THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 127

Kelly J.
Finlay Geoghegan J.
Peart J.

2014/7 COA

2014/8 COA

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

Financial Services Ombudsman

Appellant

and

Kenneth Millar and Donna Millar

Respondents

and

Danske Bank (Formerly National Irish Bank)

Notice Party

Judgment of Mr. Justice Kelly delivered on the 24th day of June, 2015.

Introduction

1. These are appeals brought with the leave of Hogan J. granted on the 23rd October, 2014, from an order made by him on the 30th September, 2014.

2. The appeals have been brought by the Financial Services Ombudsman (the Ombudsman) and the notice party Danske Bank (the bank).

3. The appeals arise in circumstances where the High Court allowed a statutory appeal which had been brought by Kenneth Millar and Donna Millar (the Millars) against a decision of the Ombudsman of the 10th December, 2013. The Ombudsman had rejected the Millars' complaint against the bank. On appeal, the High Court set aside that decision of the Ombudsman and remitted the matter to him for a fresh determination of the Millars' complaint to be carried out in a manner consistent with the judgment of that court.

Jurisdiction of the High Court

4. The Ombudsman is a statutory officer set up under s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, (the Act). That section inserts Part VIIB into the Central Bank Act 1942.

5. Part VIIB provides for the setting up of the Ombudsman's Bureau and specifies the functions and powers of the Ombudsman. It prescribes how consumer complaints are to be dealt with and confers jurisdiction on the Ombudsman in that regard.

6. Chapter 6 confers jurisdiction on the High Court to deal with both references and appeals from the Ombudsman.

7. Section 57C K subs. (1) confers an entitlement on the Ombudsman, either on his own initiative or at the request of parties before him, to refer for the opinion of the High Court a question of law arising in relation to the investigation or adjudication of a complaint. Subsection (2) confers jurisdiction on the High Court to hear and determine any question of law referred to it under that section. If a question of law has been referred to the High Court under this section, the Ombudsman may not make a finding to which the question is relevant while the reference is pending or proceed in a manner, or make a decision, that is inconsistent with the opinion of the High Court on the question.

8. Section 57CL provides for a right of appeal to the High Court from a finding of the Ombudsman. That right of appeal may be exercised either by the complainant or the regulated financial service provider. The Ombudsman may be made a party to the appeal.

9. Section 57CM requires the High Court to hear and determine an appeal made under s. 57CL. The High Court is entitled to make such orders as it thinks appropriate in the light of its determination.

10. Section 57CM(2) provides that the orders that may be made by the High Court on the hearing of such appeal include, but are not limited to, an order affirming the finding of the Ombudsman with or without modification, an order setting aside that finding or any direction included in it and an order remitting that finding or any such direction to the Ombudsman for review.

11. Section 57CM(4) provides that 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.

12. In the present case, it was the High Court that granted leave pursuant to subs. (4), hence this appeal.

13. Unfortunately, the question of law is not identified in the order. In future where leave is granted under subs. (4) the question of law for determination should be clearly identified in the court order.

The complaint to the Ombudsman
14. In 2005 the Millars entered into seven mortgage loan agreements with the bank in respect of a number of properties. In November 2011, the bank increased the variable interest rate on those loan accounts by 0.95% on each loan.

15. On the 22nd May, 2013, the Millars complained to the Ombudsman. They summarised their complaint in the following way:

> *"Effective 11th November, 2011, National Irish Bank (the bank) increased the variable interest rate on Ken and Donna Millars (the Complainants) mortgage loan account by .95% on each loan. This increase is a breach of the terms of the relevant loan agreements. The terms of the loan agreements are that the variable rate of interest can only be increased in line with general market interest rates. When the Complainants sought an explanation from the bank for the rate increase, the Complainants were advised that the increase was due to the bank's funding difficulties. However, the bank's funding difficulties were not relevant to the definition of the variable rate referred to in the various loan agreements."*

16. That summary does not accurately reproduce the actual terms of the loan agreements dealing with the question of the variable rate of interest. The wording of the actual general terms and conditions is as follows:

> *"Rates of interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect."*

17. The Millars complained that when they sought an explanation from the bank concerning the increase, they were informed that it was due to funding costs. In November 2011, the bank wrote to them and told them that whilst ECB rates had decreased, the bank was not funded through the ECB and funding costs had increased substantially so that the bank was unable to continue to absorb those costs. The Millars argued that this explanation failed to offer to them *"any coherent explanation that is consistent with the relevant loan agreements for the bank's conduct".*

18. The Millars submitted to the Ombudsman that the bank had been guilty of a breach of the terms and conditions 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.

