

THE HIGH COURT

[2012 No. 202 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57 OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY S 16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN:

NICHOLAS SMITH AND BRIGID SMITH

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ULSTER BANK IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Barrett delivered on the 4th day of February, 2014

1. This appeal centres on the issue of whether the Financial Services Ombudsman ought to have held an oral hearing when investigating a complaint made by the appellants, Mr. and Mrs. Smith, against Ulster Bank Ireland Limited. In a finding of 28th May, 2012, the Financial Services Ombudsman found that the complaint made by Mr. and Mrs. Smith against Ulster Bank was not substantiated. Mr. and Mrs. Smith are seeking, amongst other matters, an order setting aside the finding, an order remitting the finding to the Financial Services Ombudsman for review, and such further or other order as the court may think appropriate. The appeal is brought under 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. Per s. 57CL:

"(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.

(2) The Financial Services Ombudsman can be made a party to an appeal under this section.

(3) An appeal under this section must be made –

(a) within such period and in such manner as is prescribed by rules of court of the High Court, or

(b) within such further period as that Court may allow."

The orders sought by Mr. and Mrs. Smith fall to be made, if made, under s. 57CM(2)(b), s. 57CM(2)(c) or otherwise under s. 57CM of the 1942 Act, as inserted by section 16 of the 2004 Act. Per s. 57CM:

"(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.

(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:

(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;

(b) an order setting aside that finding or any direction included in it;

(c) an order remitting that finding or any such direction to that Ombudsman for review.

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.

(4) 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 Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts)."

Role of Court

2. The role of this Court in appeals brought under s. 57CL was considered in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman and Others* [2006] IEHC 323. Delivering his judgment in that case, Finnegan P. stated (at p. 9) that, when it

comes to such appeals:

"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."

3. This formulation was arrived at by Finnegan P. after considering a number of relevant authorities, including the judgment of Keane C.J. in *Orange Communications Limited v. The Director of Telecommunications Regulation and Another* [2000] 4 I.R. 159. It is sometimes referred to as the 'Ulster Bank test'. In devising the test, Finnegan P. appears to have been seeking both to give effect to the intentions of the Oireachtas and also to show due deference to the perceived expertise of the Financial Services Ombudsman in the area of financial services, a form of deference which has traditionally been extended by the courts to the decisions of specialist bodies. For example, in the judgment of Hamilton C.J. in *Henry Denny and Sons (Ireland) Limited, trading as Kerry Foods v. The Minister for Social Welfare* [1998] 1 I.R. 34 at 37 it is stated that *"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"*.

4. The practical effect of the Ulster Bank test has been that appeals brought to the court against findings of the Financial Services Ombudsman are not heard on a *de novo* basis. It might perhaps be contended that it would be more consistent with the desire for an expeditious means of resolving financial services disputes which informed the establishment of the Financial Services Ombudsman, were appeals from the Ombudsman's findings to be heard *de novo* and adjudicated upon by the court. Be that as it may, there is a significant body of recent case-law in which the Ulster Bank test has been applied and it is applied by this Court in the present appeal.

5. One dimension of the Ulster Bank test that has attracted judicial attention is the extent to which the court should defer to the perceived expertise and specialist knowledge of the Financial Services Ombudsman. The case-law suggests that this deference extends to the Ombudsman's area of specialisation – financial services matters – but does not extend to issues of procedural fairness. So, for example, in *Hyde v. Financial Services Ombudsman* [2011] IEHC 422 at para.7.4, Cross J. accepted that the Financial Services Ombudsman should not be required to exercise all the procedures and requirements of a court of law but held that the Financial Services Ombudsman ought to have conducted an oral hearing during the investigation that was in issue in that appeal. Having reached this conclusion, Cross J. states (at para.8.7) that:

"I am alive to and accept the deferential standards as set out by Keane C.J. in [the Orange Communications case]...but I do not think any of the matters I have alluded to refer to the specialised knowledge of the respondent in relation to the banking world rather they deal with the issue of fair and proper procedures and adjudication."

