THE HIGH COURT

AN ARD CHÚIRT

[2013 No. 345 MCA]

IN THE MATTER OF SECTION 57CL OF THE CENTRAL BANK ACT 1942 (AND AS INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004) AND IN THE MATTER OF AN AWARD OF AN OMBUDSMAN UM SEIRBHÍSÍ AIRGEADAIS

BETWEEN

TIMOTHY LYNCH

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

KBC BANK IRELAND PLC

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on 26th day of March, 2015

1. This is a statutory appeal from a decision of the Financial Services Ombudsman (FSO) given on the 15th October, 2013 in which the complaint of the appellant against KBC Bank Ireland PLC, the notice party, was found to be unsubstantiated. The questions raised in the appeal are primarily matters of law and this is not argued that the FSO fell into any error of process, or that an oral hearing was required to resolve any issue of facts between the parties.

Background

2. The appellant purchased two properties in London in the year 2007 with the benefit of loans from the notice party, KBC Bank Ireland Ltd. ("the Bank"). The loans

were secured by a first charge on each of the two properties, and the loans having fallen into arrears, each of the properties was sold by the Bank in exercise of its power of sale, the first of them in November 2008 and the second in June 2009. A sum in excess of £205,000stg remained from the proceeds of sale once the loans and the costs of sale had been paid. These monies were placed in a holding account by the Bank in July 2009 and the complaint before the FSO relates to the decision taken by the Bank to apply the balance so held to discharge part of a loan secured on a property in Ireland.

3. The appellant and his then wife had purchased property in Co. Sligo also with the assistance of the loan from the Bank and this loan was secured by way of a charge on the lands part of folio 14854F Co Sligo. The appellant and his wife fell into arrears on the Sligo loan and by letter of the 15th December, 2008 the solicitors acting on behalf of the Bank demanded payment of the full amount secured on the Co. Sligo property, and vacant possession of that property was formally demanded on the 19th February, 2009. Subsequent to this an agreement was entered into between the borrowers and the Bank to bring the account into order and various capital payments were made. The loan, at all material times, remained in arrears albeit the amount of the arrears was very small in July 2009 when the application of the surplus from the London sales to the Sligo loans was first proposed.

4. The appellant's complaint relates to a letter from the Bank of the 3rd July, 2009 by which the Bank indicated that it intended to apply the surplus from the London sales against the Sligo loan account. In the event this did not in fact happen until August 2012 and in the intervening years the Bank continued to deal with the borrowers under the Mortgage Arrears Resolution Process (MARPS) process.

The question before the Ombudsman

5. The appellant made a formal complaint on the 13th August, 2012 to the FSO seeking the refund by the Bank of the funds standing to his credit in the sterling account and his complaint in summary is that the Bank acted unlawfully and in breach of contract in purporting to effect a set-off of these funds held for him solely against monies owed on another contract in another jurisdiction, and when the Irish loan was a joint liability.

6. The matter was determined by the Deputy Ombudsman and she took the view that no conflict of evidence arose such as would require to be dealt with by oral evidence and identified the issue for adjudication by her as whether the Bank had acted lawfully in applying surplus funds from the sale of the properties secured by the English charge to the credit of the Irish loan account held jointly by the appellant and his wife. The appellant argued before the FSO, that the Bank had no contractual entitlement to apply a set-off, and that it acted unfairly and in breach of duty, and in breach of the Consumer Protection Code and the Code of Conduct on Mortgage Arrears.

The findings of the Ombudsman

7. The FSO came to the conclusion primarily on the interpretation of the terms and conditions in the two security documents that the Bank acted correctly, and within the parameters of the powers conferred on it by the provisions of the English charge when it applied the surplus monies held in the English account to the credit of the Irish loan account, thereby reducing the balance due on the said account.

