



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 126

2014/07 & 2014/08 COA

**Kelly J.
Finlay Geoghegan J.
Peart J.**

**In the matter of s. 57CL of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services
Authority of Ireland Act 2004**

Between

Kenneth Millar and Donna Millar

Appellants/Respondents

And

Financial Services Ombudsman

Respondent/Appellant

And

Danske Bank (formerly National Irish Bank)

Notice Party/Appellant

Judgment of Ms. Justice Finlay Geoghegan delivered on the 24th day of June 2015

1. I have had the opportunity of reading in draft the judgment which has just been delivered by Mr. Justice Kelly. I am in agreement with Kelly J. that the appeals of the Financial Services Ombudsman ("the Ombudsman") and Danske Bank (formerly National Irish Bank) ("the Bank") from the order and judgment of the High Court of the 30th September, 2014, should be allowed and wish to set out briefly the reasons for which I have reached that conclusion.

Jurisdiction of the Courts

2. The jurisdiction of the High Court and this Court on appeal is prescribed by s. 57CM of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004. All references hereafter to any section is to that Act. Section 57CM(4) provides:-

"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 [Court of Appeal] to review the determination on a question of law (but only with the leave of either of those Courts)."

3. The High Court (Hogan J.) by order of the 30th September, 2014, determined that the decision of the Ombudsman of the 10th December, 2013, be vacated and that the matter be remitted to the Ombudsman for a fresh determination of the complaint in a manner not inconsistent with the judgment delivered on the same date. By further order on the 23rd October, 2014, leave was granted to the Ombudsman and the Bank to appeal the High Court determination. The order of the High Court does not identify the question(s) of law which gave rise to the decision to grant leave to appeal and this Court was not given a note of the *ex tempore* decision granting leave. Whilst not expressly mandatory pursuant to s. 57CM(4) it appears desirable that the order of whichever court grants leave to appeal identify the questions of law which the court considered justified the grant of leave.

4. Whilst the notices of appeal of the Ombudsman and of the Bank each identified a number of alleged errors on questions of law in the judgment of the High Court, those which were the focus of the appeal hearing may be summarised as follows:-

1. The determination that the High Court should not show deference to the Ombudsman on his findings in matters of pure contract law.
2. The determination that as a consequence, the High Court is required to 'examine afresh' a question of construction where this arises in an appeal from the Ombudsman to the High Court pursuant to s. 57CL. Further that the judgment was in legal error in determining how the Ombudsman was obliged to decide upon the construction of clause 3 of the loan agreements entered into by Mr. and Mrs. Millar with the Bank having regard to the terms of the complaint made and the evidence and material put before the Ombudsman.
3. The determination of the High Court that the decision reached by the Ombudsman 'was vitiated by a serious and significant error or series of such errors'.

Complaint to the Ombudsman

5. The judgment of Kelly J. sets out fully the complaint made to the Ombudsman by Kenneth Millar and Donna Millar ("Mr. and Mrs. Millar") and subsequent procedure in relation to increases in interest rates made by the Bank in 2011 on loans held by them pursuant to a number of mortgage loan agreements entered into in 2005. I only propose referring briefly and in summary to the facts.

6. The background to the complaint was that seven loan agreements were entered into in 2005, by Mr. and Mrs. Millar with National Irish Bank. Each of those were written loan agreements signed by Mr. and Mrs. Millar and witnessed by a solicitor who recorded that he had explained the nature and content thereof to the borrowers. The rate of interest is described as a "Variable Rate which is 0.4% below National Irish Bank's variable mortgage rate currently . . .". Clause 3 of the special conditions which were incorporated into the

loan agreements provides:-

"Our rate of interest and APR are variable. Rates of Interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect."

7. When in 2011 the Bank increased the rate of interest on each of Mr. and Mrs. Millar's loans the explanation given by the Bank was that the Bank was not funded through the ECB, that funding costs "have increased substantially for the Bank and we are unable to continue to absorb these".

8. The primary complaint made to the Ombudsman as appears, was that the increase in interest rates was a breach of the terms of the relevant loan agreements. Mr. and Mrs. Millar contended that "the terms of the loan agreements are that the variable rate of interest can only be increased in line with general market interest rates". As noted by the trial judge and taken into account in his judgment, the complaint to the Ombudsman also contended that Mr. and Mrs. Millar were induced to enter into the loan agreements based on the description of the variable interest rate as provided by the Bank and that the definition of the variable interest rate was conveyed to them in a number of ways, which included the definition in the loan agreements; information on the Bank's website (though they referred to a posting on the web site after 2005); such correlations between the changes in ECB rates and adjustments to the Banks' variable rates between 2003 and 2008 and assurances from the Bank staff (not named) at the time of entering into the loan agreements. They contended that there was no suggestion at the time they entered into the loan agreements that the Bank had ever or would ever adjust interest rates "in order to meet its funding difficulties".

