

THE HIGH COURT**2011 15 MCA****IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57 CL****OF THE CENTRAL BANK ACT, 1942,****(AS INSERTED BY SECTION 16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004)****AND IN THE MATTER OF AN APPEAL FROM A FINDING OF THE FINANCIAL SERVICES OMBUDSMAN****BETWEEN****PAUL CLARK AND MARY CLARK****APPELLANTS****AND****THE FINANCIAL SERVICES OMBUDSMAN****RESPONDENT****AND****ULSTER BANK LIMITED****NOTICE PARTY****JUDGMENT of Mr. Justice Hedigan delivered on the 20th day of July, 2011**

1. The appellants reside at the Old Post Office, Farran, County Cork. On 14th January, 2010, the appellants made a complaint to the respondent concerning the notice party. The respondent is a statutory officer who deals independently with complaints from consumers about their individual dealings with all financial services providers. The notice party is a bank whose registered office is located at 11-16, Donegal Square East, Belfast BT1 5UB.

2. The appellants seek to appeal from a decision of the Ombudsman dated 11th January, 2011, in which the Ombudsman dismissed the appellants' claim that Ulster Bank failed in its duty of care towards them.

3.1 The appellants obtained a mortgage from Ulster Bank on 26th January, 2000, which was used to refinance an existing mortgage with AIB previously registered on the title. On foot of this mortgage, the appellants' solicitors, Plunkett Taaffe & Co., provided an undertaking to Ulster Bank that they would register the bank's mortgage over the property, and as soon as practicable thereafter, lodge the title deeds with the bank. In accordance with this undertaking, Plunkett Taaffe & Co. sent title deeds to the bank. The bank returned these on 12th April, 2001, as a photocopy and not the original mortgage deed was forwarded to the bank. On a second occasion, Plunkett Taaffe & Co. sent the title deeds to the bank; however, the bank returned these on 2nd May 2001, as the previous charge in favour of AIB had not been cancelled from the folio. On a third occasion, Plunkett Taaffe & Co. sent in the title deeds which the bank returned on 6th November, 2001, as only three pages of the mortgage deeds were received. On a fourth occasion, Plunkett Taaffe & Co. sent in a further version of the mortgage deeds; these were returned on 6th March, 2002, as incomplete. From March 2002, onwards, the bank sent reminders every six months to Plunkett Taaffe & Co. to send in the title deeds.

3.2 Approximately seven years later, the appellants decided to sell the property and in August 2009, a prospective purchaser for the property was obtained. On 24th August, 2009, Donal T. Ryan, solicitors, acting for the purchaser, wrote to the appellants' new solicitors, Colm Burke & Co., stating that they were awaiting contracts and title deeds. On 27th August, 2009, the appellants asked the bank to release the title deeds to their solicitors. On 8th September, 2009, the bank wrote to the appellants' solicitors to say that according to their records, Plunkett Taaffe & Co. had the deeds. On 9th September, 2009, the bank wrote to the appellants explaining that, "...every six months since the beginning of the loan term we have sent out automatic tracking letters asking for the title deeds; however, we never received the deeds from them." On 9th September, 2009, the bank wrote to Colm Burke, solicitors, asking them to reconstitute the title deeds. On this date, the bank also wrote to Plunkett Taaffe & Co. asking them for the deeds. On 9th September, 2009, Plunkett Taaffe & Co. wrote to Colm Burke, stating that on the appellants' instructions, the file had been sent to Murphy & Long, solicitors, and that Mary Clark had collected the entire file from Murphy & Long. Plunkett Taaffe & Co. solicitors and Murphy & Long, solicitors subsequently merged.

