THE HIGH COURT

JUDICIAL REVIEW

Record No. 2022 / 207 JR

BETWEEN:

MICHAEL DONNELLY

Applicant

-AND-

THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Respondent

STENOGRAPHER'S NOTE OF THE EX-TEMPORE JUDGMENT OF HESLIN J.
DATED 13 OCTOBER 2023

I'm grateful to both counsel and to Mr. Donnelly for the clarity with which they have made their respective positions clear. And as the Court understands it, matters can fairly be summarised as follows:

The backdrop concerns Mr. Donnelly's assertion that Danske Bank was incorrectly recording or reporting his credit rating and it is that which gave rise to his claim as Applicant to the Financial Services and Pensions Ombudsman, as Respondent. It is common case that the Ombudsman gave a preliminary decision, and it is not in dispute that on the 13th of December, I think 2021, the Ombudsman went no further and decided not to continue to make a final decision. And it is this discontinuation which gave rise to the judicial review proceedings.

The reason why the Ombudsman discontinued the adjudication was because, and it was stated to be because the Applicant had alleged that the Ombudsman was biased in favour of the bank in question. And the Ombudsman Respondent stated, inter alia:
"As I have pointed out on numerous occasions, I cannot complete the adjudication of your complaint in such circumstances where you do not believe that the investigation has been carried out in a fair and impartial manner."

As I say, this gave rise to the seeking of leave. An application was made on notice and Mr. Justice Simons granted leave, extended time and the proceedings progressed.

The Respondent has since made the decision to quash the decision challenged and it is appropriate to quote as follows from an open letter sent by the Respondent's solicitors on the 24th July 2023, which stated, inter alia:

"In order to avoid the need to continue with the judicial review proceedings for both parties, the FSPO (the Respondent) wishes to propose, on an open basis, to resolve these judicial review proceedings on the basis that a final order by the High Court be made, as per paragraph (d)(1) of your Statement of Grounds, quashing the determination not to proceed to a final adjudication and formally remitting your complaint to the Respondent for the adjudication to be continued and concluded by a fresh adjudicator. Provided that you are agreeable to the above proposed course of action, the FSPO (the Respondent) will pay your reasonable outlay to date associated with the judicial review proceedings, to be subject to costs adjudication in the event that this cannot be agreed."

It is appropriate to turn now to the relief and to examine the extent to which the open proposal to quash the decision for a fresh determination by a new adjudicator and to pay the Respondent's -- the Applicant's expenses meets the reliefs sought.

At paragraph (d) of the Statement of Grounds of the 14th March 2022 the relief is as follows:

"1. An Order of Certiorari quashing the Financial Services and Pensions Ombudsman's decision not to proceed to a final adjudication on my case which is before him."

And I pause to observe that this is relief which has certainly been achieved and, therefore, the issue is moot in so far as matters concerned.

"2. An order compelling the Financial Services and Pensions Ombudsman to perform their public duty and proceed to a final adjudication on my case which is before him."

Again, this is now a moot issue, in circumstances where a fresh determination will be made by a new individual within the Respondent.

Skipping to 4: "*Such further or other order."*
Well that plainly doesn't arise, no other Order is at play.

"5. The costs arising from and incidental to the proceedings."
And again that's covered in the open letter in so far as there is a commitment to pay the Applicant's expenses. No legal costs having been incurred in circumstances where the Applicant represents himself.

Turning then to the relief at 3, it is put in the following terms:
"*A declaration that in deciding not to proceed to final adjudication in my case the Financial Services and Pensions Ombudsman (a) erred in law in relying on section 52(1) of the Financial Services and Pensions Ombudsman Act 2017 as legal grounds for his refusal."*

And, as a result of the helpful submissions to me, Mr. Donnelly accepts that the decision-maker did not in fact quote section 52(1) when deciding not to proceed to complete a final decision because of the stated reasons in relation to allegations made. And Mr. Donnelly assisted me by explaining that in fact the individual concerned left within two days. It does appear that post-dating the decision challenged in the present judicial review proceedings others, not the decision-maker, but apparently with a view to try and defend the decision, did quote section 52(1). That is materially different, of course, to the Respondent, for the purposes of the decision challenged, relying on section 52(1). And it seems entirely uncontroversial to say that the question of section 52(1) plays no role in the decision challenged and, therefore, the relief at section 3(1) is entirely irrelevant.

Looking then at the relief claimed at section 3(b). This is a declaration that in deciding not to proceed to final adjudication, the Respondent *"acted in a manner that breached the Applicant's constitutional right to a fair trial in accordance with natural and constitutional justice pursuant to Article 38(10) of the Constitution*." And I'm not aware of any such article. "...and Article 6 of the ECHR".

