Neutral Citation [2016] IEHC 453

THE HIGH COURT

2015 No. 224 MCA

IN THE MATTER OF SECTION 57CL 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 A DETERMINATION OF THE FINANCIAL SERVICES OMBUDSMAN MADE ON 24 JUNE 2015 BEARING

REFERENCE NUMBER 13/78351

BETWEEN

KEVIN QUINN & JOAN QUINN

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ULSTER BANK IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2016.

Part 1

Background

1. Between July and September, 2013, the Financial Services Ombudsman received two complaints from Mr and Mrs Quinn relating to the handling of their six Ulster Bank mortgage accounts. The Quinns complained, amongst other matters, that Ulster Bank was charging them a rate of interest different to that contained in letters of loan offer, dated 6th October, 2008, and that Ulster Bank was wrongly claiming that the loans were 'interest only' for a period of five years only, after which they reverted to capital plus interest.

2. Following receipt of these complaints, an exchange of correspondence took place between the Ombudsman and the Quinns and between the Ombudsman and Ulster Bank. A final response letter of 19th March, 2014, issued from Ulster Bank to the Quinns. Before a decision was made by the Financial Services Ombudsman to investigate the complaint in detail, the parties were invited to consider availing of mediation. The Quinns indicated their willingness to do so. Ulster Bank, however, did not wish for mediation. So the Ombudsman advised that the matter would proceed to investigation and adjudication by his office. Much to-ing and fro-ing followed between the parties before a finding was issued by the Financial Services Ombudsman on 24th June, 2015.

3. The Financial Services Ombudsman considered each of the six mortgage accounts on an individual basis. He also noted at the outset of his finding that any new letters of loan offer superseded previous offers. This had the practical consequence that (later) letters of loan offer which the bank contended were the applicable contractual documentation were preferred by the Financial Services Ombudsman to (earlier) letters of loan offer which the Quinns contended were the applicable contractual documentation. Proceeding by reference to what he considered was the applicable contractual documentation, the Financial Services Ombudsman identified the interest rates arising and concluded that there was no documentation upon which the Quinns could rely in contending, as they did, that their contractual rate was the standard variable rate minus 0.21%. The Ombudsman agreed with the Quinns that the explanations provided to them as to how their interest rate operated had caused confusion and uncertainty. However, he was satisfied that the Quinns had not been charged a higher interest rate than that detailed in their mortgage agreements. He also found that the Quinns had been correctly placed on capital and interest repayments in compliance with their loan agreements. Overall, the Financial Services Ombudsman concluded that there was no reasonable basis upon which to direct the undoing of a contract freely entered into by the Quinns as competent adults. But he was satisfied that Ulster Bank had not afforded a suitable level of customer care to the Quinns and directed Ulster Bank to pay compensation of €3,000 for this failing.

4. By notice of motion dated 15th July, 2015, acting pursuant to s.57CL of the Central Bank Act 1942, the Quinns brought the within appeal seeking (1) an order setting aside that part of the determination of the Financial Services Ombudsman in which he found that the Quinns' complaints were not substantiated, (2) if appropriate, an order under s.57CM of the Act of 1942 remitting the Quinns' complaints to the Ombudsman for further determination and (3) certain ancillary reliefs. When it comes to the interest rate issue, the Quinns complain that given the confusing answers emanating from Ulster Bank as to the calculation of the applicable interest rate, the Financial Services Ombudsman should not have proceeded to a determination without requiring further information of Ulster Bank. The Quinns also complain that there was a want of evidence to support Ulster Bank's assertion as to the applicable interest rate whereas they maintain that there was evidence which undermined the Bank's assertion. When it comes to the interest-only nature of the loans, the Quinns maintain that by finding that the later letters of offer were the applicable letters of offer the Ombudsman effectively re-wrote the agreement that was extant between them and Ulster Bank. They also point in this regard to the fact that, for what it is worth, in their application forms for the loans they requested interest-only loans. The Quinns maintain that the foregoing alleged errors are either errors of principle or constitute significant and material errors of fact such as to negate the findings and conclusions of the Ombudsman and justify the remittal of matters to him for further consideration.