3.3 On 10th September, 2009, Colm Burke & Co. wrote to the appellants, stating that Plunkett Taaffe & Co. had informed them that they had forwarded their title deeds to Murphy Long, solicitors, and that they had on file a signed receipt from Mary Clark confirming receipt of the entire file. On 16th November, 2009, the bank told the appellants that it had appointed their solicitors, Colm Burke & Co., to reconstitute the deeds. On 30th November, 2009, the solicitor for the purchasers, Donal T. Ryan, noted the planning issues and also expressed concern that the title deeds were not available. On 21st December, 2009, Batt O'Keefe T.D., wrote to the appellants to say that he had been trying to secure a change of use exemption for them. On 8th January, 2010, Donal T. Ryan, solicitors, wrote to the appellants' solicitor, stating, "We refer to previous correspondence with regard to the above. We have spoken to our client about the contents of your letter of 7th January, 2010, and notwithstanding same, our client has decided that she no longer wishes to proceed with the purchase of the above property".

3.4 On 14th January, 2010, the appellants made a complaint to the Ombudsman that Ulster Bank was negligent in not notifying them that they had a problem getting their title deeds. The appellants also complained to the Law Society that their solicitors had never sent the title deeds to the bank. The Law Society advised the appellants by letter dated 16th February, 2010, that, "as the service was provided more than five years ago, you will note from the Society's leaflet that the Society can only investigate a complaint of a

provision of inadequate professional service where that service was provided within five years of making the complaint". The appellants believe that it was the problems with the title deeds which caused the purchaser to withdraw from the sale. The appellants complain that they were precluded from obtaining any redress from the Law Society due to the negligence of the bank in not notifying the appellants that there was a problem with Plunkett Taaffe & Co. not lodging the deeds.

Appellants' Submissions

4.1 The appellants seek to challenge the decision of the Financial Services Ombudsman of 11th January, 2011, on a number of grounds. In page 6 of his finding, the Ombudsman states, "I do not believe that the complainants can show any loss in this matter." The appellants complain that they furnished the Ombudsman with fully detailed financial losses with vouching receipts showing the payment of €9,341.49 in expenses, with a further €5,309.50 outstanding that the appellants are unable to discharge. The appellants further submit that their property has depreciated by approximately €100,000.00 since the sale fell through. The Ombudsman went on to state at page 6, "there was no complete contract in respect of the sale of the property". The appellants submit that the bank was advised that a sale had been agreed and was to be concluded in September 2009; however, completion was not possible due to the lack of title deeds.

4.2 At page 5 of the Ombudsman's finding, it is stated that the bank decided, as a goodwill gesture, to pay all costs incurred in reconstituting the title deeds. The appellants complain that, in fact, they themselves paid Colm Burke, solicitors, the full costs of all work done by them in reconstituting the deeds and have receipts which prove this fact. They appellants state that they have received no payment for the reconstituting of the title deeds from the bank. At page 7 of his finding, the Ombudsman states that, "It seems to me from the evidence provided to this office that the deeds were reconstituted in November 2009". The appellants are at a loss to understand this statement, as at page 3 of his finding, the Ombudsman quotes from a letter from Donal T. Ryan, solicitors, of 30th of November, 2009, stating, "it is quite serious that we are only now being made aware that the title deeds are not available". If these title deeds were fully reconstituted by Colm Burke, solicitors, in November 2009, why were the purchaser's solicitors made aware of the missing deeds at the end of November 2009? The Ombudsman is in possession of a letter from First Active plc. dated 22nd December, 2009, which states, "Our Securities Department have confirmed that they have been in contact with your solicitor, Colm Burke, who is arranging the replacement of your title deeds for your convenience". Why would the bank be notifying the appellants that the deeds were still being arranged to be replaced when the Ombudsman states the deeds were reconstituted in November? The sale fell through on 8th January, 2010. The appellants argue that this was because of a lack of title documents. The replacement documents were still not completed three months later, as evidenced from a letter from the bank dated 9th March, 2010, stating, "we can confirm that your title deeds are being reconstituted and you will be contacted in due course".

4.3 The main focus of the appellants' complaint to the Ombudsman is that the bank never notified the appellants that Plunkett Taaffe & Co., solicitors, had not lodged the title deeds with the bank. The appellants argue that they, as consumers, engaged Plunkett Taaffe & Co., solicitors, to provide them with a professional service. The appellants were unaware that the title deeds were not lodged with the bank. The bank was aware that there was a problem with Plunkett Taaffe & Co., solicitors, but did not inform the appellants who were their customers. This failure prevented the appellants pursuing their solicitors through the Law Society, as the Law Society will not hear complaints that are more than five years old. The bank withheld this information for a period of nearly ten years.