But dealing with the point[1] made supplementary and during my ruling, what I have said, I'm very much aware that the Respondent is not an individual. The point I'm making, and it is unanswerable, is that, if a decision is made at a particular time, then any *ex post facto* attempt to defend it with reference to, for example, section 52, is materially different from the position which pertained when the decision is made. In other words, there is land and sea between a situation where section 52(1) is relied on by the decision-maker for the purposes of the decision challenged - and in this case it was not -- and the other example or situation or scenario where one or more or many people quote section 52 on behalf of the Respondent in an attempt to defend the decision. The latter seems very clearly to be the position here, not the former. And it fortifies me in the view that, therefore, section 52 and the relief concerning 52 is otiose, it is irrelevant, it plays no part in the decision challenged. As to the reference to Article 38(10), I have difficulty accepting that this is a typographical error. And I mean no disrespect, but there is a fundamental difference between 40 and 38. But even if that were so, and leaving aside that there has been no application to amend, and taking full account of the fact that the Respondent -- Applicant is someone who represents himself, and with clarity and skill, the underlying and more important point is that there has plainly been no question of a trial. Plainly, the Applicant was never in jeopardy. The Applicant -- this was not a determination which engages constitutional fair trial rights. Nor is it necessary to determine that, in circumstances where the effect of the open offer of relief is to wind back the clock. And even if there was any engagement of fair trial rights, they are going to be vindicated by an entirely fresh process.

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[1] Mr Donnelly interrupted Heslin J. mid-delivery of the ex-tempore judgment. For completeness, the exchange between Mr Donnelly and the Court is set out below:

Mr Donnelly : "*Sorry, Judge, that was a typo. I was referring to Article 40.3, from which the right to a fair trial and due process is recognised. And also Judge, the Ombudsman's office is not a single person, it is an entity and the persons who took responsibility for quoting section 52 were the people who put the pen to paper, so to speak, in the absence of the former Ombudsman."*

Heslin J.: "*I'm not going -- I don't intend any disrespect, but* – "

Mr. Donnelly: "*I am just trying to clarify that*. "

Heslin J.:--" *I did ask you if you had anything else to say. I'm giving a ruling now so I appreciate it if you don't interrupt*. "

Mr Donnelly: "*Okay. Thank you."*

The dicta in *Omega Leisure Ltd. -v- Barry* [2012] IEHC 23, Clarke J., as he then was, at Section 4 is of assistance to me, it seems, because it provides a useful lens through which the Court asks the following question: Against the backdrop of a situation where the decision challenged is to be quashed, an entirely fresh consideration is to be given by the Respondent and by a different individual within the Respondent, and the Applicant's expenses are going to be paid, and in circumstances where the relief in 3(a) and (b) does not speak to the decision challenged, what good reason would there be for this Court devoting public resources to a trial in relation to whether or not such a declaration should be made?

It seems to me that there can be no good reason. As has been pointed out, a declaration is a discretionary remedy and the Court should approach it with the necessary caution. I can't agree that in the present case it would be other than an entirely theoretical question, even if the relief at 3(a) and (b) spoke to the pleaded case. And it doesn't seem to me that it speaks to the facts in the case at all.

It doesn't seem to me that this Court has a basis for embarking on a trial to determine whether to grant the relief at No. 3 given that the stated purpose is, as Mr. Donnelly put it, "*mere certiorari won't compel them to behave*". And that seems to me to be the nub of the issue insofar as the Applicant is concerned.

I do not for a moment suggest that Mr. Donnelly is acting other than in good faith. But the sincerity with which somebody believes something to be true does not of itself entitle them to call upon the Courts to devote public resources to the determination of an entirely irrelevant issue.

Furthermore, it is simply inappropriate for this Court to follow the logic which is urged on it by Mr. Donnelly, because it is plain that he makes submissions to the effect that he cannot rely on the Ombudsman to give him a fair hearing in the future, he cannot rely on the Ombudsman to engage in a fair treatment of his complaint going forward. And that is, in truth, a future crime argument. It is one the Court can't accept, because it is to impute mala fides on the part of the Respondent. It is to invite the Court to accept that it must engage with a

trial in respect of the reliefs sought at 3 because the Respondent is biased and incapable of giving a fair treatment in the future by way of the fresh determination by a separate individual within the Respondent. And this, if no other reason, is why it is entirely inappropriate to do as the Applicant urges, despite the skill with which he urges it, and despite the sincerity with which he holds his views.

The appropriate response by the Court must be to quash the decision and to make orders to the effect that a fresh determination will be made, the matter will be remitted and, indeed, to order that the reasonable expenses of Mr. Donnelly be discharged. But the Court cannot, for the reasons given, engage further.