8. The Ombudsman considered the relevant provisions of the English charge, clause 19.1 of which being the one that governed set-off. This provides that the Bank could without notice to the borrower:

"apply any credit balance, (whether or not then due and in whatever currency) which is at any time held by any office or branch of the Company for the account of the Borrower in or towards the satisfaction of the Secured Liabilities or any of them"

9. The Ombudsman took the view that clause 19.1 was *"couched in clear and comprehensive terms"*, and that it permitted the Bank to apply any credit balance held in the mortgage account towards the satisfaction of *"secured liabilities"* as defined in the charge at clause 1.2 as follows:

"Secured liabilities mean that all monies, obligations and liabilities whatsoever whether for principal interest or otherwise in whatever currency which may or at any time which would be due or owing or incurred by the Borrower to the Company whether present or future, actual or contingent and whether a loan severally or jointly as principal guarantor, surety or otherwise and in whatever name or style and whether on any current or other account or in any other manner whatsoever and including without limitation all Expenses and so that interest shall be computed and compounded on the terms agreed between the parties or if not agreed according to the usual practice of the Company as well as before any demand or judgment."

10. In doing so she came to the following findings:-

1) She held that the fact that the sale of the two properties on which the English loans were secured did not mean that the charge no longer operated, as the English charge operated to secure *inter alia* the Irish loan payment.
2) She found that the credit balance was *"held"* in a designated account at the relevant time within the meaning of clause 19.1 such that the power of set-off was *"open to invocation"*.

3) She held that the Bank was entitled to apply the credit balance towards the Irish loan account notwithstanding that the latter account was held in the joint names of the complainant and another party. She interpreted clause 19.1 as permitting the Bank to apply monies towards the satisfaction of *"secured liabilities"*, which she held included the Irish indebtedness, and monies owed severally or jointly, and the fact the Irish loan post-dated the English charge did not mean that the Irish loan was not secured by the English charge.

4) The Ombudsman also took the view that the third party borrower on the Irish loan did not suffer any prejudice by virtue of the lump sum reduction of the outstanding balance on her joint debt, and that the Bank did not breach the terms contained in the letter of loan offer for the Irish loan.

5) The complainant had also argued that clause 14 of the Irish mortgage prevented a set-off. That clause provides as follows:-

> *"Unless a Statute otherwise required neither the Borrower nor the Lender will at any time on in any circumstances have any right to set-off any sum due to either of them in relation to the Mortgage against or with any other sum whatsoever nor will either of them make use of any right of cross claim, counterclaim, retention, deduction or rebatement."*

The Ombudsman held that while clause 14 did prohibit the Bank from setting off any sum due on the Irish loan against any other sums, it did not prevent monies from other sources being applied in discharge of the joint loan and she agreed with the Bank's contention that *"clause 14 is irrelevant to the set-off exercises by the Bank"*.

6) The Ombudsman also rejected the argument that the complainant was a consumer within the meaning of the consumer protection code as he had purchased the properties in London as an investor, and for that purpose the Ombudsman also noted clause 333 of the amended letter of offer of the 29th May, 2007 by which the borrower warranted that in accepting the loan facility he was acting within his business and was not a consumer within the meaning of the Consumer Credit Act 1995. This point was not argued before me.

7) The Ombudsman also rejected the argument that the Bank failed to adhere to the provisions of the code of conduct on mortgage arrears on the grounds that this was not properly before her, as the account in respect of which this claim was made was not an account solely operated by the complainant. Again, this point was not argued before me.

Argument before the High Court

11. The appellant's primary argument is that the Ombudsman misapplied the law in the interpretation of clause 19.1, in that she failed to take account of the fact that the English charge was to be construed in accordance with English law. It was noted that nowhere in the finding of the Ombudsman did she make any reference whatsoever to foreign law, and that no submissions were sought or made by either party with regard to English law.

12. It is argued that the FSO fell into error as follows:-

1) In wrongfully determining that the English charge was extinguished once the English loans were repaid.

2) In failing to have regard to fact that the Irish loan was taken out after the English charge.