Part 2

Curial Deference

A. General.

5. Curial deference denotes the paying of respect by the courts on the basis of another's competence. It embraces (i) the paying of respect to the decisions of others by according weight to those decisions, and (ii) a recognition of the binding nature of decisions so long as they are, say, reasonable. Curial deference is not a matter of judicial servility or subservience. Rather it seeks to recognise the role of the courts *vis-à-vis* the modern administrative State. There are no degrees of deference: a court either defers or it does not. But watchful caution by our judges is needed. To the extent that curial deference precludes rigorous judicial enquiry, it tends towards administrative displacement of judicial judgment. And in that lies an obvious danger. One constraint on agency substitution of the judicial view must be when issues of fundamental rights present. But even beyond the parameters of constitutional and Convention rights, it does not suffice for the courts merely to announce that an area is one in which curial deference is shown and leave matters at that. The public, who continue to look ultimately to their courts for a remedy against perceived injustices, are entitled to know the basis and parameters of such deference, not least so that they can challenge matters if they consider that undue curial deference is being sought of a court. What then is the logical basis for curial deference to delegated decision-makers?

B. Deference as a Matter of Principle.

6. Curial deference to delegated decision-makers is sometimes posited as an example of the courts giving effect to legislative intent. Clearly the courts must give effect to legislative intent, as manifested in statute, so long as the legislature acts within constitutional boundaries. However, lawmakers rarely indicate what the general principles of judicial review in a given context should be. So curial deference seems in practice to be but a judicially ordained allocation of decision-making power between courts and delegated decision-makers by reference to other principles. But what are these other principles? Three possible principles spring immediately to mind: (1) the rightly constrained role of the judiciary as an unelected branch of government; (2) the notion that the courts function as a check on executive excess, rather than as supervisors of executive action; and (3) the concept of automatic deference, whereby despite the fact that the legislature may have delegated powers vaguely, the courts ought to assist in seeing that decisions of the delegated body are generally given effect. Each of these principles likely contains a seed of truth as to why the courts consider that, as a matter of principle, curial deference is merited *vis-à-vis* the actions of delegated decision-makers. Yet each also presents with difficulties. As to (1), the precise limitations on the judicial branch remain ill-defined, so this principle runs the risk of offering an objective cloak for subjective judgment. As to (2), this offers no guidance on the extent of the check to be provided. And as to (3), the review powers of the courts offer so significant a protection to the individual citizen that those powers, if they are to be constrained, ought to be constrained with some specificity. Even these limited difficulties prompt the thought that it may be the practical reasons for curial deference, as much as their principled cousins that inform that deference. What then are the practical reasons for curial deference?

C. Deference as a Matter of Practicality.

7. Two practical justifications for curial deference appear to present. (Whether the second justification ought to be treated as a reason for curial deference independent of legislative intent is doubtful). These two practical justifications are as follows: (1) the need for deference is ascertainable from a proper consideration of relevant statutory provisions; and (2) specialist decision-makers generally have greater expertise regarding the complex subject-matter of the questions delegated to them.