19. The remedy which the Millars sought in respect of this alleged breach of contract was a rather drastic one. They asked the Ombudsman to have the loan agreements declared void with a cancellation of the balance on each of the outstanding loans. The total value of the loans was of the order of €1.5 million. In addition, they sought compensation for hardship, stress and emotional upset caused by the bank and a refund to them of all payments made since October 2011, together with interest on the amount of the sums to be refunded. In addition, they sought a contribution towards their expenses and a commitment from the bank that it would desist from further damaging conduct towards them.

The investigation
20. Following receipt of the Millars' complaint, the Ombudsman sought to bring about a mediated settlement of the dispute. This was not possible because the bank declined to enter into mediation. Accordingly, the matter proceeded to an investigation.

21. As part of that investigation, the Ombudsman on the 26th September, 2013, served on the bank a summary of the Millars' complaint and a schedule of questions and evidence required from the bank. The bank responded on the 24th October, 2013. These are the questions posed and the answers given:

> *1. Please clarify whether or not the bank is willing to list any of the criteria taken into account by the bank when calculating the increase in the variable rate of interest.*
>
> *A. No, the bank is not prepared to divulge commercially sensitive information to the Complainants. However, we confirm that funding costs are most certainly taken into consideration. Indeed, these would be a primary driver of the decision.*
>
> *2. Please clarify whether or not the criteria relied on by the bank when making its decision to increase the variable standard rate were audited by any external independent entity in order to verify that the increase was set in accordance with accepted banking procedures and if it was commercially justifiable.*
>
> *A. We have not had an audit carried out by an external independent entity. The bank is not subject to regulated pricing on mortgage interest rates, as these decisions do not fall under the scope of s. 149 of the Consumer Credit Act 1995.*
>
> *However, we have a full governance process in place in relation to pricing decisions and this would include interest rate changes. All such changes are approved through the Pricing Committee and subsequently by Change Control Committee. In addition, the bank has conducted our own internal audit of our pricing decisions.*
>
> *3. If the bank did not commission such an audit please provide a detailed explanation for the reason why the bank did not deem such independent verification necessary.*
>
> *A. As outlined in our response to question 2, the bank is not subject to regulated pricing on mortgage interest rates. We are therefore not subject to external independent verification (although as outlined, we internally audit this area to ensure that we act in accordance with standard banking practice). The bank can confirm that all pricing decisions are only taken after robust due diligence has been undertaken and all the risks and benefits have been discussed in detail.*
>
> *4. Does the bank accept that in the absence of such independent verification, the increase in the bank's variable interest cannot be objectively justified? If the bank rejects this assertion, please state the basis on which the bank contends that this assertion is incorrect.*
>
> *A. No we do not accept this. As outlined, we operate a robust process whereby the bank's Pricing Committee carefully consider the commercial justification of any and all price changes. This process is audited by the bank's internal audit team whose purpose is to ensure that we act in accordance with our own processes, procedures and that we act with probity. We are not required to seek external assessment of commercial decisions relating to increases in our Standard Variable Rate.*
>
> *Ultimately, our customers will make their own assessment of our rates and take action if they are dissatisfied by*

changing provider, which will obviously have clear, measurable consequences for the bank. That is why such decisions are referred to as "commercial decisions" – if our customers do not feel they are justified, they will cease being our customers – the bank therefore considers all factors carefully prior to a price increase.

5. Please refer to the precise terms and conditions in each of the loan agreements that permit the increase in the variable rate of interest to be increased on the grounds of an increase in the general cost of funding to the bank.

A. In the loan agreements, the clause in question is Clause 3, which states:

'Rates of interest are altered in response to market conditions...'

It is perfectly reasonable to accept that funding cost increases are a market condition. If the bank has to pay more for its funding, it could not be considered anything else. It is not clear under what circumstances the Complainants believe that increases would be appropriate, if not funding cost increases. The Complainants themselves highlight that in early 2011, the ECB rate increased twice and the bank did not increase its variable interest rate. They are commercial decisions made by the bank, and the cost of funding has to be a primary driver.