3) In misinterpreting the provisions of clause 19.1 of the English charge and clause 14 of the Irish charge, and in determining that the clause in the Irish charge prevented a lawful set-off.

4) In failing to have regard to the fact that the money in the English account, the balance remaining after the sale of the London properties, was held on a statutory trust for the appellant by virtue of s.105 of the English Law of Property Act, 1925.

5) In failing to have regard to the fact that the Irish loan was a joint loan and that in the circumstances no mutuality arose that might give rise to a right of set off.

6) In holding that there was no waiver by the Bank of its letter of demand in regard to the Irish loan. It is argued that once the Bank engaged with the MARPS process for the purposes of the arrears on the Irish loan the letter of demand was waived.

7) In failing to take account of the fact that at the time the set-off was applied the Irish account was in arrears in the sum of only €500 and that the application of a set-off was disproportionate.

I will group these submissions in my judgment as hereafter appears.

The arguments of KBC Bank Ireland PLC

13. Somewhat unusually KBC took part in the appeal before me and argued that the adjudicative process as a whole was not vitiated by a series of errors, and further denied that the Ombudsman erred in law in reaching her decision. It is argued that the Ombudsman did not fall into error in her interpretation of the provisions of the English charge, and that she was correct in finding that clause 14 of the Irish charge did not prevent the application of monies held in another account in discharge or part

discharge of the loans thereby secured. It was also argued that the FSO was not obliged to interpret the loan offers and/or the security documentation *contra proferentem* is incorrect, and that no ambiguity arose which required the application of any canon of construction.

14. With regard to the question of waiver it is noted that the Sligo loan agreement at clause 22 contained an express "no waiver" provision and the FSO was perfectly entitled to hold that nothing that the Bank had done in its engagement with the MARPS process or otherwise amounted to a waiver of its rights under the Sligo mortgage. It is also suggested that insofar as there might have been an agreement made for a stay on enforcement of the Irish loan that it was a conditional agreement, the terms of which were set out in a letter from AC Forde Solicitors dated 15th December, 2008 and which required certain payments to be made by the borrowers within 10 days, which payments were not met.

The arguments of the FSO

15. The FSO served a short statement of opposition pleading that the decision was made within jurisdiction, that the Ombudsman did not fall into any error of process. Much of the plea in the statement of opposition by the Ombudsman is focused on the plea, which was abandoned at the commencement of the appeal, that the Ombudsman failed to accord due process to the appellant and that he is entitled to an oral hearing.

16. It is argued that a right of set-off, or the exercise of that right, is not an inherently oppressive action. It is accepted that while deference is paid by the High Court to the FSO and to other administrative bodies no such deference arises in the case of an error of law consisting of an interpretation of legal document, a misinterpretation of a statute or of the common law. This is established *inter alia* as a

result of the judgment of Hogan J. in *Millar v. Financial Services Ombudsman* [2014] IEHC 434.

17. It is argued that the FSO in all cases will come to interpret documents, and such interpretative activity can be more or less difficult depending on the documentation that falls to be interpreted. The mere fact that the FSO engaged in an interpretative process does not amount to a basis of appeal, and it must be shown that the FSO fell into a substantial or significant error in interpretation.

18. It is also argued that the FSO was justified in coming to a conclusion of fact that the Bank has not waived its right of set-off by virtue of an engagement with the MARPS process.

Discussion

19. I consider that the primary argument made in the appeal before me concerns a question of law and that my jurisdiction to determine this appeal is not constrained by any considerations of curial deference and I adopt this law as stated by Hogan J in *Millar v. Financial Services Ombudsman.* Accordingly I turn now to consider the interpretation of the two relevant security documents.

The first question: had the English charge become extinguished?

20. The English loan was advanced by IIB Homeloans Ltd through its branch in Dublin, and the letter of loan offer was accepted by signature of Mr Lynch on the 11th June 2007. The special conditions provided for the putting in place of a charge the terms of which were annexed to the loan document and which identify at clause 23.1 the governing law as being English law. What was secured by the charge was all money, obligation and liabilities whatsoever, then or at any time in the future, due or owing or incurred by the borrower to the company. The company is the same

company as that which lent the money for the purchase of the Sligo property and in favour of which the Irish charge was created.

