THE HIGH COURT

Record No.: 2011/107MCA

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

BETWEEN

DAVID WALSH, URSULA WALSH AND OFFICE SCHOOL AND COMPUTER SUPPLIES LIMITED

APPELLANTS

-AND-

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

-AND –

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 27th of June 2012

1. The first and second-named appellants are directors of the third-named appellant, Office School and Computer Supplies Limited. They reside at Clonea Lower, Garranbane, Co Waterford. 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 the Governor of the Bank of Ireland whose registered office is located at 40 Mespil Road, Dublin 4.

2. The applicant's seek the following relief:-

1. An Order pursuant to s. 57 CM (2)(b) of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004) setting aside the direction in the finding of the respondent dated 21st March 2011 (Ref 09/46361) that the notice party pay to the appellants by way of cheque the sum of €2500 in recognition of the various lapses of customer service/ administration of the notice party as found by the respondent in the finding of the respondent dated 21st March 2011 (Ref 09/46361).

2. An order pursuant to s. 57 CM (2) (c) and s. 57 CM (3) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) remitting the finding of the respondent dated the 21st March 2011 (Ref 09/46361) to the respondent for review in accordance with the directions of this Court.

3. If necessary, an order pursuant to s. 57 CM (3) (b)of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) enlarging the time limit within which this appeal may be brought.

Background Facts

3.1 The first and second-named appellants are directors of the third-named appellant, Office School and Computer Supplies Ltd. Since the appellants started in business, they have banked with Bank of Ireland (the notice party). The proceedings before the respondent arose from a deterioration in the appellants business relationship with the notice party brought about by lapses in customer service and the emergence of incorrect

acts by the notice party with regard to the appellant's personal and business accounts. In January 2009, the notice party informed the appellants that it intended to reduce their commercial overdraft limit prompting the appellants to undertake a review of their business with the notice party. As a part of this review the appellants discovered that the notice party had not adjusted the level of the monthly repayments on the appellant's eight commercial mortgage accounts in line with the changes in the variable interest rate. As a consequence of this the appellants were making unnecessary overpayments. The appellants and the notice party resolved the issue of the unnecessary overpayment on the appellant's commercial loans to the appellant's satisfaction prior to the submission of the appellant's Complaint Form to the Ombudsman.

3.2 A consequence of the notice party's failure to adjust the monthly interest repayments was the placing of additional pressure upon the appellant's commercial overdraft account. The effect of this was that additional interest charges and surcharges were applied to the appellant's commercial overdraft account. The notice party was responsible for the following other instances of maladministration with regard to the appellant's accounts:-

(a) On 25th September 2008, the notice party withdrew the sum of €5716.29 from the appellants' current account without formally advising the appellants of its intention to do so.

(b) The notice party improperly switched the first-named appellant's personal current account into the name of the third appellant without written authority from the first named appellant.

(c) The notice party attempted to ascribe the responsibility for this to the first appellant.

(d) The notice party acted incorrectly by incorrectly crediting a payment of €100,000 by the appellants to a commercial loan instead of to a bridging loan in accordance with the appellant's instructions.

(e) In May 2009, the notice party reversed three standing orders on an account that serviced three of the appellant's mortgages with the notice party. This was done by the notice party in circumstances where the account on which the standing order was set up was in credit with sufficient funds to meet the three monthly standing order payments.

3.3 The respondent issued his finding (Ref 09/46361) on 21st March 2011. The respondent found that the appellant's complaint was partly substantiated. The respondent found that the notice party was "guilty of several instances of maladministration... which have caused considerable inconvenience to the complainants". In particular, the respondent found as follows:

(a) By its own admission, the notice party acted incorrectly by incorrectly crediting a payment of €100,000 by the appellants to a commercial loan (account 20931232) instead of crediting the payment of €100,000 to a bridging loan (account 20627310) in accordance with the appellants' instructions.