6. In *Lyons and Murray v Financial Services Ombudsman* [2011] IEHC 454, Hogan J. was likewise confronted with the issue of whether there should have been an oral hearing in respect of the appellants' complaint in that case. Hogan J. acknowledged (at para. 21) that the Financial Services Ombudsman is not expected to function as a miniature court of law and considered a number of judgments by the court upholding decisions of the Financial Services Ombudsman not to hold an oral hearing. However, Hogan J. considered (at para. 29) that in *Lyons*, just as in *Hyde*, the appellants *"could not realistically hope to establish the underlying merits of their case without an oral hearing"*, concluding (at para. 36) that for the Financial Services Ombudsman to have proceeded otherwise in the *Lyons* case negated the appellants' constitutional right to fair procedures, thus vitiating the Ombudsman's decision. Again, the extent to which this Court should defer to the expertise and specialist knowledge of the Financial Services Ombudsman arose, Hogan J. stating (at para. 38) that:

"As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures...This has further consequences, for as Cross J. noted in Hyde, the resolution of the question of whether there should be an oral hearing is not a matter which goes directly to the specialist expertise of the Ombudsman, so that the deference to that expertise as enunciated by Finnegan P. in Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman [2006] IEHC 323 is simply not applicable in this particular case."

Facts

7. The appellants, Mr. and Mrs. Smith, are an enterprising couple who in the years since 1981 have made a number of property investments. Typically these investments appear to have involved the appellants buying, renovating and sometimes utilising commercial and other properties, with an eventual view to selling them on. In each instance any business or property in which Mr. and Mrs. Smith were involved was the sole source of income for their family. Mr. and Mrs. Smith were not and are not major players in the property marketplace.

8. In early-2005, certainly by February 2005, when each of Mr. and Mrs. Smith was 59 years of age, they approached Ulster Bank Ireland Limited with a view to making a property investment. It is alleged that Ulster Bank recommended participation by Mr. and Mrs. Smith in a consortium of investors, the Jubilee Consortium, which utilised a mixture of investor equity and loan monies to buy certain properties in England by way of speculative investment. The degree to which Ulster Bank encouraged Mr. and Mrs. Smith to join in the Jubilee Consortium investment is central to the complaint later made by them to the Financial Services Ombudsman.

9. It is worth noting that in a letter of 5th December, 2011, from Ulster Bank to the Financial Services Ombudsman, Ulster Bank, at p.2, describes property investments such as the Jubilee Consortium investment as *"High Risk"*, being *"medium to long term investments which are specialised, highly geared, generally illiquid and do not offer a capital guarantee"*. Although this Court is not required to make any finding in this regard, it might perhaps be perceived as surprising that any regulated financial services provider would countenance recommending or facilitating, whether by way of loan or otherwise, participation in such a form of venture by possibly unsophisticated investors who were reaching the end of their working lives. It might perhaps be expected that a regulated financial services provider would only allow investors to proceed with such an investment following a comprehensive analysis of investor affairs and the issuance of clear warnings as to the risks arising. A question occurs in this case as to whether such an analysis was done prior to Mr. and Mrs. Smith investing with the Jubilee Consortium. In addition, it is not clear that the information memorandum prepared for Consortium members, and containing the type of pre-investment information and warnings that one might perhaps expect in relation to an investment such as that in issue in these proceedings, in fact reached Mr. and Mrs. Smith prior to their making such investment.

10. When Mr. and Mrs. Smith first approached Ulster Bank in early-2005 they dealt with Mr. David McHugh, then an Ulster Bank Relationship Manager at the bank's North East Business Centre. Ulster Bank indicates in its affidavit evidence that once Mr. Smith expressed an interest in a group investment, Mr. McHugh referred the "details" to Mr. Barry Goodman, at that time a Private Client Relationship Manager with Ulster Bank. Although Mr. McHugh may have referred the details to Mr. Goodman, it does not appear on the

basis of Ulster Bank's own correspondence that Mr. Goodman met in person with either Mr. or Mrs. Smith at this time. In a letter of 18th February, 2011, from Ulster Bank to the Smiths, at p.2 it is indicated that an initial investor analysis or "*Fact-Finding*" meeting was done by Mr. Goodman on 29th March, 2005. This might perhaps be regarded as a rather belated date on which to hold an initial investor analysis meeting, given that Mr. and Mrs. Smith had on 7th March, 2005, *i.e.* more than three weeks previously, already invested in the Jubilee Consortium. A letter of 10th March, 2005, from Ulster Bank to Mr. and Mrs. Smith acknowledges that they had by that date invested in the Jubilee Consortium; an 'Advice of Debit' of 7th March, 2005, from Ulster Bank to Mr. and Mrs. Smith appears to confirm 7th March, 2005, as the date of investment.

