



THE SUPREME COURT

DETERMINATION

IN THE MATTER SECTION 64 OF THE FINANCIAL SERVICES AND PENSIONS

OMBUDSMAN ACT 2017

BETWEEN

ULSTER BANK IRELAND DAC

Appellant

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Respondent

AND

U.H.K., F.K. & K.C.

Notice Parties

Neutral Citation: [2023] IESCDET 119

Supreme Court Record No.: S:AP:IE:2023:000114

High Court Appeal No.: 2021/137 MCA and 2021/174 MCA

Date of Determination: Friday, 13th October, 2023

Composition of Court: Baker J, Hogan J, Collins J

Status: Approved

APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE

CONSTITUTION APPLIES

RESULT: The Court does not grant leave to the Appellant / Applicant to appeal to this Court from the High Court.

ORDER SOUGHT TO BE APPEALED

COURT: HIGH COURT
DATE OF JUDGMENT OR RULING: 22 JUNE 2023
DATE OF ORDER: 11 JULY 2023 / 27 JULY 2023
DATE OF PERFECTION OF ORDER: 11 AUGUST 2023 / 4 SEPTEMBER 2023
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 29 AUGUST 2023 AND WAS IN TIME

General Considerations

1. The general principles applied by this Court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment, have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this court in *BS v Director of Public Prosecutions* [2017] IESCDET 134, and in a unanimous judgment of a full court delivered by O'Donnell J in *Quinn Insurance Ltd v PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 IR 812. Accordingly, it is unnecessary to revisit the relevant constitutional principles for the purpose of this determination.

2. It should be noted that any ruling in a determination is a decision particular to that application and is final and conclusive only as far as the parties are concerned. The issue determined on the application for leave is whether the facts and legal issues meet the constitutional criteria to enable this Court to hear an appeal. It will not, save in very rare circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues, if and when such issues should further arise in a different case. Where leave is granted on any issue, that matter will be disposed of in due course in the substantive decision of the Court.

Background

3. UHK & FK and KC (the Notice Parties) brought complaints to the Financial Services & Pensions Ombudsman ("*FSPO*") asserting that the Applicant, Ulster Bank Ireland DAC ("*the Bank*"), had wrongfully failed to switch them back to a tracker rate (a rate which tracked ECB interest rates) on their respective mortgages with the Bank. In each case, the complainants had previously been on a tracker rate but had moved to a fixed rate. In each case they sought to revert to the tracker rate but the Bank declined to facilitate that. The complainants asserted that they had a continuing contractual entitlement to the benefit of a tracker rate under the terms and conditions of their respective mortgages and also complained that the manner in which the Bank had dealt with them was in breach of the Consumer Protection Code ("*CPC*") issued by the Central Bank of Ireland ("*CBI*").
4. It is a matter of public record that the manner in which certain mortgage lenders dealt with customers in relation to tracker mortgages has been the subject of

significant controversy. As a result of that controversy, the CBI undertook an exercise called the *Tracker Mortgage Examination* ("TME") and a further exercise called the *Tracker Mortgage Investigation* ("TMI") in order to assess lenders' compliance with their legal and regulatory obligations in relation to tracker mortgages. The Bank was one of the lenders covered by the TME & TMI.

5. The Bank defended the complaints. In each case it sought an oral hearing but that was refused by the FSPO. It argued in each case that the complainants did not have any entitlement to revert to a tracker rate, maintaining that the terms and conditions of the mortgage had been varied by subsequent dealings and/or by documents executed by the complainants at the time that they moved from a tracker rate. The Bank also argued that the CBI had already considered a cohort of similar cases in its TME & TMI and had concluded that the Bank had complied with the CPC.
6. In separate decisions, the FSPO found in favour of the complainants in both cases and directed that the complainants be resorted to a tracker rate and awarded compensation.
7. The Bank appealed both decisions to the High Court pursuant to section 64 of the Financial Services and Pension Ombudsman Act 2017 ("*the 2017 Act*"). In its grounds of appeal it asserted over 40 separate errors of law on the part of the FSPO (Judgment, §10). In its judgment ([2023] IEHC 350), the High Court (Bolger J) identified the following headings: (a) a right to an oral hearing (the Bank maintaining that the FSPO was wrong to have refused an oral hearing); (b) the standard of review (the Bank contending that the FSPO was not entitled to any curial deference in respect of procedural errors made by him or errors of law

