Neutral Citation Number: [2014] IEHC 6

THE HIGH COURT

[2013 No. 71 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO PART VII(B) OF THE CENTRAL BANK ACT 1942, AND CHAPTER 6 AND SECTION 57CL THEREOF (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

Between:

MARY DWYER

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ULSTER BANK IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 17th day of January, 2014.

This is an application to set aside the decision of the respondent of the 18th February, 2013, on the basis that the facts of the applicant's complaint and the notice party's response thereto mandated an oral hearing and that, absent such a hearing, there was a consequential incapacity on the part of the Ombudsman to fairly or properly resolve the critical factual disputes of the case.

The appellant is a farmer's widow aged 77 years, her husband having looked after all financial matters relating to the family home and farm until 2005 when he was diagnosed with Alzheimer's disease. The appellant then took on responsibility for financial matters. She had resources available for investment following the sale of a piece of inherited land and on the 29th May, 2006, at the age of 71, she met with two members of staff of the notice party Mr. Patrick McKenna, the branch manager in the Ulster Bank branch at Thurles and Ms. Corla Mansfield, an investment advisor employed by the notice party in the same branch, who explained the nature of the investment to the appellant. The appellant claims that the only risk brought to her attention at this stage was that other investors in the scheme might prematurely cash in their investment with the result that the investment period might be shorter than expected. She claims that the focus of the discussion was on whether she had enough liquid assets to last to the end of the proposed investment term and that she was not informed nor did she understand that the investment was a high risk investment. The notice party's witnesses assert that the appellant indicated that she understood the investment. Ms. Mansfield was of the belief that the appellant had the capacity to make her own decisions. The appellant agreed to invest GB£200,000 in a property syndicate involved in the Canary Wharf project in London.

After meetings on the 24th January, 2007, with Ms. Mansfield of the notice party at the same branch of the notice party, the appellant made a further investment of GB£200,000 in the Bedford Lakes property syndicate, a similar type of investment to that in Canary Wharf. Ms. Mansfield explained that the investment was similar to the previous investment and that the investment period was for five years. The appellant claims that there was no discussion about the possibility of losing the investment and the focus of discussions was on whether she had enough money by way of liquid assets to last to the end of the investment term. The appellant claims that Ms. Mansfield never told her the investment was high risk at the meeting on the 24th January, 2007. Ms. Mansfield for her part claims that she took the time to talk the respondent through the investment clearly and thoroughly at the meeting.

Both investments were classified and clearly designated as high risk geared property investments. The appellant claims that the investments did not perform well and that she has suffered significant financial loss as a result. However, the appellant has since received a draft of GB£118,125 as a result of the refinancing of the Canary Wharf investment in July, 2007 and a draft for £46,328.15 in March, 2008 as a result of similar refinancing of the investment in Bedford Lakes. This has significantly mitigated her investment losses.

In relation to the investments made, it appears that the appellant had certain advices from a Kilkenny based solicitor, Mr. Joe Fitzpatrick. There was some confusion as to the status of Mr. Fitzpatrick, originally thought to be the appellant's nephew but who transpires to be her solicitor only and no relation to her. It was thought that Mr. Fitzpatrick had given the appellant some advice as to the investment potential of Canary Wharf, but it now appears that he merely introduced her to it and suggested she "look into it".

Prior to making the investment the appellant was provided with the Investment Memorandum which set out clearly the risks associated with the investments. The investments were classified as "high risk" by the investment summary letter given to the appellant at her meeting with Mr. McKenna and Ms. Mansfield.

The appellant contends that the notice party failed to advise the appellant of the risks associated with the investments and that she did not understand the nature of the investments and that these investments were unsuited to her needs and circumstances. However, although legally represented when advancing her complaint to the Ombudsman, the appellant did not seek an oral hearing at which she might have challenged the account of the entire transaction detailed in documentary form by the two bank employees. Their accounts were furnished to the appellant prior to the making by the Ombudsman of his determination and the appellant had every opportunity to consider the contents of same in consultation with her legal advisers and to make a determination, if it was thought appropriate, to seek an oral hearing. No such hearing was sought.

The respondent states in his findings that there was a comprehensive supply of documents from the notice party and that there was careful consideration of the evidence and submissions put forward in coming to his finding. He notes that "the submissions and

evidence submitted [were] sufficient to enable a finding to be made in this complaint without the necessity for holding an oral hearing".

The respondent went on to consider each of the appellant's investments in turn. He concludes that the "investment memorandum" was provided to the appellant which in his opinion "sets out clearly the investment in question was very much high risk". Having had the document for a number of days in advance of the meeting the respondent concluded that the appellant should have been aware that the investment was high risk. The meeting of Ms. Corla Mansfield of the notice party and the appellant on the 24th January, 2007, regarding the second investment in Bedford Falls was referenced by way of a detailed note of Ms. Mansfield. This noted that the appellant was provided with a "suitability letter" which advised that the investment contained a high level of risk, did not have capital guarantee, was designed to last circa five years and that she should obtain independent professional advice.

The respondent decided that there was "no evidence to suggest that the investment in question was missold to the [appellant]." His reasoning for not upholding her claim is set out as follows:-

> "…I believe that the risk was clearly outlined to the [appellant] and the [appellant] chose to proceed on that basis. It (sic.) must therefore take it that at the time she was comfortable with adopting a high level of risk and she felt that the investment met with her needs and circumstances at the time. Therefore this aspect of the appeal is not upheld."