(b) The notice party failed to advise the appellants of increases or decreases in commercial loan repayments in line with interest rate changes. Due to the fact that the notice party did not alter the repayments on the various commercial loans,

significant additional reliance was placed upon the appellant's company overdraft account and this resulted in additional interest and surcharge interest being incorrectly charged to the appellant's company overdraft account between 2001 and 2008. The respondent directed that the sum of €10,903.20 be paid to the appellants.

(c)The respondent found that there remained a dispute as to the precise amount of the actual level of overpayment by the appellants on their commercial loans by reason of the failure of the notice party to adjust the monthly repayments on the appellants' commercial loans in line with changes to the applicable variable interest rate and found that the notice party's calculation of the level of overpayment was correct.

(d)The respondent found that the notice party was entitled to credit the sum of €6000 to the appellant's Account 2067310 in order to bring arrears up to date and that the Notice party acted correctly in so doing.

(e)The notice party failed to formally advise the appellants of its intention to take a lump sum of €5,716.29 from the appellants' current account to rectify the notice party's own mistake in failing to set up the standing order prior to doing so. As a matter of good practice and communications, the notice party should have formally advised the appellants of the notice party's intention to take a lump sum from the appellants' current account.

(f)The notice party acted incorrectly in reversing three standing orders on account 66597284 that serviced three of the appellant's mortgages with the notice party.

The respondent partially substantiated the appellants' complaint and made the following directions:

1. That the respondent bank refund to the complainants by way of cheque the sum of €10,903.20 in recognition of the additional overdraft interest paid by the complainant caused by the overpayments to the commercial loans.
2. That the bank pay the complainants, by way of cheque, the sum of €2,500 in recognition of the various lapses in customer service/ administration. In this regard, I am of the view that the bank repeatedly breached Chapter 1(2) of the Consumer Protection Code which concerns the requirement to act with due skill, care and diligence in the best interests of the customer.
3. I also direct the Bank to amend the Complainants' ICB credit profile to indicate that they are not in arrears in respect of accounts 30693215, 30694445 and 30695747 caused by the reversed standing order payments.

3.4 In the within proceedings the appellants seek to appeal pursuant to s.57CL of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004) against the finding of the respondent dated 21st March 2011 (Ref 09/46361).

Appellant's Submissions

4.1 The appellant's submit that the respondent's finding is vitiated by a series of serious and significant errors and that the respondent erred in three respects. Firstly the respondent erred in not making any of the directions specified in paragraph 5 of the

Grounds of Appeal. Second, the respondent erred in awarding wholly inadequate damages. Thirdly, the respondent erred in only partially substantiating the appellant's complaint.

5.2. The appellants submit that the duty of the respondent under Part VIIB of the Central Bank Act 1942 is supervisory in nature. They further submit that the supervisory aspects of this duty requires the respondent when wholly or partially substantiating a complaint, to grant a remedy that has the effect of resolving the complaint.. The resolution of the complaint in this case required the respondent to make the directions specified in paragraph 5 of the appellant's Grounds of Appeal. The respondent ought have directed as follows:-

(a) That the notice party keep the appellants informed of changes in the applicable interest rate and consequent changes in the monthly repayments on the appellants' accounts in line with future changes in the applicable interest rate and

(b) That the notice party adjust and keep adjusting the monthly repayments on the appellants' accounts in line with future changes in the applicable interest rate and

(c) That the notice party make such changes to its systems, software, procedures, guidelines, policies and/ or practices as may be necessary in order to keep the appellants informed of changes in the applicable interest rate and consequent changes in the monthly repayments on the appellant's accounts in line with future changes in the applicable interest rate and

(d) That the notice party make such changes to its systems, software, procedures, guidelines, policies and/ or practices as may be necessary in order to adjust and to

keep adjusting the monthly repayments on the appellant's accounts in line with future changes in the applicable interest rate.

The appellant's purpose in making their complaint was to ensure that the conduct of the notice party that gave rise to their complaint could not recur in the future. The appellants submit that the failure to make any of these directions amounted to a serious and significant error.