9. The Ombudsman having received that complaint put a number of questions to the bank and obtained their response. These together with the further submissions of Mr. and Mrs. Millar and the finding of the Ombudsman are set out in full in the judgment of Kelly J.

Finding of the Ombudsman

10. The finding of the Ombudsman records that the Ombudsman understood the fundamental complaint of Mr. and Mrs. Millar to be that "the bank has acted in breach of the loan agreements by increasing the applicable variable interest rate as a result of the bank's increased funding costs as opposed to an increase in line with general market interest rates". It also records that Mr. and Mrs. Millar were seeking to have the loan agreements declared void with a cancellation of the balance of each of the outstanding loans and in addition compensation and refunds of sums paid since October 2011. There is also a reference to a complaint in respect of discounts which is not relevant to the appeal to this Court.

11. On the complaint in relation to the alleged breach of the loan agreements, the Ombudsman having referred to the fact that Mr. and Mrs. Millar had entered into a number of mortgage agreements with the Bank, each of which had been produced by the Bank and clause 3 of the terms and agreement applicable to each such loan agreement then stated:-

"The Complainants assert that the bank is only entitled to amend or alter the applicable rate of interest 'in line with general market interest rates'. The Complainants therefore argue that the bank's decision to increase the rate of interest when the ECB rate has decline (sic) is a breach of the agreement. The term 'in line with general market interest rates' referred to by the Complainants is not included in any clause of the terms and conditions. Clause 3 of each of the loan agreements is clear in its wording and permits the bank to increase the interest rate 'in response to market conditions'. Under the terms and conditions of each of the loan agreements the bank is not restricted by reference to the ECB rate when it is assessing the appropriate rate of variable interest. The bank's obligation under each of the agreements is to alter the rates in response to 'market conditions' and not 'in line with general market interest rates'."

12. The Ombudsman then dealt with the alleged lack of transparency and continued:-

"Clause 3 of the terms and conditions of each of the loan agreements supports the bank's position that the Variable Interest Rate can be amended in response to the then prevailing 'market conditions' and it follows that in applying this test the bank is not breaching the terms and conditions of the loan agreement. The bank is acting in accordance with the terms and conditions of each of the loan agreement (sic) in altering the Variable Rate of interest in response to market conditions and there are no grounds for establishing that the bank is obliged to disclose the basis on which this assessment is calculated. Therefore this aspect of the complaint is not upheld."

High Court judgment

13. The trial judge at paragraph 10 of his judgment identified the questions he had to address as follows:-

"The fundamental question with which this Court is confronted on appeal is whether the Ombudsman's construction of clause 3 of the applicable terms and conditions discloses an appreciable legal error. The resolution of this issue raises once again the fundamental question: what is the true role and functions of the Ombudsman? Specifically, where the Ombudsman deals with a contractual dispute by applying principles of contract law, what attitude, then, should the court take where a disappointed party seeks to appeal to this Court? Should it defer to the Ombudsman on question of contract law or should the Ombudsman's decision be scrutinised as if it were, in effect, a decision of a lower court dealing with a contract issue?"

14. The trial judge then answered the questions identified in two parts. Firstly at paragraph 17 he determined that it would not be correct that the High Court should defer to the Ombudsman on matters of pure contract law. Secondly, and fundamental to this appeal at para. 20 he stated:-

"It follows, therefore, that the question of contractual construction is one which, generally speaking, at least, this Court is required to examine afresh in the course of determining a statutory appeal taken against a decision of the Ombudsman presenting such an issue."

15. I agree with the trial judge that where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, that the court should not adopt a deferential stance to the decision or determination on the question of law. This follows from the statutory scheme applicable to the Ombudsman and the judgments in *Orange Ltd. v the Director of Telecommunications & Anor* [2000] 4 IR 159 and *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* [2006] IEHC 323 and those following. Section 57CK(1) expressly permits the Ombudsman, at his own initiative to refer a question of law to the High Court. The relevant deferential stance on appeal as explained by Keane C.J. in *Orange* at p.185 is that "...the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the [Ombudsman]." With respect

to the Ombudsman he does not have expertise or specialised knowledge, certainly relative to the High Court, in deciding questions of law.

