Neutral Citation [2012] IEHC 277

THE HIGH COURT

[2011 No.135 MCA]

IN THE MATTER OF THE CENTRAL BANK ACT 1942 (AS AMENDED) AND IN THE MATTER OF PART VIIB THEREOF, AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57CL THEREOF

BETWEEN

JACQUELINE MCEVOY AND JAMES MCEVOY

APPELLANTS

AND

FINANCIAL SERVICES OMBUDSMAN

FIRST NAMED RESPONDENT

AND

PERMANENT TSB

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Gilligan delivered on the 3rd day of May, 2012

1. The appellants herein in 2004 applied to the second named respondent for a mortgage which application was successful as is reflected in a letter of approval dated the 19th July, 2004, and the acceptance of loan offer dated the 29th July, 2004. The interest on this mortgage was fixed for a period of one year and prior to the expiry of that period the appellants were sent out a list of options available to them and they opted for a further one year fixed rate of interest period which expired in August, 2006, at which time the appellants opted for a two year fixed rate of interest which expired in August, 2008. In August, 2008 the appellants opted for a five year fixed rate of interest which election form was signed on the 10th August, 2008.

2. The initial actual complaint that was made to the Financial Services Ombudsman was to the effect that both appellants, who hold the mortgage account with the second named respondent, contend that they were provided with incorrect information in a telephone conversation of the 11th August, 2008, by the bank's agent in relation to the options which were available to them following the expiry of a fixed interest rate term. The appellants maintain that they were advised during the telephone call with the bank that if they selected a fixed rate of interest for a five year term they could break out of the fixed rate by paying a €100.00 breakage charge. The appellants contend that acting on the strength of this telephone conversation they entered into a five year fixed rate of interest term with the bank and when they came to break the five year term they were advised by the bank that it would cost them €16,500.00.

3. The bank maintains that the appellants were at all times on notice as to the applicable conditions one of which relates to an administration fee of €100 as opposed to a breakage fee.

4. The appellants complaint was referred to the Financial Services Ombudsman and he in his decision of the 21st April, 2011, at some considerable length discusses the entire background scenario and, in particular, refers to the transcript of the telephone conversation with the second named respondents operative and he indicates that he is satisfied that the customer service agent did not have to refer the complainant, Jacqueline McEvoy, to a qualified financial adviser as the complainant confirmed to the customer service agent that the nature of the inquiry was just a general query. There is no evidence from the telephone record of the conversation to suggest that the general query should not have been handled by the customer service agent.

5. The Financial Services Ombudsman then goes on to state that having reviewed the transcript of the relevant telephone call, he is satisfied that the appellants were advised that any possible breakage fee that might apply if the complainants were to break out of a fixed rate of interest was dependent on interest rates and the length of time remaining before the fixed rate would expire. The complainant was also advised that an administration charge of €100.00 would also apply to the switch from fixed rate to another interest rate product.

6. Furthermore, the Financial Services Ombudsman specifically refers to the documentation which previously had been issued to the appellants and this is the documentation that applied when they drew down their loan in 2004 and accepted a one year fixed rate option and the subsequent documentation each time they entered a fresh arrangement.

7. The Financial Services Ombudsman sets out that he is satisfied that the appellants were aware on and before the 11th August, 2008, that a possible breakage fee could be applied to their loan account in circumstances where they elected to break out of a fixed rate of interest before the applicable time was to expire. He refers in particular to the general mortgage loan approval condition No. 5, which was a condition relating to fixed rate loans, which documentation was at all times in the appellants power or possession.

8. The Financial Services Ombudsman is satisfied that the breakage fee in general condition No.5 was both clearly constructed and adequate to describe the salient features of what was involved.

9. The Financial Services Ombudsman accepted that the customer service adviser could have provided a more accurate and precise explanation regarding the possible application of a breakage fee during the telephone conversation of the 11th August, 2008 but nevertheless, it is the case in his view that the appellants were aware all the time based on the documentation which they had previously received of the salient features of how a breakage fee is calculated. Furthermore, the Financial Services Ombudsman was

not himself satisfied that the information provided to the appellants during the telephone call of the 11th August, 2008, was instrumental in their decision to avail of a five year fixed rate of interest.

10. The reality of the situation here is that the appellants at all times had within their power, possession or procurement the conditions of their mortgage and, in particular, the conditions as set out in general condition No. 5 relating to fixed rate loans.

11. Whatever view one may hold of the second named respondents' agent who dealt with the telephone query from the second named appellant on the 11th August, 2008, the reality is that the Financial Services Ombudsman had full access to the transcript of that telephone call and he took its content into account when arriving at his decision.

12. The issue of common sense arises in that the appellants were a couple who were dealing quite extensively with their mortgage and had changed its terms at least three times prior to the 11th August, 2008, and the logical consequence of what they believed the customer service adviser was telling them was that if interest rates went down they could drop out of the five year fixed interest rate term for a breakage fee of €100.00 and proceed to enter a new arrangement that was more beneficial to them than to the second named respondent.

13. It is important to note that the appellants do not raise any procedural challenge and are simply challenging the finding of the Financial Services Ombudsman on the merits, their view being that the decision was wrong.

14. There are no unusual features about the case and it is one which can be described as a standard investigation into a standard complaint.

15. The applicable test for an appeal to this Court is that as set out by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors* [2006] IEHC at p. 323, wherein Finnegan P. set out the relevant test:-

> "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 would 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*."

16. I accept the submission of counsel for the Financial Services Ombudsman that the test as enunciated by Finnegan P. in *Ulster Bank* can be broken down as follows:-

> (i) The burden of proof is on the appellant.
>
> (ii) The onus of proof is the civil standard.
>
> (iii) The court should not consider complaints about process or merits in isolation but rather should consider the adjudicative process as a whole.
>
> (iv) In the light of the above principles the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors.
>
> (v) In applying this test the court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman.

17. It is not the function of this Court to place itself in the shoes of the Financial Services Ombudsman. As MacMenamin J. stated in *Molloy v. Financial Services Ombudsman*:-

> "I would re-emphasise the simple fact that it is not the function of the court to place itself in the shoes of the Financial Services Ombudsman. The jurisprudence militates against such a course of action. The test therefore is whether the decision was vitiated by a serious error or a series of such errors."

18. I do not consider that it would be appropriate for this Court to attempt to second guess the decision of the Financial Services Ombudsman on its merits.

19. The appellants do not satisfy me that taking the adjudicative process as a whole there was any serious or significant error or a series of such errors. I must have regard to the degree of expertise and specialist knowledge of the defendant and in these circumstances the appellants appeal herein against the decision of the Financial Services Ombudsman of the 21st April, 2011, is dismissed.