including errors of contractual or documentary construction or errors in the inferences drawn by him from documents); (c) the CBI's TME and TMI (the Bank contending that the FSPO was not entitled to disregard the CBI's interpretation of the applicable regulatory standards and the conclusions reached by the CBI in relation to identical documents and legal issues, especially by reference to the CPC); (d) the FSPO's legal theory (a complaint that both decisions were decided according to a legal theory – that the complainants were contractually entitled to a tracker rate even though they executed documents that provided that a particular rate (rather than a tracker rate) would apply on the expiry of the fixed rate period – developed in previous cases; (e) the terms of the contract (the Bank contending that the FSPO's construction of the applicable terms and conditions was in error); (f) the CPC (the Bank's contention being that the FSPO erred in finding a breach of the CPC without identifying the precise provision breached and explaining how it had been breached and also that its findings effectively altered the legal relationship between bank and customer); (g) the relevance of earlier FSPO decisions (the Bank complaining that the FSPO had effectively abandoned its previous approach to complaints of this kind without any explanation of that "*volte face*"); and (h) failure to give reasons (the Bank's complaint being that the decisions were inadequately reasoned and left the Bank uncertain as to what it was permitted to do).

8. The issue of the applicable standard of review in an appeal from a body such as the FSPO is one of the matters of general public importance identified by the Bank in its application for leave to appeal and the case made by the Bank in the High Court warrants more detailed reference. The Bank agreed that the standard of review is as set out by the High Court (Finnegan P) in *Ulster Bank Investment Fund v Financial Services Ombudsman* [2006] IEHC 323, namely whether the

impugned decision was vitiated by a serious and significant error or a series of such errors. However, the Bank relied on a series of more recent decisions, *Stanberry Investments Ltd v Commissioner of Valuation* [2020] IECA 33 (a valuation appeal), *Molyneux v FSPO* [2021] IEHC 668 and *Utmost Paneurope DAC v FSPO* [2022] IECA 77 (both appeals from the FSPO under section 64 of the 2017 Act) as authority for a series of propositions: that administrative tribunals are not entitled to deference on pure issues of law; that there could be no deference for decisions of fact premised on errors of law; that the court must intervene in mixed questions of fact and law where the FSPO made a fundamental error of principle; that the High Court is free to draw different inferences from documents that the FSPO; and that the FSPO is not entitled to curial deference in respect of errors of law including errors of contractual construction.

9. The FSPO took issue with all of the Bank's complaints. On the issue of the standard of review, it relied (*inter alia*) on the decision of the Court of Appeal in *Millar v Financial Services Ombudsman* [2015] IECA 126, [2015] 2 IR 456 which, it said, was authority that the FSPO's construction of a contract was entitled to deference and could not simply be examined afresh by the High Court on appeal.
10. On the issue of the standard of review, the Judge referred to a number of authorities, including *Ulster Bank Investment Fund v Financial Services Ombudsman* and *Millar*. In her view, the decisions in *Stanberry*, *Molyneux* and *Utmost* had not altered the jurisprudence on curial defence, including *Millar*. Accordingly, what the Court had to consider was whether the Bank had proved on the balance of probabilities that the FSPO's construction of the contractual material contained "a serious error". Applying that test, the Judge held that the FSPO was entitled to find that the Bank had been in breach of contract (while also noting that the FSPO's jurisdiction extended beyond the purely legal and

encompassed a jurisdiction to find a complaint substantiated on the basis that the conduct concerned was "*otherwise improper*").

11. Bolger J went on to consider the relevance of the CPC and CBI's findings, finding "*no merit*" to the Bank's arguments. As a matter of fact, the CBI's findings had no effect on customers' power to lodge a complaint with the FSPO. As a matter of law, the FSPO and CBI have different powers and jurisdiction, which justified the FSPO in forming its own view on the issue of compliance.

