THE HIGH COURT

[2011 No. 9 MCA]

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

BETWEEN

ALAN GRANT AND DEIRDRE GRANT

APPELLANTS

AND

IRISH LIFE AND PERMANENT PLC

RESPONDENT

AND

THE FINANCIAL SERVICES OMBUDSMAN

NOTICE PARTY

Decision of Mr. Justice Hedigan delivered on 31st day of July, 2012.

1. This is an appeal under s. 57 CM of the Central Bank Act 1942 as amended brought against a decision of the Financial Ombudsman made on the 20th December, 2011. Section 57 CM provides as follows: –

> "57CM(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)."

2. The nature of the appeal to the High Court is now well established. The classic statement thereof is that by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] IEHC 323:

"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.*"

The Orange test to which Finnegan P. referred is as follows:

"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."

3. The applicants are seeking to appeal the determination of the notice party dated 20th December, 2011 in which he determined that the three grounds of complaint raised by the applicants had not been substantiated. The first applicant is an associate director of an intermediary general mortgage corporation. The second applicant is the first applicant's wife. The applicants have three residential investment mortgages with the respondent bank totalling €1.8m secured against four properties. The applicants' complaint concerned a letter which they received from the respondent informing them that the interest only period in respect of the three mortgaged loans which they had with the respondent was due to expire. The applicants were advised that they could either switch to capital and interest free payments or they could extend the interest only period for a further twelve months at a variable rate of interest as opposed to the tracker rate which had been applied to their loan to date.

4. The Ombudsman in a decision made on the 20th December, 2011 rejected the applicants' complaint against the respondent. The grounds of their complaint against the Ombudsman's decision may be summarised as follows:

(i) that the Ombudsman wrongly re-formulated the applicants' complaint in its summary as provided to the respondent;

(ii) the Ombudsman failed to direct an oral hearing;

(iii) the Ombudsman erred in his request for documents in the schedule of evidence;

(iv) the Ombudsman erred in his determination that the European standardised information sheet did not form part of the terms and conditions of the applicants' loans.

5. In his adjudication on this complaint, the Ombudsman summarised the applicants' complaint in a letter circulated on the 5th August, 2011 to the applicants and to the respondent. This letter also framed questions and requested sight of all relevant documentation from the respondent. When the respondent's response was received, this also was circulated to the applicants. No issue was taken then with the characterisation of the complaint by the Ombudsman or in relation to the questions asked or the documents requested. Some further submissions were made by the applicants prior to the decision of the Ombudsman.

6. On the 20th December, 2011 the Ombudsman issued his finding. The finding may be summarised as follows:

(i) the respondent acted correctly and in accordance with the terms and conditions of the complainants' mortgage contracts when it decided to terminate the interest only periods;

(ii) the fact that the bank would be entitled to take this course of action was adequately highlighted to the applicants at the point of sale via the actual loan offers;

(iii) in relation to the second and third grounds of complaint, the respondent did not act in breach of any duty by failing to accept the complainants' proposal to pay a sum almost €2,000 less per month in respect of their mortgage accounts than the repayment figure required by the complainants to meet their contractual obligation;

(iv) in respect of the fourth ground of complaint, by giving the complainants an option to remain on interest only repayments, the bank had actually demonstrated a marked willingness to assist the complainants with their financial situation.

Taking these complaints sequentially

7.1 Failing to properly summarise the applicants' complaints so that the actual complaint was not dealt with; the main thrust of the applicants' case in this regard is that the Ombudsman misdescribed the applicants' real complaint when he stated it as *"a failing to highlight the importance of the special condition that allows the bank to review the interest rate only period after an initial three year period at the point of sale."* They think this formulation suggests they were not aware of the existence of the condition when they in fact were. The applicants argue that their real complaint was that active misrepresentation was made to the effect that condition (a) would never be implemented. It must be noted that the applicants' own formulation of their complaint contained in the letter of complaint to the Ombudsman at the top of the third page stated:

"I cannot believe a vague condition on a loan offer which was not highlighted in any way could have such a devastating effect on my financial situation."

It is hard to blame anybody such as the Ombudsman, who is obliged to be neutral, from characterising the complaint in almost exactly the terminology of the complaint itself. Moreover, it should be noted that the summary of complaint is just that. It is a summary. The finding itself on page 2, first paragraph, last sentence, states:

"They argue, therefore, that when they entered into the loan agreements in question, they were led to believe that the interest only arrangement would apply for the full loan term. "

Moreover, as appears at Tab 7 of the core documents herein, the applicants furnished the Ombudsman with an e-mail which contained their observations to the Central Bank Regulator dated the 20th May, 2011 in which they outline in detail why they consider the produce was mis-sold to the public. Clearly the very issue the applicants raise now was in fact considered by the Ombudsman. Furthermore, the complaint summary was circulated to the applicants on the 3rd August, 2011. The summary also contained a schedule of questions and of evidence required. The applicants had the opportunity then to comment on the formulation of the complaint, the schedule of questions and any documents that should be sought. On the 30th September, 2011, the Ombudsman circulated the respondent's response to the applicants herein and asked for submissions on these. The applicants did make submissions in an undated letter to the Ombudsman which appears at Tab 9 of the book of core documents. They made no criticism of the way the complaint was formulated. Thus, the applicants had every opportunity if they wished to complain that the summary was incorrect. They did not do so.