4.4 The appellants complain that the negligence of the bank was not addressed in the Ombudsman's finding. At page 6 of his finding, the Ombudsman states, "The Complainants believe that the bank were negligent and in breach of their duty in failing to advise them that the title deeds had not been sent to the bank by the Complainants' solicitors, Plunkett Taaffe & Company". The Ombudsman then goes on to decide there was a failure to show loss; however, he failed to engage with the issue of negligence in his finding. The appellants argue that if they had been aware of the problem, they could have had the title deeds reconstituted before they put their house on the market. For all these reasons, the appellants wish to appeal the decision of the Ombudsman.

Respondent's Submissions

5.1 The appellants challenge the finding made by the Ombudsman dated 11th January, 2011, in which their complaint against the notice party, Ulster Bank, was not upheld. In essence, the appeal amounts to a challenge to the merits of the finding that was made. In *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] IEHC 323, Finnegan P. (as he then was) stated:-

"To succeed on this appeal the Plaintiff must establish 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."

The test requires the Court to take the adjudicative process as a whole to see if the decision made was vitiated by a serious and significant error or a series of such errors. It is submitted that when one considers the present case as a whole, there is no sufficient basis made out for this Court to intervene in respect of the decision made.

5.2 The respondent submits that as Ulster Bank did not hold the title deeds in question, it cannot be criticised for having lost or mislaid them. Ulster Bank sought the deeds from the appellants' solicitors at regular intervals but was not furnished with them. Upon learning of the problem, Ulster Bank went above and beyond their obligations by arranging to have the deeds reconstituted at its expense as a goodwill gesture. Thus, the only complaint that the appellants could ever have had against Ulster Bank was in relation to the fact that Ulster Bank did not directly communicate to them the fact that it had not received the deeds from Plunkett Taaffe & Company.

5.3 The respondent argues that it is unclear on what basis it could be said that the Bank must have assumed that Plunkett Taaffe & Co. was not communicating with their own clients. Therefore, it is unclear on what basis it can be said that the bank should have taken on the responsibility for communicating the situation to the appellants itself. That would seem to be a significant extension of the duty of care that a bank owes its customers. In the normal course of events, one would expect to be able to rely on the fact that a firm of solicitors is communicating with its clients. Insofar as it may be suggested that the firm was not properly communicating with its clients, it is hard to see how that issue can be laid at the door of the bank, especially in circumstances where there is nothing to suggest that the bank was aware of this. Equally, any suggestion that the bank owed a duty to the appellants to make a complaint to the Law Society about their solicitors would amount to a significant extension of the duty of care and would raise obvious public policy issues. In any event, as the bank pointed out, because it had the benefit of the solicitors' undertaking at all times, its position was secure and so the solicitors could hold onto the title deeds until whenever they felt that all of the documents were ready. In the meantime, the bank would issue automatic six-monthly reminders.

5.5 Aside from the absence of a duty of care, it is also far from clear that the failure to reconstitute the title in time was the reason why the intended purchasers pulled out of the sale. The letter of 8th January, 2010, from the purchaser's solicitor does not say that

the reason that his clients are not proceeding with the purchase is because of the delay in dealing with the title deeds issue. There was a planning issue with the property (which, in its submission to the Ombudsman, the bank suggested the appellants must have become aware of in 1999/2000 when they purchased the property). Moreover, the bank said that, as far as it knew, the planning issue was resolved the day before the purchasers pulled out of the sale. There are all sorts of reasons why purchasers might decide not to proceed with a sale. It remains unclear as to where the title deeds were at the relevant time. As the bank has pointed out, the correspondence seems to suggest that the deeds had been passed on to a new set of solicitors and/or were given to the appellants. The location of the deeds is a matter that only the various firms of solicitors would be able to resolve. This is not a matter for which the bank can be held responsible. The respondent submits that the appellants have failed to show that taking the adjudicative process as a whole, the finding was vitiated by a serious and significant error or a series of such errors.