12. Turning to the decision-making process, Bolger J emphasised that the Bank had not identified any prior decisions in connection with which the decisions at issue had caused it any prejudice. In her view, the recognised requirements of fairness and acting judicially, insofar as they applied to the FSPO, were sufficient safeguards against arbitrariness and were satisfied. In respect of the reasons that the FSPO was required to give, Bolger J found these must be sufficient to enable parties to understand the decision, to decide whether to challenge it, and to allow a court to undertake an appeal or review. Noting the "*extensive nature*" of the Bank's submissions (which, in her view, indicated that it was well able to understand the FSPO's decisions and the basis for them) and the recognition by the courts that bodies such as the FSPO do not need to provide reasons of the same kind as the Superior Courts, she was unpersuaded by the Bank's arguments.

13. Section 64(7) of the 2017 Act provides that the decision of the High Court on the hearing of an appeal under section that section "*is final, other than that a party to the appeal may apply to the Court of Appeal to review the decision on a question of law (but only with the leave of either of those courts, as appropriate)*". By

Orders made on 27 July 2023, Bolger J gave the Bank leave to appeal to the Court of the Appeal on the questions of law set out in the Schedule to the Orders. These comprise five broadly drawn questions, agreed as between the Bank and the FSPO, concerning (a) the issue of deference to the FSPO's interpretation of the contract; (b) whether the High Court erred in holding that the FSPO's was not seriously and significantly in error regarding the interpretation of the contract; (c) the High Court's findings on FSPO's duty to give reasons; (d) the High Court's approach to the findings of the CBI; and (e) the effect of the FSPO's previous decisions on its decision-making process.

The Application for Leave to Appeal

14. The Bank nonetheless seeks leave to appeal to this court. It identifies two matters which it claims are of general public importance, namely (a) the standard of review in an appeal from quasi-judicial bodies; and (b) how such bodies make decisions. As to (a,) the Bank says, in essence, that approaching the construction of a contract as a "*mixed question of law and fact*" turns the standard of review into something approaching a "*no evidence*" standard which, it submits, is incorrect. According to the Bank, there is no real role for deference to quasi-judicial bodies in the interpretation of contracts such as the contracts at issue. The Bank submits that there is "*a tension*" between *Millar* on the one hand and *Utmost* and *Stanberry* on the other on this issue and says that it is a matter of general public importance that it be definitively determined by this Court. As to (b) (how quasi-judicial bodies make decisions), the Bank says that having regard to the specific features of the FSPO's jurisdiction (including powers which arguably exceed the power of a court, including the power to award compensation when no compensation would be recoverable in court), it is of

general public importance that certain aspects of its decision making should be determined, including its duty to give reasons, whether the FSPO should have regard to findings of the CBI relating to alleged breaches of the CPC and whether, if the FSPO departs from a previous decision, it must explain why.

15. As exceptional circumstances justifying a direct appeal to this Court, the Applicant relies on the fact of tension in the case law over the standard of review and says that the circumstances are "*exceptionally pressing and urgent*" in light of the Bank's withdrawal from the Irish market. It says that significant cohorts of borrowers will potentially be impacted by the resolution of the issues (elsewhere in its Notice, the Bank says that at least 5,300 loan accounts may be affected) and other lenders will potentially be affected also. Finally, the Bank says that if a direct appeal is not permitted, an appeal to this Court is likely to arise in any event, regardless of what decision is made by the Court of Appeal and any such appeal is likely to look the same as the proposed appeal now.
16. Finally, the Bank seeks a priority hearing on the basis of significant of the issues from its perspective, the considerable number of accounts that may be affected and the implications for other financial institutions.
17. The Bank's grounds of appeal in the Appendix to its Notices set out 13 grounds (excluding one relating to the costs of the High Court), with multiple sub-grounds, which, between them, appear to encompass the entirety of the grounds advanced in the High Court and all of the findings made by the High Court Judge, save that the Bank no longer seeks to agitate the FSPO's refusal to direct an oral hearing. Notably, these grounds appear to be even more extensive in scope than

the grounds which the High Court was asked to permit the Bank to pursue by way of appeal to the Court of Appeal.