4.2 The appellants submit that the finding of the respondent that the notice party must pay the sum of €2,500 to the appellants should be set aside pursuant to s.57CM (2) (b) of the Central Bank Act 1942 on the basis that, taking the adjudicative process before the respondent as a whole, the said finding is vitiated by a serious or significant error, or a series of such errors. The appellants make this argument on three grounds. The first ground is that it is apparent on the face of the respondent's finding that the respondent completely failed to have regard to relevant facts and considerations when determining the level of compensation that should be awarded to the appellants. The appellants submit that the respondent should have had regard to the stress and damage caused to the first appellant's health by the conduct of the notice party. The conduct of the notice party caused the first appellant to suffer a recurrence and exacerbation of a previous gastric ulceration condition as set out in the letter from Dr. Mahony dated 12th August 2009. This evidence was included before the respondent. However, the respondent made no reference whatsoever to this issue or to the report of Dr. Mahony in his finding and it is submitted that it can, therefore, only be assumed that the respondent did not have regard to these matters at any stage during the adjudicative process.

Secondly, the award of compensation made by the respondent failed to take any proper account of the amount of time devoted by the first appellant and his accountant to dealing with the litany of errors made by the notice party in relation to the various accounts, in particular, the issue of the overpayments on these accounts. These issues engaged Mr. Walsh and his accountant who was working on a professional basis between January and August 2009; the award of compensation utterly failed to reflect the cumulative inconvenience, disruption to the business and stress associated with these matters.

Thirdly it is submitted that the award should be set aside on the basis that the said award is not proportionate to the level of loss, expense and inconvenience caused to the appellants by the conduct of the notice party.

4.3 The appellants submit that the respondent seriously erred in determining that the appellant's complaint should only be partially upheld. It is apparent from a consideration of the scope of the appellant's complaint form and the finding of the respondent that the respondent misinterpreted the scope of the appellant's complaint in two respects. The appellants did not make a complaint to the respondent about the issue of the level of the overpayments made by the appellants to the notice party in respect of the appellant's commercial loans as the appellants and the notice party had resolved this issue prior to the submission of the appellant's complaint form to the respondent. However, it is apparent on the face of the respondent's finding that the respondent assumed that there was a dispute between the appellants and the notice party regarding the level of overpayments made by the appellants to the notice party.

Also, the appellants did not make a complaint to the respondent about the notice party's decision to credit the sum of €6,000 to the appellants' loan account 20627310. However,

again, it is apparent on the face of the respondent's finding that the respondent incorrectly assumed that the appellants had made a complaint regarding the notice party's action in crediting the said sum of €6,000 to the appellant's loan account 20627310. As a consequence of the respondent's misinterpretation of the scope of the complaint the respondent found that the appellant's complaint should only be partially substantiated as opposed to wholly substantiated. It is submitted that if the respondent had correctly interpreted the scope of the appellant's complaint, the respondent would have found that the appellant's complaint should be wholly substantiated.

Respondents Submissions

5.1 The appellants challenge the finding made by the Ombudsman dated 21st March 2011 in which their complaint against the notice party was partially substantiated. The Ombudsman ordered the notice party to:-

(i) repay the appellants €10,903.20 in recognition of additional overdraft interest;

(ii)pay the appellants €2,500 in recognition of various lapses in customer service/administration;

(iii) amend the appellants credit profile to indicate that they were not in arrears in respect of 3 named accounts.

This complaint largely seems to net down to what might be described as an appeal against the remedy on (i) quantum, and (ii) directions. In relation to quantum the appellants are disappointed that they were not awarded a larger sum of money. However, they have not put anything before the Court such as would permit the Court to find that the finding as regards quantum is vitiated by a serious and significant error or series of

such errors. Neither have they put anything before the Court as would permit the Court to find that the Ombudsman's decision not to make directions in respect of the notice party's conduct is vitiated by a serious and significant error or series of such errors.