Decision of the Court

6.1 This case concerns an appeal from a decision of the Ombudsman dated 11th January, 2011, to dismiss the appellants' claim that Ulster Bank failed in its duty towards them. The appellants obtained a mortgage from Ulster Bank in January 2000 in order to refinance an existing mortgage over their property at Farran County Cork. In 2009, the appellants decided to sell that property and they secured a buyer for it in August 2009. When the appellants were at the stage of issuing contracts, they requested the title deeds from Ulster Bank. The bank advised that they had never received the title deeds from the appellants' then solicitors, Plunkett Taaffe & Company. The purchaser withdrew from the sale on 8th January, 2010, and the appellants claim that it was the issues surrounding the title deeds that caused the purchaser to withdraw from the sale. The appellants argue that the bank was negligent in that it wrote to Plunkett Taaffe & Co., solicitors, every six months, seeking the title deeds to satisfy the undertaking given by them. The bank, however, never informed the appellants directly that their solicitors had failed to provide deeds to the bank so that they could have taken steps to either have the deeds reconstituted at that stage, or seek recourse from the Law Society against their solicitor. Such recourse became impossible as the complaint was more than five years old.

6.2 Section 57 BB of the Central Bank Act 1942 (as amended by the Central Bank and Financial Services Authority of Ireland Act 2004), provides that one of the functions of the Ombudsman is, "to enable... complaints to be dealt with in an informal and expeditious manner". Once his investigation is complete, the Ombudsman makes a finding that the complaint is either substantiated, not substantiated or partly substantiated. A complaint may be found to be substantiated where the conduct complained of was, inter alia, not in accordance with law or an established regulatory practice or was unjust, oppressive or improper. Under section 57 CL of the Act, a right of appeal to the High Court is given either to the complainant or the regulated service provider. The nature of such an appeal was addressed in *Orange v. The Director of Telecommunications Regulation & Anor*, [2000] 4 IR 159 where Keane CJ stated at p 184:-

"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 culminating, it may be, in the substitution by the High Court of its adjudication for that of the first Defendant. It is accepted 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 . . . 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 is vitiated by a serious and significant error or a series of such errors."

It is clear, therefore, that in order for the appellants to succeed in this appeal, they must establish that the Ombudsman's decision was vitiated by a significant error or series of such errors.

6.3 The issue for the Ombudsman to determine was whether, on the basis of the evidence in front of him, he could conclude that the bank had fallen below the standard of care required. It is well established that banks owe a duty of care to customers in certain circumstances. In *ACC Bank plc. v. Fairlee Properties Ltd & Ors* [2009] IEHC 45, Finlay Geoghegan J. found that the ACC Bank owed a duty of care to the defendants to take care with the custody of deposited title deeds, and in particular, to file and store the deposited title deeds. It was held that the bank had breached this duty by losing title deeds to certain properties and the plaintiff was awarded damages due to the losses suffered because of the bank's negligence. It is not difficult to see how a bank could be said to have fallen below the standard of care required in circumstances where it loses deeds; however those are not the circumstances which existed in this case.

6.4 In this case, the appellants' complaint is that the bank did not communicate to them directly the fact that it was seeking the deeds from their solicitors Plunkett Taaffe & Company. The bank was not on notice that the appellants' solicitors were not communicating with them. In the normal course of events, a firm of solicitors will communicate with their clients. Had there been a departure from the normal course of events, such as the solicitors engaging in some sort of egregious behaviour, then it could be argued that the bank would be put on notice that there was a problem. However, nothing like that occurred in this case. Plunkett Taaffe & Co. sent the title deeds to the bank on four occasions; however, the bank returned the deeds on the 12th April 2001, on 2nd May 2001, on 6th November 2001, and again on 6th March 2002, due to various discrepancies with them. Thereafter, the bank sent reminders every six months to Plunkett Taaffe & Co. to send in the title deeds. Banks are entitled to ensure that everything is exactly as it should be with regard to the title deeds. If this takes time, they are secured in the interim by the solicitors' undertaking. Plunkett Taaffe & Co. were the solicitors that the appellants engaged. It seems to me that except in the most unusual of circumstances, such as egregious behaviour on the part of the solicitors, it would not be appropriate to hold that the bank had a duty to go behind the solicitor-client relationship and communicate directly with the clients. To hold otherwise would be to significantly extend the duty of care that a bank owes its customers and to interfere with a strictly confidential relationship.