11. In a letter of 16th January, 2012, from Ulster Bank to the Financial Services Ombudsman, at p.1 Ulster Bank indicates that Mr. Goodman was in contact with the Smiths over the phone prior to their making the Jubilee Consortium investment. But this letter also confirms that the fact-finding exercise was done on 29th March, 2005. Even if it is accepted that the telephone calls took place, the first substantive step in the investment process as conducted by Mr. Goodman, according to Ulster Bank's own account of events, took place some weeks after the investment had transpired. It might be argued that this was too late or pointless.

12. Mr and Mrs Smith state in their affidavit evidence that in fact all their dealings in relation to the investment, prior to actually making the Jubilee Consortium investment on 7th March, 2005, were with Mr. McHugh, who was attended by another Ulster Bank colleague who did not advise them, and that they never spoke or met with Mr. Goodman before the Jubilee Consortium investment. Mr. and Mrs. Smith offer a possible rationale for the 29th March date referred to by Ulster Bank, indicating that they did indeed meet with Mr. Goodman on 29th March, 2005, but in relation to a different matter, namely the establishment of a pension plan. Ulster Bank maintains that Mr. McHugh merely referred the details of Mr. and Mrs. Smith to Mr. Goodman and, in its letter of 16th January, 2012, to the Financial Services Ombudsman, indicates that "*we do not have any record of notes between Mr David McHugh and Mr Barry Goodman on this matter*". Nor, apart from an extract from a loan sanction letter of 23rd February, 2005, and the 'Advice of Debit' of 7th March, 2005, were there any other Ulster Bank records that were placed before the Financial Services Ombudsman and which dated from the critical period between early-2005, the time of the initial meeting with Mr. McHugh, and 7th March, 2005, the date Mr. and Mrs. Smith effected their Jubilee Consortium investment.

13. Ulster Bank, in its affidavit evidence, asserts that it merely acted as a third party broker for the investment in issue, that it introduced the Smiths to BDO Simpson Xavier and that the Smiths and BDO communicated directly with each other regarding the investment. Included in the Financial Services Ombudsman's affidavit evidence is a comprehensive information memorandum concerning the Jubilee Way Consortium and containing the type of pre-investment information that it might be argued would be expected to be supplied to a potential Consortium member. Although it is exhibited immediately after a letter of 22nd February, 2005, from BDO Simpson Xavier to the Smiths, there is no indication in the letter that the information memorandum was attached to that letter; indeed the letter indicates that the Smiths had by that time already received details of the proposed investment but does not indicate from whom or in what form. Mr. Smith states in his affidavit evidence that he did not receive the information memorandum until April or May 2005, after the Jubilee Consortium investment undertaken by the Smiths had taken place. Mr. and Mrs. Smith did receive a helpful summary of the information memorandum that was enclosed with a letter of 10th March, 2005, from Ulster Bank, though again this letter post-dates the investment date of 7th March, 2005, and acknowledges that the investment has already occurred. The document commences with the statement that it is "*a brief summary of the information set out in the Memorandum of BDO Simpson Xavier, a copy of which has been supplied to you*". This Court is unable to conclude on the basis of this statement, or on the basis of any evidence in this case, when the information memorandum was supplied to Mr. and Mrs. Smith or either of them.