The appellants chose to utilise the Ombudsman's Office rather than litigating their complaints against the notice party. Differences arise in respect of the methods adopted by the Ombudsman in resolving complaints as against the methods adopted in litigation. On the one hand, the Ombudsman's Office seeks to offer a free, speedy and informal means of resolving complaints. In particular, a person who makes a complaint to the Ombudsman does not have to incur any legal costs and is not exposed to the risk of an award of legal costs against them. On the other hand, there is not the type of formal procedures, reserved judgment and strict legal analysis etc. that would be available in the High Court. In other words, the Ombudsman is not seeking to replicate High Court litigation; rather he is seeking to offer an alternative to it. The significance of this is that the Ombudsman does not make awards of compensation in the same manner that a Court does and in particular the Ombudsman is not purporting to make the type of forensic analysis of loss that a Court might be expected to do. Thus it may (or may not) be the case that if a Court were analysing the facts of the present case from a strict contract or tort point of view, it might have been minded to award a higher level of compensation. However, the fact that a Court might have approached it in that way does not mean that the Ombudsman erred or stepped outside of jurisdiction in the manner in which he assessed compensation. In respect of directions, the appellants are of the belief that the Ombudsman should have directed the notice party to change its conduct/procedures. The Ombudsman is not obliged to issue directions. Rather, pursuant to section 57CI (4) of the

Central Bank Act 1942 (as amended by Central Bank and Financial Services Authority of Ireland Act 2004) (hereinafter referred to as the "Act"), the Ombudsman is provided with a discretion as to whether to issue directions to the financial services provider.

5.2 The applicable test for an appeal pursuant to Section 57CL of the Central Bank Act 1942, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004 (the "Act") was set down in *Ulster Bank v Financial Services Ombudsman & Ors* [2006] IEHC 323, Finnegan P. (as he then was) held:-

> "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 and significant error or a series of such errors In applying the test the Court will have regard to the degree of 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 *State (Keegan) v Stardust Compensation Tribunal*."

It is submitted that the passage from Finnegan P. may be broken down into the following distinct elements:

(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 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.

5.3 Section 57CI (4) of the Act clearly provides the Ombudsman with discretionary powers in respect of the remedies that may be provided. Section 57CI(4)(a) permits the Ombudsman "to review, rectify, mitigate or change the conduct complained of or its consequences", whilst section 57CI(4)(d) permits the Ombudsman to direct the provider "to pay an amount of compensation to the Complainant for any loss, expense or inconvenience sustained by the Complainant as a result of the conduct complained of." The Ombudsman has a wide discretion when it comes to selecting the appropriate remedy in a particular case. In *Square Capital Ltd v Financial Services Ombudsman* [2010] 2 IR 514, the appellant appealed a finding of the respondent to the High Court in which the respondent, *inter alia,* directed the appellant to pay compensation to the notice party in the sum of €25,000. The notice party's complaint to the respondent arose out of an investment in property made by the notice party on the appellant's advice: it subsequently transpired that the appellant, in fact, owned the property in which the notice party had invested. However, the appellant had not informed the notice party that it owned the property in which the appellant had invested. The notice party made a complaint to the respondent in respect of the financial services provided by the appellant to the notice

party. The respondent held that the appellant should have disclosed to the notice party the fact that the appellant owned the property in which the notice party was investing. The respondent concluded that the appellant failed in its overall duty of care to the notice party and that best practice dictated that it should have been utterly transparent about the precise nature of its interest in the apartments. The respondent directed the appellant to pay the sum of €25,000 sterling to the notice party. The appellant argued, *inter alia,* that the award of compensation was not justified because the notice party had not proved any loss and also argued that any loss would not have been causally connected to the failure by the appellant to disclose its ownership of the properties. McMahon J. Adopted a deferential approach to the issue of the remedy selected by the Ombudsman and stated at p.529: -

> "It must also be recorded that the office of the Ombudsman is different from an ordinary court of law and the provisions of the legislation already noted, mean that the Ombudsman has greater flexibility and choice in fashioning an appropriate remedy in the cases that come before him. The relevant provision enables him, for example, to mitigate or change the conduct complained of or a practice relating to that conduct. In my view, it is important, therefore, that appropriate latitude should be given to the Ombudsman in determining what the appropriate remedy is in the circumstances of each individual case."