21. The English charge contains the following clause 3.1:-

> *"In addition, the Borrower charges to the Company with full title guaranteed as continuing security for the payment and discharge of the Secured Liabilities."*

22. The appellant argues that once he had repaid the monies borrowed to purchase the English properties secured by this charge over the English properties that the charge automatically became extinguished. In that regard clause 4 of the charge is relevant:-

> *"If the Borrower shall pay to the Company the Secured Liabilities in accordance with the covenants contained in these conditions the Company at the request and cost of the Borrower will duly discharge the Charge and reassign without warranty or recourse."*

23. Mr Lynch in his letter to the FSO of the 15th March, 2013, sent in response to a letter from KBC of the 13th February, 2013, specifically argues that:-

> *"I will point out that...on the redemption in full of the London Mortgage the contractual rights thereunder are extinguished and it is the contractual rights contained in the Collooney* [the Sligo] *mortgage which subsist."*

24. He makes this point again using different language at point 2 (2) of this letter arguing that *"there was no subsisting contract"* once the English borrowings were cleared.

25. KBC replied by a letter of 11th April, 2013 making the point that *"if the sale proceeds of a mortgaged asset are insufficient to discharge the loan balance, the mortgagor remains liable to the mortgagee for the shortfall due on the loan, pursuant*

to the terms of the mortgage". It is pointed out that the liabilities secured by the mortgage included all liabilities of the borrower to the Bank including the Irish loan.

26. This suggests that an automatic discharge did not as a matter of contract occur until all the secured liabilities had been repaid. No evidence was adduced before the FSO that the borrower sought the release of the charge, although the charge no longer burdens the English properties once these had been sold pursuant to the statutory and contractual power of sale.

27. I can find no error in the findings of the FSO that the English charge became extinguished once the two English properties had been sold. I reject counsel's argument that to consider otherwise would mean that the purchasers of these properties would take subject to the security interest, such that no purchaser would ever prudently purchase repossessed lands. The purpose of the statutory overreaching and discharge provisions are precisely to allow a mortgagee selling pursuant to the statutory or express power of sale (contained in s.88 of the English Act of 1925) to sell free of the mortgage term. That does not mean that the charge may not continue as security for other loans, as is precisely what occurred in this case.

28. The English charge was security for all of the secured liabilities and that term was defined in *"Secured liabilities"* are defined in clause 1.2 of the conditions attached to the English charge which provided as follows:

> *"Secured liabilities mean that all monies, obligations and liabilities whatsoever whether for principal interest or otherwise in whatever currency which may or at any time which would be due or owing or incurred by the Borrower to the Company whether present or future, actual or contingent and whether a loan severally or jointly as principal guarantor, surety or otherwise and in whatever name or style and whether on any current or other account or*

in any other manner whatsoever and including without limitation all Expenses and so that interest shall be computed and compounded on the terms agreed between the parties or if not agreed according to the usual practice of the Company as well as before any demand or judgment."

29. I consider that the FSO was correct in holding that the English charge was held by the Bank as security for all loans of the appellant, including the loan to acquire the Sligo property and notwithstanding that the Sligo loan was a joint loan, as the liability under that loan was joint and several.

The second question: did the FSO err in not considering English legal rules and principles?