18. The FSPO opposes the application for leave. It says that its decisions related to discrete and specific contractual wording which do not raise any issue of general public importance. As to the standard of review applied by the High Court, the FSPO says that the Judge cited *Fitzgibbon v Law Society* [2014] IESC 48 (as applied in *Utmost*) and applied the *Utmost/Fitzgibbon* standard. According to the FSPO, it is evident from the Judgment that applying “any or all” of *Millar*, *Fitzgibbon* and *Utmost*, the Judge considered the Bank’s argument unsuccessful. The Bank’s core point – the standard of review – was one which the Court of Appeal could determine, given that the argument was that there was a clash of Court of Appeal authority (which the FSPO did not accept). The other points raised by the Bank are, according to the FSPO, “far removed from matters of general public importance”. Even if leave was to be granted, it should be on limited grounds only.

19. The FSPO disputes that an appeal to this Court is required by the interests of justice. It also disputes that there are any exceptional circumstances justifying a direct appeal to this Court from the High Court. It refers in this context to the breadth of issues sought to be pursued by the Bank and says that there would be much to be gained by way of clarification or refinement of the issues by an intermediate appeal to the Court of Appeal. That Court can resolve any conflict in the authorities. No weighty countervailing factor or factors had been identified to justify a direct appeal.

20. The FSPO does not oppose the application for priority.

Decision

21. In the Court's view, the application for leave here does not meet the constitutional criteria.
22. The Bank identifies two issues as matters of general public importance. The second issue (which is, in truth, a constellation of discrete issues) relates to the FSPO's decision-making process. In the Court's view, that issue does not present any issue of principle transcending the particular facts of these proceedings. Neither does that issue have any features that might require that leave be given in the interests of justice.
23. As to the first issue relied on by the Bank – the standard of review issue – that is undoubtedly in a different category. The standard of review established in *Ulster Bank Investment Fund v Financial Services Ombudsman* (which has its origins in the decision of this Court in *Orange Communications Limited v Director of Telecommunications Regulation (No 2)* [2000] 4 IR 159) has been applied not just to appeals from the FSPO (and before it the Financial Services Ombudsman) but to other statutory appeals also. It has also been expressly enshrined in statute in respect of certain statutory appeals: see for instance section 15AY of the Competition Act 2002 (inserted by section 13 of the Competition (Amendment) Act 2022 and section 17(17) of the Communications Regulations and Digital Hub Development Agency (Amendment) Act 2023). The Court readily accepts that the issue of how that standard of review should be interpreted and applied is, at the level of principle, a matter of general public importance. The specific issue raised by the Bank here - whether and/or to what extent a court hearing an appeal from a non-judicial adjudicative body such as the FSPO should

defer to its construction of a contract - is an important issue which has never been directed addressed by this Court.

24. But that is not enough to warrant leave to appeal being granted here. The Bank seeks to bring an appeal directly from the High Court. It must therefore establish that there are "*exceptional circumstances*" warranting a direct appeal (Article 34.5.4). In the Court's view, there are no such circumstances here and, in fact, the circumstances here weigh decisively against permitting a direct appeal. First, granting leave on the standard of review issue (the only issue that satisfies the constitutional criteria for leave) would result in the Bank's appeals being split in two - with an appeal to this Court on that issue (and only that issue), leaving the other issues advanced by the Bank to be pursued before the Court of Appeal in the ordinary way. Such a scenario would not be in the interests of the parties or in the wider public interest. Second, the standard of review issue is not a wholly abstract or theoretical one. It arises in specific facts and circumstances, in the context of a concrete assessment by the FSPO of the particular complaints made by the complainants. In other words, the issue cannot properly be divorced from its factual context. In the Court's view, the issue is one which would benefit from an intermediate appeal where the full record will be before the Court of Appeal. It is likely that the issue will be refined and clarified as a result of such an appeal and, even if one of the parties seeks leave to bring a further appeal to this Court from the Court of Appeal, the issue may well present differently. Furthermore, as the FSPO observes in its Notice, the Court of Appeal may resolve the issue to the satisfaction of the Bank (or the Bank may succeed on other grounds). Given that the Bank's fundamental position is that there is an unresolved tension or conflict between *Millar* and *Utmost* - both of them decisions of the Court of Appeal - the Court of Appeal appears to be well-placed to address that conflict. For these

reasons, the Court is not persuaded that there are exceptional circumstances warranting a direct appeal here.

25. The Bank's applications for leave must therefore be refused.

And it is hereby so ordered accordingly.