

THE HIGH COURT

Record No: [2014] No. 128 MCA

BETWEEN

WALTER DE KRETSER

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 7th day of June, 2016

Introduction:

1. This is an appeal from the decision of the Financial Services Ombudsman rejecting a complaint made by the appellant Walter de Kretser and his wife in respect of a mortgage taken with the ICS Building Society.

2. The Financial Services Ombudsman is a body established to enable consumers of financial products to make complaint in a non-court setting and on a relatively informal basis without necessarily having the assistance of lawyers to resolve disputes with the providers of financial services. Statute provides that there is to be an appeal to the High Court from the decisions of the Financial Services Ombudsman and there is no dispute in this case as to the standard of review to be conducted by the High Court on an appeal. It is clear that this is not a judicial review but nonetheless, as the case law has established, the appeal bears some of the characteristics of a judicial review.

3. The role of the High Court on appeal was stated by the President of High Court Mr. Justice Finnegan in a case called *Ulster Bank v. The Financial Services Ombudsman* [2006] I.E.H.C. 323 where he said:-

"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*."

Background:

4. The background to this case is a complaint made by the appellant against his mortgage provider. The nature of the complaint is of critical importance and this judgment will focus on the extent to which the Financial Services Ombudsman properly identified the complaint in question. Prior to the matter being sent to the Ombudsman, Mr. de Kretser attempted to resolve the dispute by correspondence and various initiatives with the mortgage provider. They did not produce the result that he wanted and further to invitation he finally wrote to the Mortgage Appeals Board by letter dated 29th October, 2012. It is by reference to this letter that we can begin to grasp what exactly Mr. de Kretser and his wife were saying was the nature of their complaint against their mortgage provider.

5. Point one of that letter says as follows:-

"We have reason to believe the above mortgage is on 'Interest Only' for the full mortgage term."

That statement is one from which they never waiver. The letter then importantly, in my view, goes on to say at point two:-

"If you have a proven ground to reject item (1) please see below"

And what follows is an argument in favour of a continuation of the mortgage on interest only for a period which concession had been granted to this couple on successive occasions. Their financial circumstances were that they bought a house in Greystones at the height of the good times when Mr. de Kretser was doing well, before the bottom fell out of the market. He was involved in the property development area as a skilled craftsman and employed fifteen people at one point. When the market collapsed, so too did his business, and so too did the ability to repay the mortgage on the house in Greystones.

6. The money borrowed appears also to have been in respect of a property purchased in France. So what must have been a very nice life became a very difficult life. And this couple sought to put matters right and went back to education and both of them I think have done well in further education and have sought employment. Mr. de Kretser appears now to be working in London.

7. During the time they were in education they could not afford the mortgage and applied for forbearance and it is very clear that the mortgage provider granted that forbearance by changing the mortgage from full repayment, to interest only. They clearly did so for defined periods. Mr. de Kretser, however, is convinced that at a certain point in time the Society had agreed to change the mortgage to interest only for the full term of the mortgage. That is the first point he makes in his letter to the Mortgage Appeals Board on 29th October, 2012.

8. A reply came to that letter dated the 7th December, 2012 as follows:-

"Further to your letter of 29th October 2012 and specifically in relation to point 1 [point 1 is the insistence by Mr. de

Kretser that he had been given an interest only mortgage], please find enclosed a copy of your original loan offer which confirms that your mortgage was not approved for interest-only for the full term."

The letter then goes on to say:-

"As a result of your appeal, we have carefully assessed your request..."

The request being referred was ambiguous but seems to have been a request for a further period of interest only payments and /or possibly a request that the mortgage continue from the date of the appeal to its completion of its term on interest only. In any event, the mortgage provider rejected whatever request was made. So there are two clear rejections in the response from the Mortgage Appeals Board:-

- (1) You do not have an interest only mortgage,
- (2) and we are not giving you a further interest only period.

Those terms could not have been clearer.

Financial Services Ombudsman complaint:

9. In view of the level of the disagreement between the parties, Mr. de Kretser sought to bring the matter to the Financial Services Ombudsman by completing a complaint form which was received by the Ombudsman on 17th January, 2013. That form is addressed from Walter and his wife Gillian. The form invites the complainant, at section (c), to:-

"Please describe the complaint in **your own words**" (emphasis in original)

Mr. de Kretser said :-

"Refer our letter to Mortgage Appeal Board of ICS dated October 29th 2012"

That must mean that Mr. de Kretser was saying that his complaint is the same as the matter he addressed to the Mortgage Appeals Board and that must mean that he said his complaint was that he had an interest only mortgage for its full term.