The respondent went on to decide that:-

> "…it appears that the [appellant] agreed to effect the investments in question having been made fully aware of the perils involved…..It appears that the [appellant] entered into these agreements of her own free will and volition and without any negligence on the [respondent's] part."

The applicable test for an appeal pursuant to Section 57CL of the Act of 1942 (as amended) was laid down by Finnegan P. (as he then was) in *Ulster Bank v. Financial Services Ombudsman & Ors* [2006] IEHC 323 (Unreported, High Court, Finnegan P., 1st November, 2006) in which he stated the following:-

> "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*."

This test expressed by Finnegan P. above is a well established test which has become known colloquially as the "Ulster Bank Test" and there is a significant body of recent case law in which it has been followed.

In the recent case of *Carr v. Financial Services Ombudsman* [2013] IEHC 182 (Unreported, High Court, O'Malley J., 26th April, 2013) O'Malley J. stated at p. 88:-

> "I consider that the obligation of the respondent to give the broad gist" of his reasons in a written finding means that he is not obliged to deal on a point-by-point basis with every argument made by a complainant. This was a case with extensive written submissions. The respondent is, within his discretion and relying on his own expertise, entitled to select and determine those issues that appear relevant."

The appellant claims before this Court that the respondent should have conducted an oral hearing given the patent conflicts of material fact apparent between the appellant and the notice party and that the respondent failed to give any, or any adequate, consideration to the substance of the appellant's factual submissions in determining the complaint. The appellant claims that her age ought to be a factor and the fact that she is 77 years old and 71 years old at the time of entering into the investments means that she could not possibly have understood the complex investments into which she entered.

The respondent claims that the appellant failed to request an oral hearing and so now cannot complain about the failure to hold same. It is submitted that the respondent acted within his jurisdiction in exercising his discretion not to hold an oral hearing in this case.

The respondent claims that the appellant did not engage with the documents nor did she raise any substantive issues or any letters from her solicitor to take issue with the fact that it was believed that he was acting as her advisor. The respondent claims that it was for the appellant to advance evidence from her solicitor if it would support her assertions that he was not providing financial advice to her.

The case law makes clear that a deferential stance should be adopted by the Court with regard to the specialist knowledge of the Ombudsman. An issue relating to whether or not an oral hearing should have taken place is not something which automatically may be described as a matter coming within the specialist knowledge of the Ombudsman.

The court weighs the failure to request an oral hearing in the interest of the particular facts of the case. In *Caffrey v. Financial Services Ombudsman* [2011] IEHC 285 (Unreported, High Court, Hedigan J. 12th July, 2011) Hedigan J. at p. 19 held:-

> "It seems to me that in this case, the fact that no oral hearing was requested is a factor that should be weighed in the balance. I am satisfied that it was reasonable for the Ombudsman to determine that an oral hearing was unnecessary."

In the Supreme Court case of *Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324 the court examined the broad discretion of the Ombudsman as to whether or not to hold an oral hearing. The court held at p. 364:-

> "Assuming, as conceded by the respondent, that there is power to direct an oral hearing then it will be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact. There is here such conflict in relation to the oral advice given by the applicant to the notice party and also in relation to the expert evidence as to the nature of the bonds. In *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240, Costello P. held it was not possible on the records available to determine that the applicant's wages for the relevant period exceeded the insurable limit. In the course of his judgment Costello P. said at p. 251:-
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> > "(c) There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on

> the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested. In this case there is no doubt that an important right was in issue (that is the applicant's right to a pension for life). The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.
>
> (d) I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case.""

Each case will therefore turn on its own individual facts. Ultimately the court in the context of an appeal of this sort must determine whether the respondent has acted within the parameters of his powers or whether in exercising a discretion he has acted so unreasonably that the Court must intervene. In arriving at any conclusion as to the requirement for an oral hearing, the Court will consider the relative position of the parties to each other in terms of negotiating capacity and ability, whether a complainant had the benefit of legal advice and, of course, whether or not a complainant actually sought an oral hearing when placed in possession of all the facts and documentation on which it was indicated the respondent would rely.

Decision
Much emphasis has been put on the fact that the appellant is 77 years of age and was 71 years of age at the time of entering into the investments. It cannot be said that just because someone is of a certain age that they are thereby rendered incapable of making an investment decision. The notice party state that they always take the age of the potential client into consideration and that they did so in this case. It is of note that the appellant had made provisions for the investments to form part of her estate if she died before the expiry of the investment term. There is absolutely no evidence that the appellant suffered from mental impairment or incapacity, or that she could not understand (with the added benefit of legal advice) the case being made on behalf of the respondent

The Ombudsman had to consider if there were aspects to this case which clearly mandated the holding of an oral hearing. He was aware that the appellant had the benefit of legal advice. In such circumstances and in the absence of a request from a complainant for an oral hearing, it must be assumed that a complainant is content to leave it at that and it can only be in rare circumstances that the Court should hold that the Ombudsman was 'required' to hold an oral hearing. In this regard the Court will obviously look at the process as a whole and see if there were exceptional circumstances giving rise to such an obligation.

As I do not believe there were any such circumstances in this case I would dismiss the appeal.