6.5 The Ombudsman considered whether the appellants suffered any loss. He found that there was no completed contract in respect of the property, and therefore, there was no loss suffered. From the correspondence, it seemed that the issue of concern to the purchasers at the time was whether the property had proper planning permission. The land in question was registered, land therefore, title deeds should not have been an issue at contract stage; this is clear from the Law Society of Ireland 'Conveyancing Manual' which states at 34:-

"In terms of the documentation that should be produced at the initial stage of the transaction, i.e. when contracts are being prepared and issued, the recommended practice of the Conveyancing Committee of the Law Society is that the only documents at that stage that should be produced are the root of title, any document from which title is being deduced, any document referred to in the special conditions and planning documentation, if there are no documents referred to in the special conditions which are required to be produced, then the only documents that should be listed and produced at the contract stage are the root of title, the document from which title is being deduced and the planning documentation. In the case of a registered title, a copy of the folio with the map or file plan is the relevant document. It is only after contracts have been signed and exchanged and become binding that the balance of title is furnished."

Given the recommended practice of the Conveyancing Committee of the Law Society, as outlined above, it was difficult to see why an issue arose as to the original deeds at that stage.

6.6 The appellants had sought to rely on the letter from the prospective purchaser's solicitors of 30th November, 2009, in arguing that it was due to the lack of title documents that the sale fell through. In that letter, from Donal T. Ryan, solicitors, it is stated that:-

"What we are more worried about is that it is only now coming to light that your client's title deeds are in fact not available. Despite the fact that it appears to be First Active who have mislaid the title deeds it is quite serious that we are only now made aware that the original title deeds are not available. We understand from our conversation with your John Coughlan, that it is the original planning documentation and requisitions on title that cannot be located and it is noted that there is no land certificate issued."

Thus, while the prospective purchaser expressed concern regarding the title on 30th November, 2009, it was not, however, until 8th January 2010, that the sale fell through. It is by no means clear from the correspondence of the latter date that the reason for the sale falling through was due to any problems with the title deeds. In the letter from Donal T. Ryan, solicitors, of 8th January, 2010, it is stated that:-

"We have spoken to our clients about the contents of your letter of the 7th January and notwithstanding same our client has decided that she no longer wishes to proceed with the purchase of the above property".

The Ombudsman sought to ascertain the reason why the sale fell through, and on 18th August, 2010, the Ombudsman wrote to the appellants asking them to furnish a letter from their solicitor setting out the reasons why the sale of the property fell through in January 2010. No such letter was ever furnished. Also, while the letter from the purchaser's solicitor dated 8th January, 2010, refers to a letter from the appellants' solicitors dated 7th January, 2010, that letter has not been produced. It seems to me that the Ombudsman was entitled to conclude that there was insufficient documentary evidence to prove that the sale fell through due to the problems with the title deeds. The correspondence indicates that it could equally have been the case that the sale fell through due to planning issues. In truth, there are all sorts of reasons why purchasers might decide not to proceed with a sale. I am not satisfied that the appellants have demonstrated that it was the failure to reconstitute the title deeds in time that was the reason why the purchasers pulled out. That being so, no loss attributable to Ulster Bank has been established. That finding was open to the Ombudsman on the evidence before him. No error is to be found in the way the Ombudsman resolved this complaint. Thus, I am not satisfied that the appellants have discharged the duty on them to show that the Ombudsman's decision was vitiated by a serious error or a series of such errors. Therefore, pursuant to section 57 CL (2) I will make an order affirming the finding of the Financial Services Ombudsman without modification.