30. I have read the correspondence and submissions made by Mr Lynch and KBC to the FSO and it is true to say that there is no suggestion in the correspondence from Mr Lynch that the English charge is to be construed in accordance with English law. It is clear however on the fact of the charge documentation itself that it was governed by English law, and there is also an express reference to the English Law of Property Act 1925 in the body of the document. The FSO makes no express reference to a choice of law question, or to any private international law issue arising, and the matter was presented by Mr Lynch and by KBC and considered by the FSO as a matter of the interpretation of clauses in the charge documentation, primarily clause 19. 1. It is nowhere suggested that clause 19.1 is ambivalent but what Mr Lynch argues, and what is disputed in its argument by KBC, is that on a true interpretation of the clause set-off cannot apply to a joint account held in another country, albeit with the same lender. The FSO gives considerable attention to the provisions of clause 19.1 and expressed an opinion that the clause is couched in *"clear and comprehensive terms"*. The finding is that no legal difficulty of interpretation arose that might have required

the involvement of either statute law or case law for the purposes of interpretation and indeed no argument is made of this type by Mr Lynch in his submission to the FSO, nor indeed to me in the course of this hearing.

31. I consider that it is undoubtedly the case that the English charge was governed by English law, although it is less clear whether the loan for the English property was governed by Irish or English law. If the Ombudsman took the view that the clause was clear, she did so taking a view as to the meaning of the words in the clause, and nowhere in her finding expresses the view that she was assisted in the interpretative process by any legal principles, provisions of any statute or any case law. Therefore the Ombudsman did not engage with any legal principles, whether they be Irish or English legal principles, and confined herself, as she was entitled to, to interpreting the words of the clause. Had there been a finding that the clause was ambivalent, certain canons of construction might have come to be engaged, and that engagement might well have involved the Ombudsman in considering whether the relevant canons were to be found in Irish or English law.

32. My function in this appeal is to consider *inter alia* whether the Ombudsman fell into an error of law. I do not find that she did and that is because I do not find that clause 19.1 is ambivalent or that it engages any canons of construction, or requires the assistance of case law or statute. Were that to have been my view I would have required the assistance of an affidavit of laws at the least to assist me in the determination of any identified ambiguity. Mr Lynch does not say the clause was unclear, he simply urges a particular meaning, and the contrary meaning was successfully urged by KBC in its submissions to the Ombudsman.

33. I do not find any error of law in the Ombudsman findings

The third question: the trust argument

34. Counsel for the appellant also seeks to argue that the surplus monies held in the English Bank were held on trust for him, and that in those circumstances the Bank was in breach of trust in applying those monies to another account. The trust is alleged to arise under s.105 of the English Law of Property Act 1925, and I accept that the provisions of that Act applied to the English charge. The relevant section provides that on the sale by a mortgagee exercising the statutory power of sale:-

> *"The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof."*

35. It is argued that by virtue of s.105 the Bank had an obligation as trustee to account for the surplus, and that the surplus ought not to be susceptible to a set-off. Counsel relies on an extract from Derham, *The Law of Set-Off* (4th Edition), at para. 10.38 which I quote:-

> *"In the case of set-off, the fundamental point should be that a mortgagee is a trustee for the mortgagor, or is the case may be a subsequent incumbrance, in respect of any surplus remaining after exercising a power of sale and paying the secured debt. This is not a recent development. Dr Waters has suggested*

that it would have been obvious to judicial minds at least since Cholmondeley v. Clinton in 1820. Therefore, the obligation to account for the surplus should not be susceptible to a set-off. Talbot v. Frere supports that view. Sir George Jessel MR said in that case, in the context of a deceased mortgagor's insolvent estate, that: 'the mortgagee cannot plead set-off. He is a trustee of the money for the estate, and his claim is only a simple contract debt against the estate.'"

36. Derham goes on to make the general point:-

"A secured creditor should not be entitled to use the security to obtain priority over other creditors in relation to a debt that otherwise was unsecured."

37. Counsel for the appellant argues that the monies held on trust are not, and ought not to have been interpreted by the Ombudsman as, monies *"held under a credit balance"*. Only monies held on a credit balance could be applied by way of set-off under clause 19.1.