14. The Jubilee Consortium investment did not perform well and Mr and Mrs Smith suffered significant financial losses as a result. The scale of these losses became increasingly manifest between 2007 and 2010. On 17th January, 2011, in a letter that appears to be part of ongoing correspondence with Ulster Bank concerning the financial arrangements of Mr. and Mrs. Smith, Mr. Smith refers to the "*Jubilee Way fiasco*" and asserts that "*we relied totally on the Bank's advice*". On 19th January, 2011, Mr. and Mrs. Smith made a complaint to the Financial Services Ombudsman about Ulster Bank. On 25th January, 2011, a member of Ulster Bank's staff spoke by telephone with Mrs. Smith to discuss the assertions made in the letter of 17th January, 2011, and to enquire whether the Smiths wished to raise a formal complaint. On the same day the member of staff wrote to confirm that she would investigate the Smiths' complaint. On 26th January, 2011, the Financial Services Ombudsman wrote to Mr and Mrs Smith indicating that they needed to complete their complaint with Ulster Bank and receive a "*Final Response*" letter before the Financial Services Ombudsman could consider the Smiths' complaint. On 28th January, 2011, Mr. and Mrs. Smith wrote a comprehensive letter to Ulster Bank "*to complain about the outcome of an investment made by us on the advice and recommendation of Ulster Bank*". On 18th February, 2011, Ulster Bank wrote a comprehensive letter by way of final response, rejecting the Smiths' complaints, thereby enabling the Financial Services Ombudsman to proceed with its investigation. On 1st March, 2011, the solicitors for Mr and Mrs Smith wrote to advise the Financial Services Ombudsman that they had been engaged in this matter. On 1st June, 2011, the Financial Services Ombudsman advised the solicitors for Mr. and Mrs. Smith that Ulster Bank had declined mediation and that sometime within the next 20 weeks the Financial Services Ombudsman would commence an investigation of the Smiths' complaint. On 7th November, 2011, the Financial Services Ombudsman wrote to the solicitors for Mr and Mrs Smith to indicate that the investigation had now commenced. In the course of the investigation that followed, the solicitors for Mr. and Mrs. Smith, in a letter of 7th February, 2012, wrote, on their clients' instructions, to request an oral hearing of the matter, offering the reason that "*the issues are too complex to be dealt with in correspondence*". In a letter of 9th February, 2012, to the solicitors for Mr. and Mrs. Smith, the Financial Services Ombudsman noted this request.

Respondent's finding

15. On 28th May, 2012, the Financial Services Ombudsman issued its finding. This concluded that the complaint made by Mr and Mrs Smith was not substantiated. Moreover, the Financial Services Ombudsman found that no oral hearing was necessary. At p. 2 of the finding the following appears:

"Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict",

At page 3 the finding states:

"I am wholly satisfied that such conflicting accounts as are given by the parties to this complaint may safely be resolved by analysing the documentation included in the Schedule Evidence, and all documents submitted".

Again, however, Ulster Bank, in a letter of 16th January, 2012, to the Financial Services Ombudsman had indicated that "*we do not have any record of notes between Mr. David McHugh and Mr. Barry Goodman on this matter*". Nor is there in the material that was available to the Financial Services Ombudsman documentation of such a nature, whether internal to Ulster Bank or between Ulster Bank and Mr. and Mrs. Smith or either of them, that dates from the critical period between early-2005 (the time of the first meeting with Mr. McHugh) and 7th March, 2005, (the date Mr. and Mrs. Smith effected their investment) on which the Financial Services

Ombudsman could have determined what, apart from the issuance of a loan, transpired between Ulster Bank and Mr. and Mrs. Smith prior to the investment. The Financial Services Ombudsman did have access to correspondence between Mr. and Mrs. Smith and BDO Simpson Xavier during this period but this correspondence does not address various factual issues in dispute between Mr. and Mrs. Smith and Ulster Bank and there is no evidence as to when the information memorandum was supplied. There are assertions and counter-assertions by Mr. and Mrs. Smith and Ulster Bank and by declining to hold an oral hearing the Financial Services Ombudsman in effect denied Mr. and Mrs. Smith the opportunity to test by way of cross-examination various factual issues arising between the parties, the determination of which was necessary to enable the Smiths to establish the merits of their case. Such issues include but are not limited to: whether Mr. and Mrs. Smith or either of them had any meaningful contact with Mr. Goodman before they invested in the Jubilee Consortium; what advice, if any, Mr. McHugh gave Mr. and Mrs. Smith before they invested in the Jubilee Consortium; whether Mr. and Mrs. Smith acted on the advice of Mr. McHugh when they invested in the Jubilee Consortium; whether Mr and Mrs Smith received an information memorandum in advance of their investment in the Jubilee Consortium; and whether Mr. and Mrs. Smith were apprised of the high risk nature of the Jubilee Consortium investment before they participated in same. The failure by the Financial Services Ombudsman to allow these issues to be tested at an oral hearing denied Mr. and Mrs. Smith the opportunity to establish the merits of such case as they sought to make and thus is an error of such significance as to vitiate the finding. As the question of whether there should be an oral hearing is a matter that is not within the specialised area of knowledge of the Financial Services Ombudsman, the issue of the deference to be accorded to that expertise does not arise.

16. It is not my function and I have no view as to the ultimate merits of the complaint made by Mr. and Mrs. Smith.

Order

17. Pursuant to s. 57CM(2)(c) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) the court orders that the complaint of Mr. and Mrs. Smith against Ulster Bank Ireland Limited be remitted back to the Financial Services Ombudsman for fresh consideration.