An important distinction can be drawn between *Square Capital* and this case. It is clear from the finding herein that the Ombudsman viewed what occurred as "maladministration" on the part of the notice party. There was no suggestion that the notice party had acted in bad faith or deliberately sought to defraud the appellants.

5.4 The respondent submits that this case is closer to In *De Paor v Financial Services Ombudsman* [2011] IEHC 483. In *De Paor* the appellant claimed that the compensation that the Ombudsman has awarded her did not meet the stress and anxiety that had been caused to her when her health insurers had wrongfully declined to cover her cancer treatment. The Ombudsman had awarded her €850 for stress and inconvenience. The appellant was unsuccessful in her appeal against this amount to the High Court.
Whilst the appellants challenge the amount awarded and describe it as manifestly inadequate and insufficient, they have not suggested any alternative figure or any alternative means by which it should be calculated other than stating that the conduct of the notice party "merited an amount of compensation substantially in excess of €2,500".

Decision of the Court

6.1 The first and second-named appellants are directors of the third-named appellant, Office School and Computer Supplies Ltd. Since the appellants started in business they have banked with Bank of Ireland (the notice party). The proceedings before the respondent arose from a deterioration in the appellants business relationship with the notice party. In January 2009, the notice party informed the appellants that it intended to reduce their commercial overdraft limit. This prompted the appellants to undertake a review of their business with the notice party. In the course of this review the appellants discovered that the notice party had not adjusted monthly repayments on the appellant's commercial mortgage accounts in line with the changes in the variable interest rate. As a consequence of this the appellants were making unnecessary overpayments. The

appellants and the notice party resolved this issue prior to the appellant's complaint to the Ombudsman. However as a consequence of the notice party's failure to adjust the monthly interest repayments additional pressure was placed upon the appellant's overdraft account resulting in additional interest charges. The applicants complained of the following issues of maladministration with regard to their accounts:-

(a) The notice party withdrew €5716.29 from the appellant's current account without advising the appellants.

(b) The notice party improperly switched names on the appellant's current account.

(c) The notice party attempted to ascribe the responsibility for this to the first appellant.

(d) The notice party incorrectly credited a payment of €100,000 to a commercial loan instead of to a bridging loan.

(e) The notice party reversed three standing orders in circumstances where the account on which the standing order was set up was in credit to meet the three monthly standing order payments.

6.2 The appellants submitted a complaint form dated 14th August 2009 to the respondent in respect of the notice party's conduct. The respondent issued his finding on 21st March 2011. The respondent found that the notice party was "guilty of several instances of maladministration... which have caused considerable inconvenience to the complainants". The respondent partially substantiated the appellant's complaint and made the following directions:-

1. That the Bank refund to the Complainants the sum of €10,903.20 in recognition of the additional overdraft interest paid by the Complainant caused by the overpayments to the commercial loans.

2. That the Bank pay to the Complainants, the sum of €2,500 in recognition of the various lapses in customer service/ administration.

3. That the Bank to amend the Complainants' ICB credit profile to indicate that they are not in arrears in respect of accounts 30693215, 30694445 and 30695747 caused by the reversed standing order payments".

In the within proceedings the appellants seek to appeal against the finding of the respondent.