10. In his own words he continues as follows:-

"Furthermore we have sent numerous letters to ICS to, 'to confirm or reject' that this product is only 'interest only' for the full term of the mortgage but we have not received as satisfactory response. Our last letter dated 19th Dec. '12 (sent by registered post) has not been responded to as of yet.

The appeals board's decision to reject our appeal of the 29th Oct '12 was based on point #1 and it attached the original loan offer as the basis of its decision and furthermore it totally ignored the rest of our points of appeal."

11. So it is very clear what Mr. de Kretser's complaint is. When he was asked to say in his own words what the complaint is he says that his complaint is that he has an interest only mortgage for the full term and that this has been accepted by his mortgage provider.

12. At the second part of section (c) of the form he was invited to answer the following question:-

"How do you want the Financial Service Provider to put things right?"

And he answered that by saying to continue paying interest only.

13. It is clear to me that when he fills out this form he is absolutely and morally convinced that somehow he has managed to obtain an "interest only" mortgage for the full term although he accepts, and he has accepted in front of me, that what he originally signed was obviously a full repayment mortgage. In any event, the complaint he makes is that he somehow obtained and wishes to continue an "interest only" mortgage.

14. In the context of these proceedings the respondent, having reflected on everything, delivered an affidavit of Jacqueline McCrum dated the 28th November, 2014. She says:-

"The Office received a completed Complaint Form dated 14 January 2013 together with a number of enclosures from the Appellant. The complaint was against ICS Mortgages. It will be seen that under the heading "*What is your complaint?*" the Appellant referred to his letter to the Mortgage Appeal Board, where he said he had not received a satisfactory reply to correspondence and raised other issues."

15. Now it is interesting that in describing what the complaint was, Ms. McCrum seems to believe that the appellant was complaining about not having received satisfactory answers to letters. And she, in effect, does not characterise the complaint as one where Mr. de Kretser says, as he clearly does, that he believed he had been granted an "interest only" mortgage for the full term. Ms. McCrum does not so characterise the complaint which is interesting, as we shall see.

16. During the course of the handling of the complaint to this consumer body, the parties are given a chance to write to each other one last time and for each of them to reply. The parties take up this opportunity to engage about what the complaint was. And so by letter dated 22nd January, 2013, Mr. de Kretser, in response to the Ombudsman's invitation to state fully and finally what his complaint is, writes to the mortgage provider saying:-

"We refer to our letter of appeal [that is the letter to the Mortgage Appeals Board] dated 29th October and response from ICS Appeals Board dated 7th December last and one of numerous correspondence sent to the ICS Customer Relationship Unit last being 19th December (copy enclosed) for which the bank has not yet responded."

17. To understand what the appellant is saying one needs to look at the letter of the 19th December where they say:-

"We refer to our letter of the 6th November, your reply of the 12th November and our answer of the 15th November 2012

(copy enclosed). The bank keeps on sending the original loan agreement at drawdown dated 14th March 2006 as its response. The terms of the loan were changed circa. June 2006 when the bank changed the interest rate from variable to tracker and furthermore the mortgage was changed from repayment to interest only."

That is the very very clear statement by Mr. de Kretser of what his position is - that the bank changed the deal in 2006 from full repayment to interest only and when asked to finally state the complaint Mr. de Kretser refers to a letter where this assertion is clearly made.

18. What do the banks say as their final chance response? By letter of the 27th February, 2013, they say:-

"Thank you for your letter of the 22nd January 2013 addressed to Ms Bernie O'Donnell....In August 2006 you sought to convert your mortgage account to interest only for a period of one year."

The letter goes on in those terms and insists that there was an agreement for a year and insists that there were numerous requests to extend that until finally it was refused and then there was a review of the financial position where again the banks say that they are refusing to extend the period of interest only and says:-

"I regret to inform you that the Society's position remains unchanged."

19. Now on any analysis that letter does not answer the complaint of Mr. de Kretser which was that at some point in time there was a dramatic change in the mortgage from full payment to interest only. This was the clear case Mr. de Kretser made and it was not answered by the bank in terms expressly denying that the change had happened. They simply say that the mortgage remained unchanged. Inferentially they are saying that the change from full repayment to interest only never happened. But in fact they do not grapple with it in terms. As the process before the Ombudsman proceeded there was then an invitation to both sides to mediation. That was not pursued.

