THE HIGH COURT

[2009 No. 38 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57 OF THE CENTRAL BANK ACT

BETWEEN

CORNELIUS M. CAGNEY

APPELLANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

LIBERTY ASSET MANAGEMENT LIMITED AND BANK OF SCOTLAND PLC

Judgment of Mr. Justice Hedigan delivered on the 25th day of February, 2011.

1. In this case there is a challenge made to the decision of the Financial Services Ombudsman. The first thing that should be considered by the Court is the test applicable in determining whether it can actually intervene in a particular case. The law in relation to that has been very well summed up by *Ulster Bank v. Financial Services Ombudsman and Ors.* [2006] IEHC 323, judgment of Finnegan P. To summarise the criteria that he set out in that judgment, one may say that, firstly, the burden of proof is on the appellant, secondly, the onus of proof is the civil standard, thirdly, the Court should not consider complaints about process or merits in isolation but rather should consider the adjudicative process as a whole. Fourthly, in the light of those 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. Finally, in

applying this test the Court is to adopt what is known as deferential stance and should have regard to the degree of expertise and specialist knowledge of the Ombudsman. That leads one to consider just what exactly is the nature of the Financial Ombudsman's position and that I think is very well described in the case of *Hayes v. Financial Services Ombudsman and Ors.*, judgment of MacMenamin J., 3rd November, 2008, where he stated:

> *"What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issues.*
>
> *The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57CI(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."*

One can see from the above that the form of the Ombudsman's position and role is very far removed from that of a court determining issues hotly contested between parties such as the breaches of contract and so forth.

2. In this particular case the question that is raised is as to whether the decision of the Ombudsman to proceed to a decision, resolution or determination in this case without holding an oral hearing was a reasonable one to make in the circumstances. In this regard the Ombudsman clearly enjoys a fairly broad discretion as to whether or not to hold an oral hearing. That is well described in the case of *J. & E. Davy v. Financial Services Ombudsman* [2010] IESC 30, where the Supreme Court cited and approved the judgment in the case of *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, judgment of Costello P. as follows:

> *"There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide in State (Boyle) .v General Medical Services (Payments) Board [1981] I.L.R.M. 14 is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr Higgins on the one hand and (b) the accuracy*

of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined under oath before the appeals officer)."

That, therefore, sets out what the approach of the Court is to be in applications or appeals of this sort, what the nature of the Ombudsman is and what are the rules in relation to interfering with his decision to decide not to have an oral hearing. The bottom line is that the Court's role is a relatively restricted one.

3. In this case considering just what exactly was being investigated, what was the nature of the allegations being made in the context of whether the Ombudsman should decide to hold a hearing or not, I think Mr. McDermott has very fairly said that in this case what is being alleged is fraud or forgery. I think he is being careful not to overstep the privilege of counsel in Court by casting aspersions upon anyone and I think he is correct to do that. Nonetheless, I think it is an almost impossible argument to advance that you can allege fraud without actually pointing the finger at somebody. There is always some person who may be readily identified as involved by those in particular positions. It is thus impossible to make such an allegation in *vacuo*. It may be the appellant thought so and that may be why he was anxious not to have the notice parties present here in Court but, quite plainly the Court decided otherwise, and quite correctly too. In this case the Bank of Scotland and Liberty Asset Management are parties whose own integrity has been called into question and justice is a two way thing. It is to be noted that to date no graphological evidence has been produced at any stage. There is just the bald assertion that these signatures are forged. It is obvious to say that anyone can make such an allegation. Standing it up is a very different thing indeed and standing up such allegations is notoriously difficult as Mr. McDermott has pointed out and as anyone who has dealt with any such allegations

would know. The mere statement by some graphologists to the effect that a signature is a forged signature will certainly not be allowed to stand on its own. It will invariably be hotly contested and probably contested by expert evidence on the other side. That, it seems to me, is classically not the Ombudsman's function. It is classically a function for the Courts in plenary proceedings in which evidence is called in detail, experts are examined and cross-examined in great detail and ultimately a Judge experienced in these matters comes to a conclusion as best he or she can. It is something that I think is far beyond the role of the Ombudsman.

4. Mr. Lewis, on behalf of Liberty Asset Management Limited, makes the point quite fairly that some of their staff's good name is being called into question, that were the Ombudsman to proceed to consider the allegations being made in the form of an oral hearing, the results would in all probability be results that would not necessarily give to those persons whose good name was called into question the real opportunities which a Court hearing would provide to defend their good name. The allegations made are of fraud, forgery or conspiracy. They are very serious allegations that are made and they are ones that are classically not to be determined by an Ombudsman either at oral hearing or in any other way.

5. Mr. Fanning, on behalf of the Bank of Scotland Plc, has pointed out that the oral hearing, even had it been held, would not have advanced things any more than were advanced at the time. I am inclined to agree. The appellant at that stage had not submitted any graphological evidence, as has already been pointed out by Mr. McDermott. He has merely asserted that the signatures were forged. If indeed he had the expert evidence produced before the Court before an oral hearing it would undoubtedly have been challenged. Again, it is the same ground that was referred to

by both Mr. McDermott and Mr. Lewis and again I find that the Ombudsman is not an appropriate forum in which matters such as this should be decided.

6. Therefore, taking all those matters into account, applying the tests which are relevant to this Court in determining first of all how and what the scope of the appeal before it is, and, secondly, as to the basis on which an Ombudsman may hold an oral hearing, it seems to me that in the circumstances of this case the decision made by the Ombudsman not to hold an oral hearing was a decision that was well within his jurisdiction and therefore not something with which this Court can interfere. That is the essential complaint that is made before the Court here today and I think that that effectively disposes of it. Consequently, the appeal is dismissed.

Approved
30/6/11
John McDermott