8. As to (1), there is nothing in s.57CL of the Central Bank Act 1942, as amended, in particular as amended by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004 (the provision that established the Financial Services Ombudsman and the related consumer dispute resolution scheme) (hereafter 'the Act of 1942') that in and of itself limits the right of appeal to the form of appeal that our courts have concluded that provision to entail (as considered later below).What the courts have done to arrive at the present position is (a) to look to s.57BB of the Act of 1942 which states that an object of Part VIIB of the Act of 1942, in which s.57CL(1) sits, is to enable consumer complaints that go before the Financial Services Ombudsman "*to be dealt with in an informal and expeditious manner*", and (b) to divine from that object and certain case-law (relating to curial deference but arising under other statutes) the conclusion that when complaints go beyond the Financial Services Ombudsman and into the courts, it accords with the object stated in s.57BB that the form of appeal available in the courts is limited. Some might contend for an alternative reading of the Act of 1942, namely that (a) it confers a right on all consumers to complain to the Financial Services Ombudsman (s.57BX), (b) it has as its object that all such complaints will be dealt with expeditiously and informally (s.57BB), (c) in so providing, it seeks to offer consumers of limited or moderate means an inexpensive means of having their disputes considered and, hopefully in many instances, fully and finally resolved by the Ombudsman, but (d) it confers a full right of appeal on consumers who remain dissatisfied and wish, doubtless reluctantly but with the same entitlement as their wealthier counterparts, to come to court (s.57CL(1)). Read this way, the Act of 1942 becomes an additional crutch for consumers of limited and middling means who are driven by financial circumstance to avail of the Financial Services Ombudsman scheme in the first instance, and not a basis on which to discriminate against poorer consumers in favour of their wealthier neighbours who can go straight to court and enjoy ample rights of appeal. Nonetheless it is the former reading that has hitherto found favour with the courts.

9. As to (2), necessary deference to agency expertise is a constant refrain of Irish case-law on curial deference in s.57CL appeals. An inherent difficulty with this proposition is that it is perhaps prone to being overplayed. If, for example, one looks to the types of dispute that present before the Financial Services Ombudsman, they tend to be, as in the case of the Quinns, disputes over whether a consumer got the deal that s/he thought s/he was buying into. Those are precisely the types of disputes that many judges, as commercial and contract lawyers, are likely to have advised upon in practice, and to which they are likely to bring considerable expertise, as do the counsel appearing before them.

Part 3

Case-Law

10. The court turns to consider various cases to which it has been referred by counsel.

i. Ulster Bank Investment Funds Limited v. Financial Services Ombudsman [2006] I.E.H.C. 323.

11. This was an early s.57CL appeal that followed on the establishment of the Financial Service Ombudsman's office and continues to shape the form of such appeals. In the critical passage of his judgment, Finnegan P. observes as follows, at 9-10:

> *"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*….Having regard to my decision on the standard of review it is appropriate that the appeal should proceed on the basis of the materials which were before the Financial Services Ombudsman only. The Court however has a discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate in the interest of justice..."*

12. A number of observations can perhaps be made about Finnegan P.'s judgment in *Ulster Bank.*

13. First, Finnegan P. considers only ss. 57CK, 57CL and 57CM of the Act of 1942. There is no consideration of s.57BX and no consideration why the Oireachtas would wish to establish a two-tier system which would see lesser court protection afforded (a) consumers driven by circumstance to make complaint to the Financial Services Ombudsman and who thereafter come to court on appeal pursuant to s.57CL, over (b) consumers who can afford to come straight to court and enjoy fulsome rights of appeal.

14. Second, Finnegan P., at 5, appears to focus on the form of an appeal as being determinative of the scope of same:

> *"It is thus envisaged that the appeal may be conducted between the complainant and the regulated financial service provider concerned the Financial Services Ombudsman not being a party. A full appeal on the merits will ordinarily be between the parties to the original hearing the deciding party not being a party. In judicial review on the other hand the deciding body will normally be a party or at least a notice party with the option of taking part in the proceedings..."*

15. A difficulty that arises in this regard is that the nature and scope of the court's jurisdiction on a statutory appeal is in all cases a matter of statutory construction. And, as a general rule it would be surprising if the legislature, having created a right of appeal, did not, at the least, intend to vest the High Court with substantial powers additional to, and distinct from, the inherent powers of judicial review which it enjoys at common law. Indeed, as Costello J. indicated in *Dunne v. Minister for Fisheries* [1984] I.R. 230, in a passage quoted by Finnegan P. in *Ulster Bank*:

