THE HIGH COURT

[2012 No. 291 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO PART VII(B) OF THE CENTRAL BANK ACT 1942 AND CHAPTER 6 AND SECTION 57CL THEREOF (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN

HENRY HAVERTY AND MARTINE HAVERTY

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ACC BANK PLC

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 3rd day of May, 2013

This is an appeal by the appellants herein challenging the finding made by the respondent on the 26th July, 2012, in which their complaint against the notice party regarding the non-release of the Deed of Charge

on lands comprised in Folio GY70824F, the appellants family home situate at Meelickbeg, Tuam, County Galway, was not upheld.

This appeal was brought by Notice of Motion dated the 14th August, 2012 and the relief the appellants are seeking is contained therein at paragraph 4 which states the following:-

> "an Order remitting the findings and decision or any part thereof of the respondent back to the respondent for review pursuant to Section 57CM(2)(c) of the Central Bank and Financial Services Authority of Ireland Act 2004."

On the 20th May, 1997, a loan offer of £55,000 was made to the appellants by the notice party herein (hereinafter referred to as "ACC") to construct a dwelling house in which they would reside as their family home. This offer was accepted by the appellants on the 28th May 1997. No consent of spouse to the charging of the family home was executed, though Martina Joyce (as she then was), who married the first named appellant in September, 1997, was a co-signatory to the Deed of Charge.

The said monies were utilised in the construction of what became the family home and it was agreed and understood by all concerned that the same were to be secured by way of a Deed of Charge on the lands. This Charge was executed on the 4th of February 1998, describing the appellants as "the Borrower".

At that stage the appellants had not yet been registered as owners of the said property but were subsequently registered in their joint names as the owners of the lands comprised in Folio GY70824F on the 22nd of January, 1999, and the Charge in favour of ACC was registered as a burden at Entry No.2. As it was prior to the appellants marriage on the 13th September, 1997, the second named appellant was registered in her maiden name, that of Martina Joyce.

It is common case that the said monies were repaid in full on the 6th March, 2007. However, the Charge pertaining to the appellants family home comprised in Folio GY70824F was not released and same was requested by the first named appellant on a number of occasions.

The first named appellant was at that time a builder and was dealing with ACC on a commercial basis in relation to loans advanced to him in a commercial capacity, such as the sum of €500,000 which was utilised by the first named appellant to purchase development land at Rooskey, Claremorris in 2004. He developed a housing estate through a company called Gateway Developments Limited, of which he was an equal shareholder with another party. Both parties were directors of the company and intended to borrow in the name of the company but ACC insisted the loan application be in the first appellant's name. Consequently, the lands were registered in his sole name and the homes

were built by the company. In total the sum of €1,581,000 was borrowed in relation to this development and the loan was repaid in full.

A further loan in the sum of €1,073,000 was advanced to the first named appellant in August 2006, for the purposes of acquiring a five-acre site with planning permission to build 27 units at Castlerea, County Roscommon. This sum of €1,073,000 was intended to be secured by way of a first Charge over that property and an extension of an existing charge over a 14-acre site, and was the subject matter of a Facility Letter which was signed by the first named appellant.

In 2007, a further loan of some €150,000 was made to the first named appellant's construction business, Clareton Developments Limited, in which the first named appellant is a shareholder and director, and the loan was secured by way of a Charge over the five acre site in Castlerea.

A further advance in the sum of €1,234,000 was loaned to the first named appellant on the 2nd December, 2009, which was intended to be secured in part by the Castlerea Development and in part by a Limited Recourse Mortgage created by the second named appellant over some 24 acres of land in Galway. No mention is made in any of the securities as to the family home being part of the security for such advances.

On the 30th November 2011, ACC wrote to the solicitors for the appellants, Messrs Gleeson & Keane in response to Messrs Gleeson &

Keane having requested a release of the Charge. ACC refused to furnish a discharge of the Charge maintaining that it covered not only present advances, but future advances also, stating that:-

> "I refer also to your request dated the 31st of August 2011 that ACC Bank release its Charge over the property at Meelickbeg. This Charge covers future and present advances due by either Henry Haverty and/or Martina Joyce either in their own names or as guarantors for another party. We are satisfied that this Charge remains validly in place and we cannot therefore agree to your request to release this Charge. I attach a copy of the Deed of Charge dated the 4th of February 1998, for ease of reference."