6. Please comment on, with reference to each loan agreement, the Complainants' assertion that in order to increase the variable interest rate, the bank must establish an increase in the "general market interest rates" and that in the absence of such an increase the bank is acting in breach of contract by increasing the variable rate of interest based solely on an increase in the bank funding costs.

A. Firstly, the bank has never claimed that the increase was due ***solely*** *to increased funding costs. However, as outlined, increased 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 could 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.*

7. Please comment on the Complainants' assertion that they have been precluded from availing of the discount on offer from the bank due to the fact that they already have discounted mortgages. Please clarify whether or not this exclusion is referred to in the advertisements. If not, please explain why this was not so included.

A. It is difficult to fully understand the Complainants' argument on this point, outlined in their case to the FSO. It seems in essence to be that they have been given a discount on their mortgages at inception. The fact that this discount was not applied to everyone on the same product, but was applied to them, does not seem to be an issue for them. However, when the bank later offered a "reward discount" for customers who were willing to move their core business to the bank and take our package, the Complainants are angered that their discount would now not be as superior as it had been up to that point. To clarify, they were still getting the exact same discount ie. 0.4% reduction on the standard variable rate. The marketing material very clearly called out that there were exclusions. This was a brochure entitled "Our Package Accounts Explained" and has been included in the Complainants' submission. In the page entitled "Important Information", it states:

> *"This discount rate cannot be used in conjunction with any offer or any discounted rate already in place."*

8. Please provide any additional comments that the bank would like to make.

A. We have no further comment save to reiterate that:

- *The bank is entitled to increase the standard variable interest rate in response to increased cost of funding in the market which can only be considered by any reasonable party to be a market condition.*

- *The bank, like any other business, is also entitled to reward customer loyalty by offering incentives for customers to do more business with us.*

- *The complainant (sic) signed agreements which entitle him to a 0.4% discount on the standard variable interest rate. He is receiving a 0.4% discount on the standard variable interest rate.*

- *Notwithstanding the Ombudsman's adjudication in this case, the Complainants' demand for recompense seems completely unconscionable. He is requesting that every loan he has be voided and that he be refunded all payments made plus interest and compensation. These unwarranted demands have no merit, even if it is adjudicated that the interest rate increases were incorrect. Notwithstanding this we are satisfied that we have clearly outlined why our position is that we have acted entirely in accordance with our entitlements under the agreements between us.*

22. The bank was also required to provide evidence to the Ombudsman under five different headings. This evidence included correspondence between the parties, a copy of the terms and conditions for each of the loan agreements, a copy of all documents and advertisements relating to the discounts offered by the bank for the increase in the variable rate applied in November 2011, any other documentation or records relating to the subject matter of the complaint and any additional documentation which the bank would seek to rely on or which it considered desirable to put before the Ombudsman. The bank complied with this request.

23. The Millars were provided with an opportunity to respond to the bank's replies and did so on the 7th November, 2013. They criticised the information provided by the bank as lacking in coherence and contended that the bank was without any reasonable or reliable defence to their complaint. They contended *inter alia* that the bank failed to refer to any precise term or condition of the loan agreements that permitted it to increase interest rates on the grounds of an increase in a general cost of funding to the bank. Whilst the bank continued to assert that its funding costs were the primarily the reason for the rate increase in November 2011, the Millars contended that it did not provide any evidence as to how its funding difficulties could be reconciled with the terms of the loan agreements. They concluded that the bank had failed to advance any rational coherent or sound argument to demonstrate that when it adjusted its variable rate by .95% in November 2011, it was acting within the terms of the loan agreements, was not abandoning the definition of the standard variable rate, or that it did not repudiate the loans agreements.

The Ombudsman's finding
24. On the 10th December 2013, the Ombudsman made his finding. I will set it out in full.