38. I note that the Ombudsman made no reference whatever to this trust argument in her ruling. I consider that the appellant is correct that the surplus monies held in the account following the sale of the two English properties were held pursuant to s.105 on trust for the appellant. However the matter does not rest there and the English charge was created to secure all of the secured liabilities as therein defined to include all monies, obligations and liabilities of the borrower whether jointly or severally in any currency or in any capacity. Therefore it seems to me that while the Ombudsman made no reference to s.105 of the English Law of Property Act 1925 this fact did not lead to any error in substance which would entitle me to set aside her order. This is because no trust balance came to arise having regard to the fact that the English charge was put in place to secure *inter alia* the monies owed on the Sligo property, and no surplus funds existed which could be held under such trust.

39. Therefore I find no error in the finding of the Ombudsman.

The fourth question: set off

40. The appellant also argues that the FSO fell into error in holding that the bank was entitled to set off the English monies against the Sligo loan having regard to the true meaning of clause 19.1 of the English charge and clause 14 of the Irish charge. I accept that there is nothing inherently oppressive about the actual set off that occurred, and note also the right of set off in the English charge which provide a general right to set-off to the satisfaction of the secured liabilities or any of them, and set-off was agreed to apply in regard to any credit balance in any office or branch of the bank for the account of the borrower. Clause 19.1 was clear in my view and clause 14 of the Irish charge did not prevent a payment into the Irish loan account, but properly construed may have prevented a set off or payment out of the monies thereby secured.

41. I reject the argument that the FSO fell into error in the construction of the relevant set off provisions.

The fifth question: waiver

42. Counsel for the appellant also argues that the Ombudsman failed to consider his argument that the Bank had waived its demand in regard to the Sligo loan.

43. The appellant also contends for an alleged agreement said to have been made between Mr Lynch and the Bank to waive or suspend the demand. This agreement was not made before the Ombudsman at all. The appellant argues that he made an agreement with one Mr Spellman acting on behalf of the Bank, that the action on foot of the Sligo accounts would be stayed. Mr Lynch says in his grounding affidavit that an agreement was entered into with KBC *"to bring the arrears on the account into order"*, and this was done by way of lodgements. He says the loan was not in arrears

at the end of June 2009 but it fell into thereafter and the Bank engage with himself and his co-borrower under the MARPS agreement.

44. It is argued, and I quote from the long and detailed letter of the 15th March, 2013 from Mr Lynch to the FSO as follows:-

> *"I believe that this illustrates that KBC were aware that they had to treat his loan in this manner and were writing to me in this regard and treating P and I as consumers in the proper way but for some reason in August 2012 they unfairly and incorrectly ceased treating us under the proper codes and incorrectly off-set the monies."*

45. I can find nothing in the extensive correspondence that took place between Mr Lynch and the FSO where he makes a separate argument that the Bank agreed not to enforce its right to seek full payment of the Sligo loan following its initial demand on the 15th December, 2008. Mr Lynch does not say on affidavit that an agreement was made that continued to subsist up to the date when the actual set-off was applied, on the 19th April, 2012 and at best he makes the argument with regard to the bank's engagement with him through MARPS, and the forbearance that the Bank showed through 2009 and 2010, as evidence that he and his co-owner were consumers. He has not pursued the argument that he is a consumer for the purposes of this appeal.

46. It has not been shown by My Lynch in any of his affidavits that the Sligo loan arrears had been cleared, albeit he says that a very small amount was still in arrears in July 2009. The existence of an agreement between the Bank and Mr Lynch that the Bank would not enforce, or had agreed to waive, its rights to seek payment of the full amount on the Sligo loan was not canvassed before the Ombudsman, and there is no point raised before the Ombudsman by Mr Lynch that the agreement which he asserts

and which he says was made with Mr Spellman prevented the Bank from ever seeking to call in the Sligo loan, or to apply the surplus monies to that loan.