On 26th July, 2012, the respondent herein wrote to Messrs Gleeson & Kean stating that he was satisfied that the submissions and evidence tendered by the parties to the complaint did not disclose a conflict of fact and that such materials submitted were sufficient to enable him to reach a finding without the necessity for holding an oral hearing. The respondent agreed with ACC in making the following finding which is the subject matter of this appeal:-

> "While I fully accept that the complainants repaid their family home Mortgage in full on the 6th of March 2006, the Deed of Charge/Mortgage referred to above covers present

> and future borrowings, and was entered into between the parties after the family home Mortgage offer was accepted by the complainants. By loan offer dated the 20th of May 1997 the Bank offered to extend finance in the sum of £50,000 to the complainants "to construct a dwelling house at Meelickbeg, Tuam, County Galway". On the 28th of May 1997 the complainants accepted the Bank's offer. Subsequently, on the 4th of February 1998, the complainants executed the Deed of Charge/Mortgage referred to above, which covered not just the family home borrowing of £55,000, i.e. the present borrowings, but all future borrowings as well. As the first named complainant currently owes approximately €1.3 million to the Bank, and as the first named complainant is named as a "Borrower" on the Deed of Charge/Mortgage dated the 4th of February 1998, I am satisfied that the monies are currently due and owing on foot of the Deed of Charge/Mortgage dated the 4th of February 1998."

The Deed of Charge dated the 4th of February 1998 is a standard form charge made between the appellants on the one hand and ACC on the other. The appellants are referred to as the "Borrower" therein and

the relevant provision of the Charge is at Clause (B)(3), which states as follows:-

> "(3) As registered owner or the person entitled to become registered as owner as beneficial owner HEREBY CHARGES in favour of ACC BANK (by way of Charge for present and future advances) for so much of the mortgaged premises the ownership whereof or in the case of the leasehold property the leasehold interest whereof is registered or is required to be registered in the Land Registry and all other right title and interest which the Borrower now has therein or shall hereafter acquire including the milk quota with payment to ACC BANK of all monies payable to the Borrower by virtue of the covenants herein contained and hereby assents to the registration of the said Charge as a burden on the mortgaged premises and so much thereof as is charged in this Clause. "

Clause 1 of the Mortgage provides as follows:-

> "1. The following sums shall from time to time be considered to be monies due on the security of the Mortgage hereby created and to form part of the balance or balances secured to be secured hereby videlicet; all monies now due or from time to time due by the

Borrower to ACC Bank on foot of loans made to the Borrower on foot of agreements or covenants made or executed by the Borrower or on foot of an account or accounts current or on foot of notes, bills, cheques, or drafts paid, discounted or endorsed, interest, discount and all other usual Bank charges or any other debt, liability or obligation whether due or current and whether such advances shall be made to or on behalf of the Borrower either solely or jointly with others, or to any other person or persons, company or companies at his request or upon his guarantees".

Clause 24 of the Mortgage states the following:

"In these presents words importing the masculine gender only shall include the feminine and neuter genders and words importing the singular number only shall include the plural number and vice versa and where there are two or more persons included in the expression "the Borrower", covenants expressed to be made by the Borrower shall be deemed to be made by such persons jointly and severally and the expression "the Acts" shall mean the Agricultural Credits Act 1978 and all other Acts amending, altering or extending same. "Mortgaged Premises" shall mean all or any portion of the Mortgaged Premises. "

Counsel on behalf of the appellants submitted that the respondent, in reaching his finding, gave no detailed analysis to the provisions of the Mortgage deed of 1998, and in particular did not have regard to any definition of the phrase "the Borrower". As such, it was argued, he had failed to take cognisance of the fact that the Mortgage Deed does not contain a definition of same as provided in Clause 24 of the Mortgage Deed cited above. It was thus contended that the respondent was mistaken in finding that the phrase "the Borrower" could mean either one of the appellants herein or both of them. Rather, the Mortgage Deed is not expressed to cover borrowings by either/or Henry Haverty or Martina Joyce, but future borrowings by the "Borrower" as provided for at Clause 1 cited above and that in that regard, there is nothing in the Mortgage Deed to indicate that it was intended to cover future advances made to one or other of the Borrowers as opposed to both of them.

While it was accepted by counsel for the appellants that although the provisions of the Family Home Protection Act 1976 were not expressly raised in the matter before the respondent, it was submitted that it was presumed that the respondent would be familiar with the effect of same when considering the provisions of a Mortgage Deed over the aforementioned property, the appellants family home, in considering whether the subsequent Charges were valid.

Counsel on behalf of the respondent contended that the respondent, in reaching his finding, had accepted ACC's submission that the Deed of Charge/Mortgage covered present and future borrowings. Furthermore, it was contended, the respondent had correctly interpreted the phrase "the Borrower" as meaning both of them or one or other of them. In that regard, it was argued, as the first named appellant owed ACC approximately €1.3 million Euro, it followed that ACC was not obliged to discharge the Deed. It was argued that the above finding was one that was within the jurisdiction of the respondent to make.

It was further submitted by counsel for the respondent that the appeal herein should be limited to the issues which were canvassed before the respondent during the course of the investigation, and in that regard no submissions should be entertained pertaining to the provisions of the Family Home Protection Act 1976 as same were not raised before the respondent.

The office of the Financial Services Ombudsman was created under s. 57BB of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004(hereinafter referred to as "the Act of 1942 (as amended)), as an independent body whose function is to "investigate, mediate and adjudicate complaints made about the conduct of regulated financial

service providers involving the provision of a financial service, an offer to provide such a service or a failure to provide such a service".