> *"**Background***
>
> *The Complainants hold a number of mortgage accounts with the bank. The Complainants state that the bank increased the variable interest rate that applied to each of their loans by 0.95% (from 3.4% to 4.35%) with effect from the 11th November, 2011.*
>
> *The Complainants state at page 1 of their correspondence dated the 22nd May, 2013, to this Office that the terms and conditions of each of the loan agreements entered into between the parties provide that 'the variable rate of interest can only be increased in line with general **market interest rates'** (emphasis added). The wording of the sample general terms and conditions provided by the Complainants state in clause 3 'Rates of Interest are **altered in response to market conditions** and may change at any time without prior notice and with immediate effect' (emphasis added).*
>
> *The Complainants state that when they sought an explanation from the bank for the latest increase in the bank's variable interest rate they were informed that it was due to 'funding costs'. The bank wrote to the Complainants on the 14th November, 2011 and informed them that whilst ECB rates have decreased the bank is not funded through the ECB and funding costs have increased substantially and the bank is unable to continue to absorb these costs. The Complainants argue that this fails to offer 'any coherent explanation that is consistent with the relevant loan agreements for the bank's conduct'.*
>
> *The Complainants submit that using this basis for setting the variable interest rate is a breach of the terms and conditions of the loan agreement. The Complainants assert that the bank has failed to properly explain the criteria taken into account when setting the variable interest rate and has failed to provide any transparency in this regard or to justify the 0.95% increase applied since October 2011.*
>
> *The Complainants state that the bank offered a discount in the increase of the applicable variable interest rate increase to 'Prestige' and 'Easy Plus' customers. The Complainants state that the bank erroneously advertised in a press release that all customers could avail of this reduction. However, the Complainants state that they are precluded from benefitting from this discount rate due to the fact that they were already benefitting from a discount on the variable interest rate. The Complainants submit that this erodes the value of their original discount. In taking this course of action the Complainants believe that the bank is disregarding a previous finding of this office as to whether the Complainants had been wrongfully excluded from a discount offer to mortgages that only applied to a Principal Private Residence.*
>
> ***The Complainants' case***
>
> *The complaint is that the bank has acted in breach of the loan agreement 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.*
>
> *The Complainants are seeking to have the loan agreements declared void with a cancellation of the balance of each of the outstanding loans. In addition to this the Complainants are seeking compensation for hardship, stress and emotional upset caused by the bank and a refund of all payments made since October 2011, together with interest on the amount of the sums refunded.*
>
> *The Complainants are also seeking a contribution towards their expenses and a commitment from the bank that it will desist from further damaging conduct towards the Complainants.*
>
> *In the alternative the Complainants 'invite the Financial Services Ombudsman to reach a finding that rectifies the result of the bank's misconduct'.*
>
> *The Complainants also believe that the bank has eroded the effect of a discount that they are receiving by precluding them from availing of the discount on offer to 'Prestige' and 'Easy Plus' customers.*
>
> ***The Provider's case***
>
> *The bank states that the manner in which it assesses the applicable variable interest rate is commercially sensitive and it is unwilling to disclose the relevant data. The bank asserts that by its very nature the Standard Variable Rate is 'variable' and therefore is fully entitled to vary this rate.*
>
> *The bank asserts that it is entitled to offer a loyalty discount to customers and does not accept that it has acted wrongfully in the manner in which it applies discounts to its customers.*
>
> ***Finding***
>
> *During my investigation I put a number of questions to, and sought certain evidence from, the bank. The bank responded fully to my questions. The Complainants were given the opportunity to see the bank's response and the schedule of evidence and a full exchange of documentation took place.*
>
> *In arriving at my findings I have carefully considered the evidence put forward by each of the parties to this complaint.*
>
> *Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions in 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 in evidence submitted are sufficient to enable a Finding to be made in this complaint without the necessity for holding an oral hearing.*
>
> *The Complainants entered into a number of mortgage agreements with the bank. The bank has provided a copy of each of the loan agreements in evidence, including the applicable terms and conditions for each agreement. Clause 3 of the general terms and conditions is the same for each agreement and states:*

'Rates of Interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect'.

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'.

The Complainants have questioned the lack of transparency in the bank's decision making process. The bank is not obliged to openly disclose the criteria it applies when making this assessment and uses a procedure of internal checks and balances. The bank is theoretically correct when it asserts that when it sets its Standard Variable Rate its customers make their own assessment of the rate by deciding whether to remain as customers of the bank or not. Clause 3 of the terms and conditions of each of the loan agreements supports the banks 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.

The Complainants received and continued to receive a 0.4% reduction on this standard variable rate of interest since the inception of each of the loans. The Complainants believe that the bank has eroded the effect of the discount that they are receiving by precluding them from availing of the discount on offer to customers who are willing to move their business to the bank and agree to the other terms on offer from the bank. I do not accept this argument. The nature of a discount is that it is a special rate offered to a limited number of customers. If it were not limited to certain customer (sic) then it would cease to be a discount and would represent a standard rate. The bank is entitled but is not obliged to offer a discount, as it deems appropriate. The fact that a customer does not qualify for a new type of discount cannot be viewed as adversely affecting an existing discount. Therefore this aspect of the complaint is not substantiated.

