or by treating what should be the primary investigation procedure as some first staging post on the way to an appeal to this Court. The extent of judicial intervention should be calibrated only in accordance with the interests of justice. There is a public interest in finality in proceedings before the Ombudsman, just as there is in court proceedings.

64. In *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman,* [2006] IEHC 323 (Unreported, High Court, Finnegan P., 1st November, 2006), there is a following helpful passage from Finnegan P. as he then was:-

> "Having regard to my decision of the standard of review it is appropriate that the appeal should proceed on the basis of the materials which were before the

Financial Services Ombudsman only. *The Court however has a discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate in the interests of justice.* See *Dunne v. Minister for Fisheries and Forestry* [1984] 230 at 239." (Emphasis added).

65. In the instant case I conclude that the appellants have satisfied the threshold tests and that, in the interests of justice in this exceptional case, a more flexible and less rigid approach should be applied so as to admit the evidence.

66. Here the following factors are of particular importance:-

(a) The telephone conversation related to a central issue in the dispute;

(b) There was a dispute as to the contents of the conversation;

(c) The contents of the telephone call, related directly to whether or not the appellant received advice and if so the nature, extent and qualifications placed on that advice; and specifically whether the appellants had the expectation (whether reasonable or not) of a mortgage review in December, 2009.

I add the comment that in its correspondence, the Bank gave a three paragraph summary of the contents of the conversation which in fact runs to 11 minutes 28 seconds in duration.

Having decided that the evidence should be admitted, the question now arises as to what course of action the Court should adopt? It is necessary next to briefly consider whether, taken as the whole, the appellant satisfied the criteria necessary for an appeal.

(IV) **The remit of the High Court in considering an appeal from the Ombudsman's finding**

67. By now it should be unnecessary to reiterate what is well travelled ground in identifying the tests for appeal of this type. The criteria have been fully set out by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman and Others* [2006] IEHC (Unreported, High Court, Finnegan P., 1st November, 2006). It has been applied in many cases such as this. In what is now a well known passage Finnegan P. stated:-

> "To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious or significant error or a series of such errors. In applying the test the Court will have regard to the degree is expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in *Orange v. The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v. Stardust Compensation Tribunal*."

68. Thus it follows:-

(i) the burden of proof is on the appellant;

(ii) the onus of proof is the civil standard;

(iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;

(iv) in the light of the above 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;

(v) in applying this test, the court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman;

(vi) The court is not considering a *de novo* appeal. The court cannot and must not engage in a re-examination from the beginning of all the merits of the decision, or seek to step into the shoes of the Ombudsman, or arrogate to itself the decision making process;

(vii) In this context, it is important to recollect that the role of the Ombudsman in his statutory function, may, in limited circumstances actually exceed the normal powers of a court in a *lis inter partes*. The power of the Ombudsman to direct a financial services provider as to its future conduct is an illustration of this; where a court may be confined to the facts of the case, the Ombudsman may not be.

69. It is also worthwhile re-emphasising Hamilton C.J's observation in *Henry Denny & Sons v. Minister for Social Welfare* [1998] 1 I.R. 34 that the court should be slow to interfere with the decisions of expert administrative tribunals unless a decision is based on an identifiable error of law or an unsustainable finding of fact (see *Hayes v. Financial Services Ombudsman*, IEHC (Unreported, High Court, MacMenamin J., 3rd November, 2008); *Square Capital v. Financial Services Ombudsman & Ors* [2010] 2 I.R. 514, McMahon J.)