20. When the matter went to full investigation by the Ombudsman a "summary of complaint" was drafted in June 2013 by the Ombudsman. That "summary of complaint" says as follows:-

"In August 2006 the Complainants sought to convert their mortgage account to interest only for a period of 1 year. The request was approved. Further requests were made for periods of interest only payments. These were approved and the final approval was dated 24 November 2011 to October 2012."

The summary continues:-

"The complaint is that following a full review of the Complainant's finances on 22 October 2012 the Provider wrongfully declined the Complainant's request for further forbearance and following a review by the Provider's Mortgage Appeal Board, the request was also declined."

21. That is a very significant summary of the complaint because it is only accurate in part. It fails to reflect or express the complaint which was Point One of the letter sent to the Mortgage Appeals Board and which was also spelt out in terms in handwriting by Mr. de Kretser on the complaint form sent to the Ombudsman. That first complaint was not that there was a refusal by the mortgage provider to acknowledge that he had obtained an interest only mortgage for the full term of the mortgage and this had then been denied or repudiated. That is not, however, how the Ombudsman characterises the complaint at the very beginning of this "summary of complaint." The "summary of complaint" does go on to say and set out what that complaint is because further down in the body of the "summary of complaint" (the author of this document was Joanne Cronin) the senior investigator says:-

"They [that is the complainants] contend that when they initially agreed with the Provider to make payments on an interest-only basis, this was for the whole term of the mortgage".

That is actually then set out as part of the contention of the appellants but it is interesting that it is not stated in the paragraph which summarises the actual complaint. That "summary of complaint" is then sent to both sides and further correspondence is then received in respect of it.

22. A letter of 18th March, 2013, was then sent by Mr. de Kretser to the Financial Services Ombudsman, two months prior to the summary of complaint being drafted by the Ombudsman, saying:-

"Our complaint is based on the following reasons:

(1) ICS have characterised our account as being unsustainable, and

(2) we have always argued that when we agreed with the bank to make repayments on interest only in September 2006 it was for the whole term of the mortgage."

That could not have been more clearly stated by the de Kretzers on 18th March 2013, when they wrote to the Financial Services Ombudsman. Notwithstanding the clarity of that letter, that is not summarised as the actual complaint except by way of secondary reference in the "summary of complaint" document.

23. Further submissions are then made by the parties to the Ombudsman and when the bank again denied various matters the de Kretser's write by letter of 19th September, 2013, saying:-

"On our point (2), the letter of the 6th of September 2007 clearly states the facts of our case. The mortgage and product type are clearly stated as 'Interest Only - Tracker Variable' with a maturity date of 31st March 2031. There is no indication of it being a temporary facility and the Provider's response to this is weak and clearly should be dismissed. The consent form signed on the 17th September 2007 was for the changing of the mortgage and product as stated in the 6th September 2007 document and not for the two documents the Provider claims, being the letter of 10th September and a Mortgage Form of Authorisation claimed as signed on the 17th September, 2007 as attached to their appendix. There is no other document from the Provider to contradict our assertion. The form signed on 17th September was a form for changing the mortgage from 'repayment' to 'interest only' and from a 'standard variable' to a 'tracker variable.'"

24. In my view, that again is a repetition of the position steadfastly maintained by Mr. de Kretser with the Mortgage Appeals Board,

on his complaint form to the Ombudsman, addressed in final expression of complaint to Ms. O'Donnell of the Society and repeated again on 19th September, 2013, to the Ombudsman.

25. The Society do respond to that and simply say it is not the case. And they say that the letter of the 6th September is taken out of context. The Society says:-

"This letter was issued to confirm that the interest rate on the account had been further reduced for a second term to ECB +0.75% a reduction of 0.1% on the previous margin of 0.85%. This confirmation of great reduction was issued while the loan was on temporary period of interest only, it does not replace the mortgage loan offer dated 8th March, 2006".

The Society strongly rejects any inference that it hoodwinked or bullied the complainants. The original loan offer and subsequent account history presented in this schedule is evidence clearly demonstrating this loan was drawn down on an annuity basis. And that is the response to the insistence of Mr. de Kretser that he had obtained an interest only mortgage.

Financial Services Ombudsman decision:

26. That is the background of the matter which the Financial Services Ombudsman was dealing with. A decision was issued rejecting the complaint and it is that decision which is sought to be appealed to this court. The decision is signed by Jacqueline McCrum whose affidavit I have previously referred to, where she took the opportunity to express what she believed the complaint was. It is not surprising to find at para. 3 the following paragraph:-

"The complaint is that following a full review of the Complainants' finances on 22 October 2012 the Provider wrongfully declined the Complainants' request for further forbearance and following a review by the Provider's Mortgage Appeal Board, the request was also declined.