16. However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High Court is required "to examine afresh" that issue in the course of the appeal. Rather the correct position is that the general principles set out in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman* still apply to the determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding. In that judgment Finnegan P. following a consideration of the judgment of Keane C.J. in *Orange v the Director of Telecommunications & Anor* stated:-

"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 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 & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal*.

Having regard to my decision on the standard of review it is appropriate that the appeal should proceed on the basis of materials which were before the Financial Services Ombudsman only. The Court however has a discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate in the interests of justice."

17. This means that on appeal to the High Court from a finding which includes a decision on a pure question of law, the burden of proof remains on the appellant; the onus of proof is the civil standard; the court should consider the adjudicative process as a whole and the onus is on the appellant to show that the decision was vitiated by a serious and significant error. The court will normally determine the appeal on the evidence and material before the Ombudsman. There are limited circumstances in which fresh evidence may be admitted in the High Court on application. No such application was made in the High Court herein.

18. The construction of a contract is not a pure question of law. It is a mixed question of law and fact. In relation to a contract in writing *Chitty on Contracts* 31st Ed. Vol. 1, para. 12-046:-

"The construction of written instruments is a question of mixed law and fact. The expression 'construction' as applied to a document includes two things, first, the meaning of the words; and secondly, their legal effect or the effect which is to be given to them. Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word of technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (when they are relevant) are questions of fact."

19. Accordingly it appears to me that the trial judge was in error in the conclusion reached at para. 20 of his judgment. It is not permissible for the High Court on an appeal pursuant to s. 57CM to "examine afresh" a contractual construction placed by the Ombudsman on a relevant term of a contract. Rather he should consider whether an appellant has established on the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error.

20. It follows that the trial judge was in error in then examining afresh the contractual construction of clause 3 of the applicable terms and conditions. Rather the question which he was required to decide was whether or not Mr. and Mrs. Millar had discharged an onus of proof in establishing on the facts and materials of their complaint submitted to the Ombudsman that the decision made that their complaint was not substantiated by reason of the construction he placed on clause 3 of the loan agreements was vitiated by a serious error. Insofar as the decision of the Ombudsman included a determination on a pure question of contract law the trial judge was not required to take a deferential stance to that determination in deciding the appeal. Accordingly, I would allow the appeal against this part of the High Court judgment.

21. The trial judge decided on two further grounds that the finding of the Ombudsman was vitiated by "a serious and significant error or series of such errors" such that the Ombudsman's decision should not be allowed to stand. The first at paragraph 27 was essentially that the Ombudsman was obliged to consider the complaint from a wider perspective than the loan agreements entered into and by way of example whether Mr. and Mrs. Millar could establish a collateral contract in relation to the meaning of the term "variable interest rate" or be entitled to rely on principles of promissory estoppel.

22. Whilst as I have noted, Mr. and Mrs. Millar in their complaint did refer to certain other matters from which they contended the meaning of 'variable interest rate' should be derived such contention was secondary to their main contention and not based upon specific facts or evidence. The Bank put before the Ombudsman the signed loan agreements and submitted that they comprised the relevant contractual terms and conditions. It is implicit in the findings that the Ombudsman accepted that the relevant contractual terms were the written loan agreements between the parties including clause 3 of the general terms. The trial judge in my judgment erred in law in deciding that on the material before the Ombudsman, Mr. and Mrs. Millar had established that he was in serious error in failing to consider their complaint that the Bank was in breach of contract from any wider perspective than the alleged breach of clause 3 of the general terms.

23. Secondly the trial judge decided at paragraph 29:-

"In any event, if the construction of clause 3 urged by Danske were to prove to be correct, the Ombudsman was nonetheless in error in failing to examine whether it would be broadly fair and reasonable for Danske to apply such a construction having regard to his enhanced statutory powers in s. 57BK(4) and s. 57CI(2): see, by analogy, my own reasoning in *Koczan*."

24. It appears implicit in this part of the judgment that the trial judge considered s. 57BK(4) and s. 57CI(2) imposed a mandatory obligation on the Ombudsman to consider in relation to Mr. and Mrs. Millar's complaint whether reliance by a bank on contractual terms was "broadly fair and reasonable". I regret, I cannot agree with such a statutory interpretation. The complaint herein was not made on that basis. The essential complaint was that the Bank was in breach of the loan agreements. Whilst, pursuant to s. 57BK(4) and s. 57CI(2), the Ombudsman may consider and decide a complaint from such a broader perspective, he is not obliged by the terms of the sections to do so. Whether or not he is in error in failing to do so will depend upon the complaint and facts before him. In my judgment he was not in error in failing to consider such issue herein having regard to the terms of the complaint made by Mr. and Mrs. Millar.