How the appellants' case evolved

70. In the course of submissions, counsel for the Ombudsman has correctly drawn attention to the "incremental nature" of the way in which issues were raised by the

appellants. The case began with a straightforward complaint as to whether or not the Bank was entitled to adopt the position that it has espoused regarding interest rates. No procedural complaint was made. In the grounding affidavit sworn on 6th September, 2010, the appellants complained, interestingly, that the Ombudsman should have sought discovery of a phone recording even though no such suggestion was made by the appellants during the investigation; the complaints against the Bank were grounded in the language of tort. It was suggested that the Bank had been guilty of negligent misstatement and in breach of its duty of care towards the appellants. It was suggested that the Ombudsman was biased. At no point was any complaint made as to bias during the course of the investigation. I reiterate that, insofar as the allegation was made, I do not understand it to have been made against the Financial Service Ombudsman himself, but an official of the office. The allegation was not pursued or substantiated in any way during the course of the hearing. That allegation should not have been made. The appellants complained that the Bank had embarked on a campaign to induce mortgage borrowers to act to their detriment. They referred to "the most sinister part" of their complaint. This was not pursued. A complaint was made that the Ombudsman had failed to consider the EC (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989, S.I. No. 224/1989 and the European Communities (Unfair Terms in Consumer Contracts) Regulation 1995, S.I. No. 27/1995. Neither instrument was raised by the appellants during the investigation, even though they were legally represented. In their second affidavit sworn on 13th January, 2011, the allegations in tort were, to a degree supplanted by a contention that there was a want of consensus *ad idem* between the parties. Such an argument had never been made during the course of the

written procedure before the Ombudsman. Finally, there was an allegation that the Bank failed to act in good faith.

In the third affidavit, sworn on 14th March, 2011, for the purposes of exhibiting the telephone transcript, a complaint was made about the failure to hold an oral hearing even though no direct request was made during the investigation, and no complaint had been made about this in any of the previous affidavits. At this point, for the first time, an allegation was made that the Bank misled the Ombudsman. It will be recollected that all this took place in the context of an email from the appellants' solicitor dated 14th June, 2010, wherein it was fully accepted by the appellants that they were making their final submission prior to the Ombudsman making his decision. In other circumstances the appellants would have been debarred from making these points for the first time on the appeal.

71. The courts have consistently deprecated any tendency to seek to make a case that was not advanced before the Ombudsman (see *J&E Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324; *Hayes v. Financial Services Ombudsman & Ors* IEHC (Unreported, High Court, MacMenamin J., 3rd November, 2008); *Bandon Medical Hall Limited v. Pensions Ombudsman & Anor* IEHC (Unreported, High Court, Dunne J., 21st June, 2010). The Court would not depart from these principles at all but for the fact that an exceptional issue arises with regard to the recording.

72. I would also wish to make clear that I do not, in any sense, wish to criticise the format or the way in which the Ombudsman set out his decision. To the contrary, in my view, he went considerably beyond the requirements of identifying the "broad gist" of the

basis of the decision (see *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107). The decision was clear, cogent, concise and reasoned.

73. He himself is not to be criticised for failing to seek discovery. The appellants were legally represented. As I have pointed out earlier, parties to the procedure are not passive observers, a *fortiori* when they are legally represented. As I have found, there was no want of reasonable diligence on the appellants' solicitors' part. Nor do I think that in the circumstances, the Ombudsman is to be criticised for failing to hold an oral hearing on the basis of the material which was placed before him. The FSO enjoys a broad discretion as to whether or not to hold such a hearing (see *J&E Davy v. Financial Service Ombudsman* [2010] 3 I.R. 324; *Molloy v. Financial Services Ombudsman*, IEHC (Unreported, High Court, MacMenamin J., 15th April, 2011); *Cagney v. Financial Services Ombudsman*, (Unreported, High Court, 25th February, 2011); *Caffery v. Financial Services Ombudsman*, [2011] IEHC 285 (Unreported, High Court, Hedigan J., 12th July, 2011); *Starhomes (Middleton) Limited v. Pensions Ombudsman* [2010] IEHC 463, (Unreported, High Court, Hedigan J., 21st December, 2010) It is important to recognise that, if the Ombudsman's office is to be permitted to carry out its statutory function, effectively it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law.

(V) <u>The duties of the parties in making disclosure of documents</u>

74. Having made these broad comments, however, there remains the question as to whether the decision in this case was vitiated by an error or a series of errors. I find that this decision was so vitiated.

75. The first procedural error stems from the preliminary stage when the FSO official wrote to the Bank seeking disclosure.