The complaint is not upheld.

Conclusion

The complaint is not substantiated pursuant to s. 57CI(2) of the Central Bank and Financial Services Authority of Ireland Act 2004.

The above finding is legally binding on the parties, subject only an appeal to the High Court within 21 calendar days.

William Prasifka

Financial Services Ombudsman."

Appeal to the High Court
25. The Millars exercised their entitlement under s. 57CL of the Act. The judgment of the High Court on that appeal has given rise in turn to this appeal.

The High Court judgment
26. The High Court judge identified what he perceived to be the fundamental question with which he was confronted as being "*whether the Ombudsman's construction of clause 3 of the applicable terms and conditions discloses an appreciable legal error*". He went on to say:-

> *"The resolution of these issues 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 (sic) 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?"*

27. A survey of the case law which has built over the years on appeals to the High Court from the Ombudsman demonstrates a rather deferential attitude on the part of the courts.

28. In *Ulster Bank v. Financial Services Ombudsman and Others* [2006] IEHC 323, Finnegan P. having considered a series of decisions indicating the standard of review to be applied by the High Court on statutory appeals said the following:-

> *"It is desirable that there should be consistency in the Courts in the standard of review on statutory appeals. Accordingly unless the words of the statute mandate otherwise it is appropriate that the standard of review in this case be that enunciated by Keane C.J., Kearns J. and Laffoy J. I see nothing in the wording of the statute with which I am concerned to mandate a different approach to the statutory appeal under the Central Bank Act 1942 section 57CL. 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."*

29. As is clear from this quotation from the judgment of Finnegan P. there was nothing novel in the courts taking a deferential approach to decisions of expert or specialised tribunals. For example in *Henry Denny and Sons v. Minister for Social Welfare* [1998] 1

I.R. 34, Hamilton C.J. said:-

> *". . . I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

30. The test enunciated by Finnegan P. has been followed on many subsequent occasions on appeals from the Ombudsman. Thus, in *Hayes v. Financial Services Ombudsman and Others* (Unreported, 3rd November, 2008,) MacMenamin J. said of the test:-

> *"It must now be seen, therefore, as a well established and accepted test.*
>
> *The principle ultimately can be seen as having the following elements:-*
>
> *1. The burden of proof is on the appellant;*
>
> *2. The onus of proof is the civil standard;*
>
> *3. The court should not consider complaints about process or merits in isolation but rather, should consider the adjudicative process as a whole;*
>
> *4. In 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 series of such errors;*
>
> *5. In applying this test, the court may adopt what is known as a deferential stance and may have regard to the degree of expertise and specialist knowledge of the respondent.*
>
> *Furthermore, this is not a de novo appeal where this court looks to all the material ab initio and makes its own determination of what it should do . . .*
>
> *Thus, while a statutory appeal (such as this) is not a judicial review, and where the decision maker is acting within his own area of professional expertise, the test set out by Finnegan P. suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as that error falls short of being one which is serious and significant."*

31. Later in that judgment MacMenamin J. said of the statutory recourse to the Ombudsman as follows:-

> *"What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.*
>
> *The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57CI(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction.*
>
> *Nor is it to be expected that a decision of the respondent should be as detailed or formal as a court judgment. As O'Flaherty J. observed in Faulkner v. Minister for Industry and Commerce [1997] E.L.R. 107 at 111.:-*
>
> > *'We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to a minute analysis.'*
>
> *It is necessary, with these considerations in mind, to revert to the evidence and submissions thereon."*

32. Further support for this approach is to be found in the judgment of McMahon J. in *Square Capital v. Financial Services Ombudsman and Others* [2010] 2 I.R. 514, where he said:-

> *". . . it is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this court from the Ombudsman's decision is not a full rehearing of the case where the court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."*

33. I am of the view the approach identified in the decisions just cited, is the correct one. Indeed, I do not understand the trial judge to have taken any different view. The question which troubled him was whether deference should be shown to the Ombudsman when the issue before him involved a pure question of law. The way in which he dealt with this is to be found at paras. 17 to 20 of his judgment. This is what he said concerning the appropriateness of curial deference being shown to the Ombudsman.