27. That summary of the complaint seems to me to be wrong. That was not the complaint. It was certainly part of the complaint but the first point steadfastly maintained by Mr. de Kretser is that he had obtained an agreement from the bank to change the original mortgage from full annuity and full repayment to interest only and that that agreement had not been honoured. That was his complaint. It was not just a failure to deal with correspondence and it was not just an application if he was wrong about that somehow that a further forbearance be given. He always had two complaints as is evident from the first letter he wrote to the Mortgage Appeals Board saying "I have interest only but if you reject that I want further forbearance." It was always a two pronged complaint.

28. Thereafter, the decision maker proceeds to describe the complaint in the following terms and this is p. 2:-

"The Complainants contend that when they initially agreed with the Provider to make payments on an interest-only basis, this was for the whole term of the mortgage."

29. The decision goes on to say:-

"The Complainants argue that the Mortgage Form of Authorisation of 30 November 2011 was signed by them under duress..."

The decision maker then proceeds to explain the bank's case and effectively the bank's case is that when you look at all the documentation together it is perfectly clear that there never was an agreement for interest only for the full term and that the complainants only ever applied for short-term or temporary interest only periods and that was granted on a number of occasions.

30. The section of the decision to which I now wish to turn is called "Finding" and the following passage I wish to refer to is at p. 4 under the heading "Finding" where the decision maker says:-

"During my investigation I put a number of questions to, and sought certain evidence from, the Provider. The Provider responded fully to my questions. The Complainants were given the opportunity to see the Provider's response and the schedule of evidence. A full exchange of documentation took place between the parties.

In arriving at my finding I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict. I am also satisfied that the submissions and evidence submitted are sufficient to enable a finding to be made at this complaint without the necessity for holding an oral hearing.

Having considered the submissions received to date, it appears to me that the main complaint relates to the Complainants' request for further forbearance on their mortgage account and the Provider's failure to agree to interest-only repayments for the remaining term of the agreement."

Decision of the court:

31. It seems to me that in those two paragraphs the Financial Services Ombudsman fell into fundamental serious and significant error. The fundamental serious and significant error is that the Financial Services Ombudsman never appeared to grapple or deal with or understand that the main complaint advanced by Mr. de Kretser was that he had obtained an interest only mortgage for the full term from the provider and that the provider was denying it. This gave rise to a clear and obvious simple conflict of fact.

32. Two problems arise from the failure of the Financial Services Ombudsman to identify the first and foremost complaint advanced by Mr. de Kretser. She decided that no oral hearing would be required because there was no conflict of fact. But there was a conflict of fact - whether or not an oral hearing was required to resolve it is another day's work. But it was wrong to say that the reason no oral hearing was required was because of the absence of a conflict of fact. It is not for me to say whether or not there should be an oral hearing but the reason given for refusing one was wrong in fact. There was, as a matter of fact, a conflict of fact between the parties.

33. But another consequence flows from the failure. It highlights the fact that the Ombudsman never fully grasped what the first

complaint of Mr. de Kretser was. And it seems to me that having misunderstood the complaint the decision then falls into serious error because the decision then proceeds to deal with the second part of the complaint - which was that the mortgage provider unfairly or wrongly did not extend further forbearance on interest only to Mr. de Kretser - as if it was the main complaint. That was not the principal matter being addressed by Mr de Kretser.

34. The parties will be fully aware from the questions which I addressed to Mr. and Mrs. de Kretser when this matter was at hearing that it is clear to me that they advanced almost nothing in support of their contention apart from the bald assertion that they had actually obtained an interest only mortgage.

35. However, as the parties have pointed out by reference to the case law, I am not the Ombudsman and I cannot step into the shoes of the Ombudsman. It is not for me to comment on whether they presented a weak case or not. The Ombudsman does not dismiss the case advanced by the de Kretzers that they had obtained an interest only mortgage for the full term on the basis that it is weak. It seems to have been dismissed based on a misunderstanding about what the complaint was and a mistaken finding as to the absence of a conflict of fact.

36. That is the error into which the Ombudsman has fallen in this case and it seems to me that it was a very significant error, that it was a serious error and is one which warrants the appellant succeeding on this appeal and I so find. I remit this matter to the respondent for reconsideration.