76. I do not consider that this letter was a compliance with the procedure which was laid down under the governing statute. The Central Bank and Financial Services Authority of Ireland Act 2004, s. 57CE provides:-

> "(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.*"
>
> (Emphasis added).

77. The Ombudsman is to be the decision maker as to relevance, not the financial services provider. The first error therefore, was to leave the decision-making discretion as to relevance to the Bank where, in fact that matter lay within the purview of the Ombudsman. The next error was that the Bank failed to provide relevant material. A procedure conducted without access to relevant material is procedurally flawed and will often lead to error in substance. Quite the most surprising aspect of this case was the fact that the Bank very specifically instructed its counsel to make the case that it was not under any duty of good faith in the provision of documents. It contended that the duty of good faith in the "discovery/disclosure" process devolved only upon a complainant but not upon a financial services provider.

78. As the authorities on disclosure were advanced with considerable emphasis by senior counsel for the appellants, it is necessary to consider the principles upon which the submission was based.

79. In *J&E Davy v. Financial Services Ombudsman* [2010] I.R. 324, the Supreme Court laid down that the procedures to be adopted in the investigation and adjudication of a complaint were a matter for the Ombudsman himself, or for regulations to be made by the Ombudsman Council under Part VIIB of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, *subject to the requirement of fair procedures*. The head note in the report states that, while a formal discovery process of the courts was not to be imported into the Ombudsman procedure, *that procedure must be fair*, and that access to documents might be necessary in the interest of fairness to enable a party to establish or answer a complaint. The court held that having regard to the terms of s. 57BX(8) of the Act of 2004 which required the Ombudsman to provide an applicant with a copy of the complaint, and having regard to the serious nature of the complaint, and the serious consequences likely to flow from it for a respondent in the procedure, the Ombudsman should have disclosed, not only the letter of complaint, but also the appendices attached to it. That court also held that written submissions would not usually be sufficient in resolving conflicts of fact which would generally require an oral hearing appropriate to the issues that arose, but limited to the examination of those witnesses whose testimony was necessary and that in considering a request for documents, the Ombudsman should have regard to their necessity in relation to cross examination. I would lay emphasis on the necessity to guarantee and maintain fairness within the parameters of the legislative purpose of

providing an informal and expeditious method for resolving disputes. While the full gamut of discovery procedures need not, and should not be imported into the Ombudsman procedure, this does not abrogate the requirement for constitutional fairness. Such fairness does not exist if one party retains the right to keep a card up its sleeve, whether that card is an ace or two.

80. In the course of the Supreme Court's judgment in *J&E Davy v. Financial Services Ombudsman* [2010] I.R. 324, Finnegan J. observed, at p. 360:-

> "[99] 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 s. 57BX(8) which requires the respondent 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..."

81. Having dealt with the necessity for the Ombudsman to provide, not only the letter of complaint, but appendices thereto. Finnegan J. then went on to state on p. 361:-

> "Somewhat different considerations apply to the request by the applicant [Enfield Credit Union] to the notice party for documents and on the notice party declining to furnish the same to the request to the respondent to require the notice party to furnish same. Procedures before the respondent 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 respondent'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 the applicant is not to be unfairly disadvantaged. The respondent must consider the request in this light and w*here fairness so demands he should direct that documents be furnished.* He is not, however, required to mimic court procedures. *Finally the submission of the notice party on the report of the Deputy Ombudsman should have been furnished to the applicant.* Included with this submission were witness statements which were the basis of the respondent's assessment of the expertise of the members of the notice party'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..." (Emphasis added)

82. These important observations arose in a context where, as I have sought to show, the letter of complaint was furnished to the financial services provider but appendices thereto were not. But the context is all important. As was pointed out in the passage just

quoted, the request for discovery made in that case was extraordinarily broad. The solicitors for the applicant Credit Union sought *all documents then in J&E Davy's possession, custody, control or power or procurement including all notes, memoranda, diary entries, emails and electronically stored data relevant to the matters the subject matter of the Deputy Ombudsman's report.* They sought *all annual reports of the notice party from 2001 up to date including all documentary records relating to the notice party's investment policy or practice and all documentary records including minutes or notes of the notice party's board meetings and investment committee meetings in relation to bonds and particular categories of bonds.* As is readily discernable, therefore, Finnegan J.'s observations as to the request as being in "very wide terms" was if anything an understatement. Were the Ombudsman's office to embark on such a procedure in each case, or many cases, its functions must come to a standstill.