25. Accordingly I would allow the appeals and vacate the order made by the High Court remitting the matter to the Ombudsman.

Further Order

26. There remains the question of what further order should be made by this Court following the above conclusions. Upon an appeal on a question of law such as this it is open to this Court having allowed the appeal to remit the matter to the High Court or make any order which ought to have been made by the High Court. As the appeal to the High Court is on affidavit, this Court is now in a position to decide on Mr. and Mrs. Millar's appeal against the finding of the Ombudsman in accordance with the principles set out above and the added expense of remitting the matter to the High Court is not justified.

27. The issue is whether Mr. and Mrs. Millar established on the evidence before the High Court, that as a matter of probability, taking the adjudicative process as a whole, the finding of the Ombudsman was vitiated by a serious and significant error or series of such errors. The relevant finding is failing to uphold the complaint made by Mr. and Mrs. Millar that the Bank was in breach of the terms of the loan agreements in increasing the interest rate in 2011 by reason primarily of an increase in its cost of funding.

28. The finding of the Ombudsman must be considered in the context of the complaint made by Mr. and Mrs. Millar and material submitted to the Ombudsman. As appears from the full recital of facts in the judgment of Kelly J. their primary contention was that clause 3 of the general terms meant that the "variable interest rate can only be increased in line with general market interest rates" and hence an increase in interest rates when ECB rates declined was a breach of the agreement. The Ombudsman rejected the meaning contended for by Mr. and Mrs. Millar stating:-

"The term 'in line with general market interest rates' referred to by the Complainants is not included in any clause of the terms and conditions. Clause 3 of each of the loan agreements is clear in its wording and permits the bank to increase the interest rate 'in response to market conditions'. Under the terms and conditions of each of the loan agreements the bank is not restricted by reference to the ECB rate when it is assessing the appropriate rate of variable interest. The bank's obligation under each of the agreements is to alter the rate in response to 'market conditions' and not 'in line with general market interest rates'."

29. The trial judge was critical of the statement that Clause 3 "is clear in its wording". In the context stated, objectively the Ombudsman is doing no more than rejecting the meaning contended for by Mr. and Mrs. Millar and saying that it is clear that, in accordance with the ordinary meaning of the words used, the Bank may increase the rate 'in response to market conditions' and is not restricted to doing so 'in line with general market interest rates'. It is implicit that the Ombudsman considered each phrase to have a different meaning having regard to the difference in the ordinary meaning of the words "in response to" and "in line with" and the difference between "market conditions" and "general market interest rates" as used in the respective phrases. . I am not satisfied he was in error in doing so.

30. Later in the finding on this issue he stated:-

"Clause 3 of the terms and conditions of each of the loan agreements supports the bank's position that the Variable Interest Rate can be amended in response to the then prevailing 'market conditions' and it follows that in applying this test the bank is not breaching the terms and conditions of the loan agreements. The bank is acting in accordance with the terms and conditions of each of the loan agreement (sic) in altering the Variable Rate of interest in response to market conditions and there are no grounds for establishing that the bank is obliged to disclose the basis on which this assessment is calculated. Therefore this aspect of the complaint is not upheld."

31. The Bank in the responses given to the matters raised by the Ombudsman had submitted that "funding costs are clearly a condition in the market, and in fact, could only be considered as a primary driver of pricing decisions. The Bank has to pay more for funding mortgages – there is simply no context in which that would not be considered to be 'market conditions'. We have therefore acted in full accord with the terms of the agreement between us and the Complainants."

32. It is implicit in the above part of the Ombudsman's finding that he accepted the submission of the Bank that its funding costs are part of 'market conditions'. In my judgment, Mr. and Mrs. Millar have not established on the evidence before the High Court that the Ombudsman was in serious error in his determination in accepting that the increase in cost of funding to the Bank was a 'market condition' and finding that the wording used in clause 3 permitted an increase in interest rates in response to such a market condition and was not restricted to making an increase in line with general market interest rates. It follows that Mr. and Mrs. Millar have not established that the Ombudsman was in serious error in finding that the Bank was not in breach of the terms and conditions of the loan agreements in making the increases in 2011 and rejecting their complaint as unsubstantiated.

33. Accordingly I would also now make an order dismissing the appeal of Mr. and Mrs. Millar against the finding of the Ombudsman of 10th December 2013.