> *"17. This principle does not apply, however, so far as the ordinary application of the law of contract is concerned. It was never the intention of the Oireachtas that a complainant should be disadvantaged by electing to make a complaint to the Ombudsman rather than by proceeding in the ordinary courts. Within the judicial system no appellate court would hesitate to correct what it considered to be legal error on the part of the first instance court. The Supreme Court would*

not hesitate, for example, to reverse what it considered to be an erroneous decision of this Court on a point of contract law, no matter how experienced or expert the trial judge was in matters of contract or commercial law. In these circumstances, it could not be correct that this Court should defer to the Ombudsman on matters of pure contract law, not least given that the Ombudsman's decision would create a res judicata on that very contractual point which would bar the re-litigation of the issue before the ordinary courts.

18. Although both Mr. McDermott, counsel for the Ombudsman and Mr. White, counsel for Danske, urged that I should defer to the expertise of the Ombudsman on the question of the construction of the applicable contractual terms and conditions, it must be observed that the issue presented here involves the straightforward application of ordinary principles of contract law governing the construction of contractual documents. It follows, therefore, that for all the reasons which I have just advanced, it would be inappropriate for this Court to defer to the Ombudsman on these issues and thus only interfere if the interpretation of the contract which was arrived at was somehow unreasonable or irrational.

19. Moreover, just as it is clear that the courts will not defer to the views of specialist agencies on questions of statutory interpretation, the same must, in any event, be true in respect of purely legal questions of contractual construction. The former point was forcefully made by Barr J. in Shannon Regional Fisheries Board v. An Bord Pleanála [1994] 3 I.R. 449, 456:

> *'Statutory interpretation is solely a matter for the courts and no other body has authority to usurp the power of the court in performing that function.'*

20. 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."

34. I am of the view that the trial judge was correct in his conclusion that no curial deference is to be shown to the Ombudsman on what he described as "purely legal questions". That is so not merely for the reasons which were relied upon by the trial judge, but also because such an approach is entirely consistent with the statutory scheme underpinning the jurisdiction of the Ombudsman.

35. I have already set forth the statutory provisions which expressly confer on the Ombudsman an entitlement to refer questions of law to the High Court for its consideration. In addition this very appeal is limited to a question of law.

36. Having correctly, in my view, concluded that pure questions of law ought not be shown curial deference, the trial judge then went on to carry out an exercise in construing the provisions of clause 3 of the agreements in suit.

37. It is at this stage in his judgment that I take the view the trial judge fell into error.

38. I am of the view that the issued raised by the Millars complaint was not a pure question of law, but rather a mixed question of both law and fact.

Clause 3

39. Clause 3 of the contractual arrangements made between the Millars and the bank provides:-

> *"Rates of interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect."*

40. From the very outset of their complaint the Millars have contended that this means that *"the variable rate of interest can only be increased in line with general market interest rates".*

41. I am of the view that this contention does not involve a construction of clause 3, but rather a recasting of it. It seeks to read into it something which is not there. The case which was made by the Millars was not an invitation to construe clause 3, but to rewrite it in accordance with a script prepared by them. This the Ombudsman quite correctly refused to do. Instead, he considered the actual wording of clause 3 and the evidence placed before him. He concluded that the bank's position in contending that the variable interest rate could be amended in response to the then prevailing market conditions was correct. The bank was not breaching the conditions of the loan agreements by acting as it did.

42. I am of the view that the Ombudsman was correct in concluding that clause 3 is clear in its wording. The trial judge in his analysis came to a different conclusion, holding that the term "*market conditions"* may be taken to refer to "*market conditions generally".* I do not share that view nor do I agree that the clause in question is ambiguous.

43. The judge went on then to consider the possibility of the Millars being able to rely upon the existence of a collateral contract regarding the meaning of the term variable interest rate. That was not a case which was sought to be made and did not arise.

44. The Ombudsman was correct in rejecting the contrived construction which the Millars sought to place on clause 3. He was also correct in finding that its wording was clear. It was for him to then consider the factual material placed before him and he is entitled to curial defence in that regard.

45. The High Court would only have been justified in holding as it did if the criteria stipulated in *Ulster Bank v. Financial Services Ombudsman* had been met.

46. I am of the view the Millars did not discharge the burden of proof demonstrating that the decision of the Ombudsman was vitiated by a serious and significant error or series of errors.

47. Accordingly, I would allow the appeals and discharge the High Court order. I would restore the Ombudsman's finding.