83. I do not interpret any of the passages as absolving *any* party from a duty of good faith in the provision of documents and things which *in the view of the Ombudsman are relevant.* It does not lie in the power of a financial services provider to "second guess" the Ombudsman on what is relevant. That power resides in the Ombudsman. If redacted or summarised documents are provided, then this fact should have been indicated clearly to the Ombudsman and to the appellants, so that each would have had the opportunity of requesting a copy of the transcript itself, if deemed necessary. This is particularly so in the light of the fact that there was said to be a conflict of evidence which might have required some limited form of oral hearing appropriate to the issues (see Finnegan J.'s judgment in *J&E Davy v. Financial Services Ombudsman* [2010] I.R. 324 at p. 373). But this would be a matter within the Ombudsman's discretion.

84. In this context, I think one section of the judgment of Charleton J. in the High Court in *J&E Davy v. Financial Services Ombudsman* 2 I.L.R.M. 507, is of some assistance. At para. 51, he had this to say:-

> "51. The final issue complained of concerning disclosure is that, when requested, the Financial Services Ombudsman did not require Enfield Credit Union to disclose to him, and through him to J. & E. Davy, the documents which were relevant to the advice that had been received as to the nature of perpetual bonds. As I have previously indicated, the Act gives a power of disclosure as against the financial service provider. There is no power under the Act to order disclosure from a complainant. However, *a complainant must cooperate* with the Financial Services Ombudsman. Before the complaint can proceed, and at every stage while it is proceeding, *the Financial Services Ombudsman must be satisfied that the complainant is acting in good faith.* Hence, any letter requesting relevant documents from the Financial Services Ombudsman would ordinarily require to be replied to. Whereas there is a specific power to seek further particulars in relation to a complaint from the complainant, it may be argued that this does not extend to the discovery of relevant documents. It seems to me that both of these powers should be interpreted so as to allow, in an appropriate case, disclosure to be made to the ombudsman and, thence, for those documents to be discovered to the respondent to a complaint. That should be done where the documents are relevant, on a fair assessment, to the resolution of any issue. Where the documents are such as to potentially influence the Financial Services Ombudsman in the decision which he might make as to the complaint, then the financial

service provider has an entitlement to see them. Submissions can then be sought from each side." (Emphasis added).

85. It seems to me that the corollary of Charleton J.'s observations has equal force: if there is a duty of good faith on the complainant, there must be an equivalence; a commensurate duty of good faith on a respondent. I am unable to find anything in any of the decisions which would indicate that there is no duty of good faith on a financial services provider, the contrary is true in my view.

86. While certain observations of Hardiman J. in *O'Callaghan v. Mahon* [2007] IESC 17 (Unreported, Supreme Court) arose in the somewhat different context of a tribunal of inquiry, it is noteworthy that in the course of his judgment, that judge referred specifically to the classic statement of principle in *Compagnie Financiere du Pacifique v. Peruvian Guano Company* [1882] 11 QBD 55, where the Court of Appeal very clearly stated that there should be disclosure of *every* document which relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* (not which must) either directly or indirectly enable the party requiring the party either to advance his own case, or to damage the case of his adversary. Among these categories are documents which may fairly lead the party to a train of inquiry which may either have the consequence of advancing a party's case or damaging that of the opponent.