6.3 The appellant's first complaint concerns the failure of the respondent to issue certain directions. This particular remedy was not explicitly sought by the appellants in their complaint form to the respondent. In order to complain about the failure to issue directions the appellants should be able to point to a request for directions and the Ombudsman's failure to give them. Even allowing that the request for directions could be considered implicit in the appellant's complaint, it seems to me that the decision whether to grant a direction is classically a decision for an expert tribunal. The Ombudsman has a wide discretion when it comes to selecting the appropriate remedy and the Court must have regard to the degree of expertise and specialist knowledge of the Ombudsman in such matters. Furthermore the Court is being asked to order the Ombudsman to make certain directions in a evidential vacuum. For all this court knows the current practice might well be desirable to many customers. The Court has no way of knowing. No

evidence of an ongoing problem has been produced for the court. There would need to have been evidence on affidavit that there is an ongoing practice causing damage for the court to consider intervening. Moreover, had there been an affidavit before the court alleging that a continuing practice was causing damage, the Bank may have chosen to come into court and defend the practice. They have, quite reasonably, chosen not to come into court because they were not on notice of such a complaint. In any event it seems to me that if there was a systemic problem this would very quickly come to the attention of the Ombudsman as a result of dissatisfied bank customers submitting complaints to him. Where a systemic problem is found to exist the Ombudsman can approach the Bank at management level to resolve the problem or if needs be he can approach the Central Bank to find a resolution. In any event, it is not for this Court to intervene.

6.4 The appellant's complain that the damages of €2500 awarded by the Ombudsman are wholly inadequate. They do not however suggest what sum would be adequate. There is no scale being put before the Court by which to judge adequacy. Is it inadequate in comparison to the damages which may be awarded in the High Court for stress or personal injury? I do not think such a comparison is valid. Cases in the High Court involve far more formality. In this case there is a note from the first named applicant's general practitioner which states that the he has suffered a reoccurrence of an ulcer due to business stress. This is a long way from showing that Bank of Ireland is wholly responsible for the ulcer. Such a note would not be sufficient in High Court litigation. The Financial Services Ombudsman is an informal cost free system of resolving disputes.

It is not a tribunal for measuring damages. In particular, it is not its role to measure general damages as does the High Court.

I do not think that this case is comparable to *Square Capital Ltd v Financial Services Ombudsman* [2010] 2 IR 514. In that case the Ombudsman awarded higher compensation in circumstances where there was apparent dishonesty. The finding made by the Ombudsman in this case is simply of maladministration. It seems to me that this case is closer to the *De Paor* case, in which €850 euro was awarded to a complainant. In that case, McGovern J held at paragraph 18:-

> "If the Court was to treat matters such as this as an appeal on quantum in the usual sense, it is likely that such appeals would frequently come before the courts arising out of decisions of the Ombudsman. If that were permitted, it would have the effect of frustrating the purpose of the scheme which is aimed at informal resolution of consumer issues. The whole purpose of the legislative scheme is to keep the process - so far as possible - out of the courts."

The Ombudsman is not the correct forum for a party who wants court style remedies. The appellants have referred to accountants costs incurred in dealing with the errors made by the notice party in relation to the appellant's accounts. No bill was produced to the Ombudsman to indicate the costs incurred. In any event a party who makes a complaint to the Ombudsman does not have to incur any legal costs and is not exposed to the risk of an award of legal costs against them. It is thus quite reasonable that a complainant cannot expect to be compensated for professional fees incurred in formulating their complaint.

6.5 The appellants complain that the respondent erred in deciding certain issues which were not in dispute and determining that the appellant's complaint should only be partially substantiated. However the appellants did not write to the Ombudsman asking him to disregard certain issues because they had been resolved. The issues he was to resolve only came to the Ombudsman's attention through the appellants. He was obliged to resolve all the issues passed to him. If the Ombudsman did not do so, it would be open to either side to say that the Ombudsman overlooked the issues. It seems to me that the Ombudsman was simply being prudent in addressing all the issues. Moreover the Ombudsman's finding is a private matter. It is not a matter of public record. It seems highly unlikely that the Bank will bring up the finding in any manner that could prejudice the appellants as the majority of the complaints were upheld against it. Therefore I can see no practical benefit in having the finding amended. For all these reasons I must refuse the relief sought.