This failure on the applicants' part is fatal to the applicants' case. It is not permissible in a complaint to the Ombudsman for a person to effectively confirm the summary of complaint form circulated to them and then upon receiving an unfavourable finding challenge that same summary.

As observed above, what the applicants now claim is the gravamen of the complaint, i.e. that the respondent represented the loan would always remain interest only, was before the Ombudsman when he considered the complaint. This Court cannot interpose its view for that of the Ombudsman on this question as to whether the applicants were misled by misrepresentation. I can only do so if there was some form of irrationality in the sense of the non-existence of any evidence upon which his decision was based. In this case there is a surfeit of evidence to the effect that it was clear to anybody, layman or informed layman that the bank at every turn in the documents involved herein were explicitly retaining the right to transform the loan to an interest and capital one at their discretion. There is so much evidence of this that had the Ombudsman come to a different conclusion on this issue, he might well have been challenged on rationality grounds by the respondent. Moreover, as the acceptance of loan offer witnesses, this document was signed by the applicants' solicitor who it states explicitly, has fully explained the terms and conditions. These terms and conditions contained as condition A the very condition allowing the bank to review the nature of the loan.

Failing to hold an oral hearing:

7.2 The Ombudsman clearly has a broad discretion as to whether to hold an oral hearing. See *Davy v. The Financial Services Ombudsman* [2010] 3 I.R. 324 at 364.

There is a line of cases in this Court which illustrate that the Courts are slow to question the exercise of this discretion. The Ombudsman must consider whether any

real dispute exists before directing such a hearing. His decision on this is one very much within his jurisdiction albeit one which can be questioned on the basis of fairness of procedures taking the adjudication as a whole. The Court will be slow to intervene. In his complaint both the Ombudsman and the Court are operating in what may accurately be described as a fact free zone. Many references have been made to representations made by the respondent but there is no detail given save the reference to a PowerPoint presentation in the submission to the Central Bank Regulators copied to the Ombudsman in May 2011 (see above). Who, what, where, when, how – none of these questions are answered – no details were given. Where is the evidential dispute that demands an oral hearing – it was not brought to the Ombudsman's attention nor was it provided in this hearing. There was in my view no evidential dispute apparent which required the Ombudsman to direct an oral hearing.

The European standardised information sheet (ESIS)

7.3 This document arises from a European agreement on a voluntary code of conduct on pre-contractual information for home loans and is a standard form used by all of the banks in Ireland. It states explicitly that it does not constitute a legally binding offer and therefore is not part of the offer to the customer. In any event, the ESIS states that the monthly repayment comprises of interest only with repayment of principal deferred for the first three years of the term or such other periods as the lender will decide subject to the rights of the lender to review the deferral of the repayment of principal at any time. Consequently, on both counts the ESIS offers no comfort to the applicants and no support for their complaint.

The applicants were being forced off a tracker mortgage:

7.4 Two options were offered to the applicant; switch to capital plus interest repayment on the basis of a tracker mortgage or continue on interest only for twelve months with no guarantee of further extensions on a variable rate of 2.8%. In doing so the bank was invoking condition A which reserved to itself the right to change the loan from interest only to interest and capital. The second option offered was considered by the Ombudsman to be an attempt to assist the applicants rather than a breach of duty. This is a judgment by the Ombudsman made in the exercise of his expertise and appears perfectly reasonable and grounded on uncontroverted facts. It is thus not the kind of decision with which this Court should interfere.

Failing to request all relevant documents of the respondent and/or abandoning his jurisdiction to order such documents

7.5 I accept the submissions of the respondent filed in these proceedings in this regard. The applicants at no stage of the proceedings objected to the manner in which the Ombudsman requested documents nor did they ever specify documents they thought should have been produced. Moreover, the applicants still do not identify any documentation they consider relevant which has not been produced nor how this could amount to a serious or significant error. In order to argue that significant documentation should have been ordered, the applicants need to be able to identify such documentation and demonstrate their significance. The applicants rely on Ryan v. The Financial Services Ombudsman (Unreported, High Court, 23rd September, 2011) in this regard. Yet in that case it was a specific item of unquestioned significance that the Court considered the Ombudsman should have ordered. Section 57CE(1) of the Act gives the Ombudsman the authority to require production of any

document or thing that appears to him to be relevant to his investigation. In framing the request in this investigation in the way he has, the Ombudsman hewed closely to the wording of the Act. This provision should, in my view, be interpreted as it clearly appears to be, i.e. a tool for use in a procedure that is intended to be as informal as possible and which bears many of the characteristics of an arbitration.

7.6 For all the above reasons, I am not satisfied that the applicants have demonstrated any serious or significant error or series of errors and therefore I must affirm the finding of the Ombudsman.