87. Counsel for the appellant, Ms. Patricia Dillon, S.C., in her forceful submission, went so far as to characterise Hardiman J.'s criticism of the respondent Tribunal as being "trenchant". I would not go as far as this. However, the criticism was in no sense lacking in clarity. What was necessary here, in the first instance, was simply compliance

with the Act. Where there is a question of doubt, the Ombudsman is the arbiter, no one else, I emphasise that the quotation of the passage just cited in *O'Callaghan* is not to be seen as in any way necessitating the full gamut of court discovery procedure. What was necessary was rather that the Bank either (a) disclosed the existence of the transcript, or (b) supplied a copy of it. But the principle in *O'Callaghan* is important: what was withheld or redacted or excised by the Tribunal might have been highly relevant in assessing the credibility of an important witness. What was omitted here might have had a similar relevance.

88. The duty of good faith on a lawyer and client in making disclosure was considered by Murphy J. in *Irish Nationwide Building Society v. Charlton* [1997] IESC 112 (Unreported, Supreme Court, 5th March, 1997). That judge emphasised that the *duty* owed by a solicitor to a court was to carefully go through the documents disclosed by the client to make sure, as far as possible, that *no* relevant document had been withheld from disclosure. He emphasised that a client/party cannot abdicate responsibility to legal advisers and that there should be "careful consultation between solicitor and client to ensure that a deponent extracts all documents which are relevant". The duty lies on a party and its legal advisers.

89. The duty of a financial services provider must, of course, be seen within the narrower confines which are identified in *J&E Davy v. Financial Services Ombudsman* [2010] I.R. 324. However, I do not in any sense consider that the good faith requirement is any the lesser, even in the statutory procedure in this case. In order to ensure constitutional fairness between the parties, the requirement cannot be less. If a bank, or a financial services provider has a doubt as to its duty, it should consult its legal advisers.

The good faith requirement is an adjunct to the principle of *audi alteram partem* and the right of one party to know the case presented against him or her. (See generally, W. Abrahamson, J. Dwyer and A. Fitzpatrick, *Discovery and Disclosure* (Thompson Roundhall, 2007), chapter 33). It follows that I consider the Bank failed to act in good faith on the disclosure procedure here.

(VI) If as a result of breach of statutory procedure the decision was vitiated by error , what are the consequences?

90. It also follows that I consider that the decision in this case was vitiated by not one, but two errors. The first was in the direction given by the FSO official who drafted the disclosure request to the Bank. The second flaw was far more fundamental in nature. It was the Bank's failure to provide the transcript or at the very least, notice of its existence. The first error was important in the sense that it goes to the question of statutory compliance. The letter of request simply did not comply with the terms of the Act. The second error, that of the Bank in failing to provide a transcript was of far more major significance and as I have pointed out, seems to have arisen from a view based on what I consider to be a mistaken and misplaced concept that there was no duty of good faith on it as a financial services provider to supply relevant material to the Ombudsman. It has not been suggested there was any mistake. The consequence of applying such a view generally would be entirely to undermine efficacy and the functioning of the Ombudsman's office. In this particular situation the consequence of the decision was to deprive the Ombudsman of relevant evidence, and of the opportunity of making a decision as to whether there should be an oral hearing in the interests of fair procedures in

the light of all the relevant evidence. I emphasise I am not in any sense to be taken as saying he should now necessarily take a different view as to the outcome of this case.

91. I make no comment about the inferences which might be drawn from the transcript because this process should have lain within the remit of the Ombudsman. On remittal, he may conclude that the conversation does not alter his view or he may decide otherwise; but the integrity of the decision making process must be upheld and maintained by ensuring that there is constitutional fairness, and an even balance maintained between a complainant and a notice party. It follows from this, exceptionally, that despite the criticisms I have made as to the "evolution" of the case, there is new evidence here which requires the matter to be remitted.

92. There may be a number of consequential directions the respondent may wish to make in this, or in other cases or generally. Here he may wish to invite renewed submissions in light of all the evidence; he may also wish to direct an oral hearing on this specific issue if he feels it would advance matters. These are issues within his discretion. It follows of course that pursuant to s. 57CL(2) the court should direct the Bank to provide any additional documentation necessary in order to ensure compliance with the statute when read constitutionally and I will so order. What is to be provided here is simply that which is necessary in order to comply with a fundamental precept of this vital statutory procedure; that is basic fairness. The matter will therefore be remitted for reconsideration.