> "[It does not follow] *that in every case the Court's jurisdiction on a statutory appeal is the same; in every case the statute in question must be construed. In construing a statute it does not seem to me to be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the Court would have powers in addition to those already enjoyed at common law."*

16. Third, Finnegan P. quotes the last-mentioned passage with apparent approval, then proceeds to consider the form of appeal that exists under other statutes before arriving at the conclusion that *"It is desirable that there should be consistency in the Courts in the standard of review in statutory appeals"*. As to this last observation, it could not unreasonably be contended that it is a matter more for the Oireachtas than the courts as to what level of consistency is to pertain between statutory rights of appeal arising under different statutes.

17. Fourth, in pursuit of his preference for "*consistency in the Courts in the standard of review on statutory appeals*", and despite the fact that there is no obligation on the Oireachtas to achieve such consistency through statute, Finnegan P. adopts a standard of review that presents in a trio of cases which he briefly considers (*Carrigdale Hotel Ltd v. The Comptroller of Patents, Designs and Trade Marks and Anor* [2004] 3 I.R. 410, *Orange Communications Ltd v. The Director of Telecommunications Regulation and Anor* [2000] 4 I.R. 159, and *M & J Gleeson Ltd v. The Competition Authority* [1999] 1 I.L.R.M. 401) and which are concerned respectively with appeals under the Copyright Act 1963, the Postal and Telecommunications Services Act 1983, and the Competition Act 1991. However, there is no indication in the Act of 1942 that the form of statutory appeal which is contemplated by our elected lawmakers in s.57CL of the Act of 1942 was intended to mirror the form of statutory appeal contained in very different statutes enacted, respectively, 41, 21 and 13 years before the amending statute of 2004.

18. Fifth, when it comes to the issue of curial deference, Finnegan P. favours a concept of curial deference identified by Keane C.J. in a different statutory context in *Orange v. The Director of Telecommunications Regulation and Anor* [2000] 4 I.R. 159. In this regard, Keane C.J. relied, *inter alia*, upon the decision of the Canadian Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc.* (1997) 1 SCR 748 which Finnegan P. states, at 7, to be "*equally apposite here*". The text from the Canadian decision is concerned with "*a decision of an expert Tribunal"*, and states, *inter alia*, that "*if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the Tribunal enjoys some advantage that judges do not"*. Presumably, the advantage is the expertise of the tribunal, an aspect of matters which, as the court has noted previously above, can run the risk of being overplayed.

ii. *Hayes v. The Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008 (McMenamin J.)); *Square Capital Limited v. The Financial Services Ombudsman and Anor* [2010] 2 I.R. 514; *Molloy v. Financial Services Ombudsman and Anor* (Unreported, High Court, 15th April, 2011 (McMenamin J.); *De Paor v. The Financial Services Ombudsman* [2011] I.E.H.C. 483; *Goverey v. Financial Services Ombudsman* [2013] I.E.H.C. 403; *Verschoyle-Greene v. Bank of Ireland Private Banking Limited and Anor* [2016] I.E.H.C. 236; *Stowe and Millar v. Financial Services Ombudsman and Anor* [2016] I.E.H.C. 199.

19. These cases essentially affirm the logic of *Ulster Bank* and their collective and individual persuasiveness to a large extent rises or falls on whether or not one accepts the decision in *Ulster Bank* to be logically un-flawed. With regard to the judgment in *Stowe*, this Court respectfully does not agree with the notion, advanced therein at 20-21, that, in effect, a limited right of appeal under s.57CL is the price consumers pay for electing to place a complaint before the Financial Services Ombudsman instead of coming straight to court. The harsh financial reality of life is that many consumers do not, to borrow from the wording of Stowe, elect to take a complaint to the FSO "*rather than litigating their complaint*", do not freely "*opt for the FSO complaint process*", and do not "*choose the FSO complaint process*". The present high cost of court proceedings means that for many consumers on limited or middling means who find themselves in dispute with a financial services provider, the Financial Services Ombudsman offers the only affordable route