Section 57BB of the Act of 1942 (as amended), provides that the objects of Part V11B of the Act include *inter alia,* the following:-

> "(b) to ensure that...complaints about the conduct of regulated financial service providers are dealt with efficiently and effectively and are adjudicated fairly;
>
> (c) to enable such complaints to be dealt with in an informal and expeditious manner;"

The function performed by the Ombudsman is different to the function performed by the courts as he is specially enjoined not to have regard to technicality or legal form, as provided for in s. 57BK(4) of the Act of 1942 (as amended) which states that the Ombudsman is "required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

Thus the Ombudsman has a unique statutory function in that he therefore resolves disputes in an informal way as stated above using criteria that would not normally be used by the courts, such as whether the conduct complained of was unreasonable *simplicter* or whether an explanation for the conduct was not given when it should have been. Although a conduct complained of may have been in accordance with a

law, the Ombudsman also considers whether this conduct was unreasonable or otherwise improper.

The applicable test for an appeal pursuant to Section 57CL of the Act of 1942 (as amended) was laid down by Finnegan P. (as he then was) in Ulster Bank v. Financial Services Ombudsman & Ors [2006] IEHC 323 in which he stated the following:-

> "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 The State (Keegan) v Stardust Compensation Tribunal."

This test expressed by Finnegan P. above is a well established test which has become known colloquially as the "Ulster Bank Test" and there is a significant body of recent case law in which it has been followed. The deferential standard to be applied to which Finnegan P. refers is that which was enunciated by Keane C.J. in the seminal

judgment of Orange v. The Director of Telecommunications Regulation & Anor [2000] 4 IR 159, in which he stated the following (at p. 184):-

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

The options open to the Court on an appeal are set out in Section 57CM of the Act of 1942 (as amended) which provides as follows:-

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

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

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

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

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

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

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

As outlined above, the courts in general and this court in particular are usually slow to interfere with the decisions of expert bodies who have performed their functions with a high degree of expertise in reaching a decision on the evidence before them.

In Analog Devices B.V. v. Zurich Insurance Company [2005] I.E.S.C. 12 [2005] 2 I.L.R.M. 131, a case concerning insurance policies and the interpretation of the phrase "jointly and severally", Geoghegan J. delivered the judgment of the court and held (at p. 138) that:-

"interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

I am satisfied that the respondent herein correctly interpreted the language contained in the Mortgage Deed pertaining to the term "the Borrower" in the way that would have been understood by a "reasonable man", that is, as meaning both of them or either of them. I think it is necessary here to reiterate what Condition 24 of the Deed of Charge/Mortgage actually states in relation to the term "the Borrower" in the context of the phrase "jointly and severally", which is the following:

> "...and where there are two or more persons included in the expression "the Borrower", covenants expressed to be made

by the Borrower shall be deemed to be made by such persons jointly and severally..."

The term "the Borrower" clearly refers to both of the appellants together or one or other of them separately. I find it difficult to ascertain how any other interpretation could be put on the above. In that regard, the Deed of Charge/Mortgage undoubtedly covers future advances due by either the first named appellant and/or the second named appellant in their own names or as Guarantors for another party.

However, I am also satisfied that the respondent in reaching his finding, failed to have regard to the provisions of the Family Home Protection Act 1976 and the possible implications thereby arising, especially in circumstances where the family home in question provided security for further loans advanced to one of the parties to the Mortgage Deed.

The Family Home Protection Act 1976 (hereinafter referred to as "the Act of 1976) was enacted to protect the dwelling in which the married couple ordinarily reside, that is, the family home. Its main purpose is the prevention of one spouse from conveying an interest in the family home without the written consent of the other spouse. Section 3 of the Act of 1976 provides that:-

"2.-(1). Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the

family home to any person except the other spouse, then, subject to sub-section (2) and (3) and Section 4, the purported conveyance shall be void."

The Letter of Loan Sanction and Agreement for Bridging Finance from ACC to the first named appellant dated the 3rd August, 2006, contains no reference to the lands comprised in Folio GY70824F, the appellants family home, as constituting security for the loan amount of €1,073,000 which was advanced by this letter to the first named appellant.

Similarly, the Facility Letter of the 2nd December, 2009, from ACC to the first named appellant again contains no reference of the lands comprised in Folio GY70824F, the appellants' family home, constituting security for the loan amount of €1,234,000 which was subsequently advanced to the first named appellant.

I am of the view that the matter should be remitted to the respondent for further consideration of the possible implications for the validity of the charges on the family home in the absence of a written consent from the second named appellant in this case. This is a legal question which remains to be addressed by the respondent notwithstanding that it was not agitated before him. I will thus allow the appeal and remit the matter for further consideration by the respondent. An issue as to costs may now arise in circumstances where the only point

on which the appeal has succeeded was not argued before the respondent and I will hear the parties' submissions in that regard.