47. I do not accept that in the course of the hearing before me I am entitled to now enter upon an analysis of the factual nexus and the arguments which Mr Lynch asserts imputes an agreement not to enforce the Sligo. Nothing that Mr Lynch has said on affidavit would suggest that there was before the Ombudsman a live and real issue as to the nature and effect of the alleged agreement. Mr Lynch's own document dated the 20th December 2012 which he describes as *"a summary of complaint"* argues that he is a consumer, a point not now being pursued, argues that the Bank is in breach of the Consumer Protection Code and the Code of Conduct on Mortgage Arrears, a point also not being pursued, and apart from these arguments the focus of his complaint, and of the questions that he raises in his schedules, is with regard to the set-off, the question of whether the Sligo and the London mortgages ought to be treated as separate contracts, and I consider that the focus of his argument which crystallised further in his long and detailed submissions made in March 2013, was the set-off and whether the finding of the FSO that a right of set off arose was legally correct.

48. It is fair to say that the Ombudsman considered that the main issue for adjudication by her was the alleged wrongful application of the surplus funds towards the Sligo account, and the Ombudsman did not deal in her findings with the argument of waiver or the other matter that I will detail below. A considerable amount of correspondence had been exchanged with her with regard to the question of a waiver and whether there was an agreement to waive, and it might have been preferable if the Ombudsman had dealt with this in the course of her finding. However I accept the argument of the Bank that the English charge and the Sligo loan both contained a "no waiver provision", in each case at clause 22. For that reason it seems to me that

nothing would be gained were I to remit for consideration by the Ombudsman the question of waiver and in that regard the alleged argument of waiver was fully ventilated through extensive correspondence, and no argument could be made by the appellant that his argument was not fully before the Ombudsman.

The sixth question: was set off disproportionate?

49. The appellant argues that in a series of letters and meetings between May 2007 and August 2012 the Bank engaged in correspondence with the appellant and his wife with regard to the Sligo loan. The first letter of demand in respect of that loan was sent on the 15th December, 2008 and it was not until 2012, and after a face to face meeting in July 2009 between the Bank and the appellant to inform him of the Bank's intention to set-off the surplus monies against the Sligo loan, that the actual set-off occurred. The appellant's made the point that there was *"only a modest amount of money owing"* at the time the Bank first indicated that it intended to apply the surplus monies towards the balance outstanding on the Sligo account. The Sligo account was in arrears and the Bank made the point in the course of correspondence and before the Ombudsman that the loan had been called in and the Bank had thereby become entitled to accelerate the payment and to call of the repayment of the entire principal and any accrued interest and charges. By the time the set off was actually made the arrears on the Sligo loan were very substantial and were in the order of €50,000. It is the arrears at the time of actual set off that appears to me to be relevant to the question of proportionality and I do not consider that the FSO fell into error on this question.

General

50. My jurisdiction with regard to findings of fact made by the Ombudsman is limited to setting aside findings of fact which are unsustainable. I reject the argument by the appellant that the FSO did not consider the waiver point at all and that no

proper hearing was given to the appellant on that point. Ample correspondence was had which fully ventilated the question.

51. It is well established as a matter of law that for the High Court to allow an appeal under the statutory scheme it must be satisfied that the adjudicative process taken as a whole was vitiated by *"a serious and significant error or a series of such errors"*. In that regard I not the dicta of O'Malley J. in *Carr v. Financial Services Ombudsman* [2013] IEHC 182 where she stated the following:-

> *"I consider that the obligation of the respondent to give the "broad gist" of his reasons in a written finding means that he is not obliged to deal on a point-by-point basis with every argument made by a complainant. This was a case with extensive written submissions. The respondent is, within his discretion and relying on his own expertise in the area, entitled to select and determine those issues that appear to him to be relevant."*

52. It is also well established in the case law that the function of the High Court is to look at the adjudication process as a whole and to determine whether real and substantial errors are found such as would require the High Court to intervene and make on the forms of orders which it is entitled to make. I do not consider that the Ombudsman fell into error and I also consider that the adjudicative process as a whole was satisfactory and that no finding was made by the Ombudsman which was not substantiated by the evidence before her. She also did not fall into any error of law.

53. I dismiss the appeal.