by which they can seek an impartial resolution of matters. So going to the Financial Services Ombudsman, some might contend, is not, to borrow again from the wording of *Stowe*, a "*free go*"; for many people it is their only 'go'. And for the few who persevere to the point of bringing an appeal under s.57CL, it just does not ring true that the Oireachtas, comprised as it is of lawmakers elected largely on the strength of the many voters who survive on limited or middling means, and not the few who are wealthy, decided back in 2004 that people driven by financial necessity to use the Financial Services Ombudsman should face a restricted form of appeal when they come to court, but that those wealthy enough to come straight to court should enjoy fulsome rights of appeal. Nor does it seem to this Court to offer any comfort to a consumer minded to bring a s.57CL appeal, because s/he considers the Financial Services Ombudsman to have got matters wrong, that any constraints on the scope of that appeal are no greater than the constraints her or his financial services provider would have faced had matters gone otherwise and the provider sought to bring an appeal under s.57CL.

iii. Koczan v. Financial Services Ombudsman [2010] IEHC 407.

20. Amongst other matters, the decision of Hogan J. in *Koczan* (1) identifies instances in which an assessment of the actions of the Financial Services Ombudsman is properly done by way of judicial review rather than by way of statutory appeal (a form of analysis that highlights the clear distinction to be drawn between judicial review and statutory appeal), and (2) touches upon the purpose of a statutory appeal. Per Hogan J., at 19-20:

> *"There are, doubtless, certain categories of cases where the legal argument raised falls properly to be canvassed by means of judicial review rather than by way of statutory appeal. As indicated in Square Capital, an argument directed towards a total lack of subject matter jurisdiction is perhaps one such case. Judicial review might also be appropriate where the complaint relates to the integrity or basic fairness of the decision-making process….There may well be other cases – such as e.g., those touching on the constitutionality of legislation or the validity of statutory instruments – where the legal issues cannot properly be raised by way of appeal…and which must be dealt instead with by means of a declaratory action….*
>
> *These cases must…however, be regarded as the exception rather than the rule. It is well established that the Oireachtas must be presumed to know the law and the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference – albeit a rebuttable inference – that the Oireachtas 'must have intended that the Court would have powers in addition to those already enjoyed at common law' in respect of its judicial review jurisdiction: see Dunne….That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so".*

21. It is difficult to see how a presumed intention on the part of the Oireachtas to allow the entirety of an appellant's arguments to be ventilated on appeal is facilitated in the context of s.57CL appeals by the neutered power of review that our courts post-*Ulster Bank* have generally considered themselves to enjoy in this context.

B. Decisions of the Court of Appeal.

***Financial Services Ombudsman v. Millar* [2015] I.E.C.A. 127; *O'Regan v. Financial Services Ombudsman* [2016] I.E.C.A. 165.**

22. *Millar* was an appeal on a point of law from a decision of the High Court following a s.57CL appeal. The crux of the case on appeal was the proper extent of curial deference. In his judgment, Kelly J., at para. 26, refers to the judgment of the High Court judge (Hogan J.) who had posed the critical issue arising thus: "*Should it* [the High Court] *defer to the Ombudsman on* [a] *question…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?*" Commencing his consideration of applicable law, Kelly J. notes, at para. 27, that "*A survey of the case law which has built* [up] *over the years on appeals to the High Court from the Ombudsman demonstrates a rather deferential attitude on the part of the courts."* Kelly J. then looks to 'old reliables' such as *Ulster Bank, Hayes*, and *Square Capital*, emphasising, at para. 29, that there is "*nothing novel in the courts taking a deferential approach to decisions of expert or specialised tribunals*", concluding, at paras. 34, 36, that no curial deference is to be shown to the Ombudsman on purely legal questions, but (see para. 38) that deference is required on issues embracing law and fact. In a concurring judgment which relies heavily on the judgment of Keane C.J. in *Orange*, Finlay Geoghegan J. likewise agrees that there is no deference to be shown to the Financial Services Ombudsman on questions of law. This is because, per Finlay Geoghegan J. at para.15 of her judgment, "[T]*he Ombudsman…does not have expertise or specialised knowledge…relative to the High Court, in deciding questions of law."* However, on questions of law and fact, Finlay Geoghegan J., at para.17, concludes, by reference to *Orange*, that "[T]*he court should consider the adjudicative process as a whole and the onus is on the appellant to show that the decision was vitiated by a serious and significant error."*

23. The legal position, following *Millar*, seemed clear. *Ulster Bank* and *Orange* appeared to reign supreme; no curial deference to the Financial Services Ombudsman was required on issues of law; when it came to issues of law and fact (such as contractual interpretation) the just-quoted test applied. In recent weeks, however, the decision of the Court of Appeal in *O'Regan* has the result that the legal landscape appears to have shifted somewhat. In *O'Regan*, counsel for the appellants submitted, *inter alia*, that (1) s.57CL(1) does not specify the form of appeal from the Financial Services Ombudsman, and (2) the test in *Orange*, formulated as it was in the context of commercial litigation, has no applicability in the context of consumer protection legislation such as that establishing the Financial Services Ombudsman. As to (2), the Court of Appeal did not consider this issue in any detail, Hogan J. observing, at para. 57, that: "*Beyond noting that the Supreme Court has recently re-affirmed the* Orange *test….in the not entirely dissimilar field of data protection legislation (see* Nowak v. Data Protection Commissioner *[2016] IESC 18), it is unnecessary to express any view on this wider question".* Notably, neither counsel nor court, in *O'Regan*, appears to have considered that the issue of curial deference and whether *Orange* was properly applied by Finnegan P. in *Ulster Bank* had been finally settled by the Court of Appeal in *Millar*, with Hogan J. appearing to bat this "*wider question*", which he seems to perceive as an extant question properly arising, to later resolution. As to (1), the decision of the Court of Appeal in *O'Regan* is not applicable to the within proceedings. This is because *O'Regan* was concerned with, in the words of Hogan J., at para.65 *"the scope of an appeal from the FSO to the High Court in a case of this kind following an oral hearing"*. By contrast, the case now before the court did not involve any oral hearing.

Part 4

Conclusion

24. Having regard to the still-binding decision in *Millar* and the weight of previous High Court case-law, the court cannot see that, when it comes to deciding the within proceedings, it is not required, as a matter of precedent, to apply the tests originally identified in *Ulster Bank*.

25. When it comes to: (1) the interest rate issue, the Quinns contend in effect that the Financial Services Ombudsman should have sought still further information of Ulster Bank and decided matters differently on the evidence before him; (2) the interest-only nature of the loans, the Quinns contend in effect that the Financial Services Ombudsman should have decided matters by reference to the contractual documentation which they contended and contend to be applicable.

26. As to (1), all the evidence before the court points to the Financial Services Ombudsman as having done a thorough investigation of the Quinns' complaints. However, there comes a point when investigation must end and adjudication is done. It will likely ever be the case that more could always be considered before a decision is rendered. But there is nothing in the evidence which suggests any procedural or other flaw to present in terms of when the Ombudsman ended his investigation and commenced the process of adjudication. As to both (1) and (2), there is nothing in the evidence before the court which suggests that the Ombudsman could not have reached the decisions that he did on the evidence before him. The Quinns may consider that the weight of evidence lay in one direction. Unfortunately for them, the Ombudsman considered that it lay in another. The Quinns have the abundant sympathy of the court that the decision of the Ombudsman may have the practical result that they are placed in financial difficulty. But such natural sympathy does not afford a legal basis on which the court can interfere with the Ombudsman's considered decision.

27. Having regard to all of the foregoing, the court must respectfully decline to order any of the reliefs sought by the Quinns at this time.