THE HIGH COURT

[2014 No. 109MCA]

BETWEEN:

EDWARD STOWE AND LISA STOWE MILLAR

APPELLANTS

-AND-

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

-AND-

EBS LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Michael Twomey delivered on the 18th day of April 2016.

1. In this case, the appellants, Mr. and Mrs. Stowe, seek an Order pursuant to s. 57CL of the Central Bank Act 1942 (as amended) setting aside the decision of the respondent, the Financial Services Ombudsman ("FSO"), of 25th February, 2014. In that decision, the FSO refused to uphold a complaint made by the Stowes against the notice party, EBS Limited ("EBS").

Background

2. The history of the complaint is that the Stowes agreed to a fixed rate home loan mortgage from the EBS in Sutton, Co. Dublin and signed a Home Loan Application Form dated the 23rd July, 2006, in relation to this home loan. They also signed a Fixed Rate Mortgage Application Form on the 1st September, 2006, which stated:-

"I/We understand that when this fixed rate period has expired the loan will convert to the applicable variable rate then prevailing. The variable interest rate basis will be specified in the Loan Offer letter issued by EBS (if the loan is approved)".

3. The Loan Offer letter duly signed and accepted by them a few days later, on the 12th September, 2006, confirmed that upon expiry of the five year fixed period (at an interest rate of 4.85%), their interest rate would revert to the 'variable base' which on that date was stated to be 4.25%. This Home Loan Application Form, the Fixed Rate Mortgage Application Form and the Loan Offer constitute the main terms of the Stowes' home loan mortgage agreement ("Mortgage Agreement") with EBS.

4. Despite this documentation stating that upon the expiry of the fixed rate, their home loan would revert to the applicable variable rate, the Stowes believed that on the expiry of their home loan rate, their new rate would strictly follow the European Central Bank rate. In other words, the Stowes understood that when their five year fixed rate ended, they had effectively a tracker rate and not a traditional variable rate mortgage (where market conditions and commercial factors, as well as ECB rates, are taken into account in determining the variable rate which applies).

5. They say that they had a very good reason for this belief, namely that the branch manager of Sutton EBS, Mr. Manuel, explained to them that the term 'variable rate', in the Mortgage Agreement signed by them, meant "Standard Variable Rate". Mr. Stowe avers that the EBS provided at this time, in September 2006, a general definition of Standard Variable Rate as follows:-

> "Standard Variable Rate – A mortgage rate which can rise and fall in line with the interest rate changes set by the European Central Bank (ECB)".

6. No exact date has been provided by the Stowes as to when the alleged representation was made by Mr. Manuel, since in the letter of complaint of 27th May, 2013 regarding the Mortgage Agreement, which letter was signed by both of them to the EBS, it is stated:-

> "It was explained to me at the time of the mortgage offer from EBS, the standard variable rate could rise and fall in line with interest rate changes set by the European Central Bank."

The final document signed by the Stowes in relation to their home loan was the Acceptance Form, which they signed on 12th September, 2006. Therefore, the last date that Mr. Manuel could have made the representation, in order for it to have influenced the Stowes' acceptance of the Mortgage Agreement was on the 12th September, 2006.

7. In addition to this Mortgage Agreement taken out in September 2006, the Stowes also took out a top up mortgage ("Top Up Mortgage"), which is termed an EBS Lifechoice Loan, by loan offer letter dated 3rd September, 2007 from EBS to the Stowes, which had been signed previously by the Stowes on the 19th August, 2007. This loan offer letter signed by the Stowes contains an explicit provision regarding interest rates as follows:-

> "EBS reserves the absolute right to increase or decrease the rate of interest at its discretion".

Despite this, the Stowes understood that this mortgage rate was effectively a tracker rate, since Mr. Stowe avers that this Top Up Mortgage was presented to them on the basis of the "Standard Variable Rate" from its inception, which they understood to mean that

it strictly followed ECB rates, for the same reasons as they believed that their Mortgage Agreement would strictly follow the ECB rates.

8. Based on the foregoing, it follows that the Stowes were surprised to receive a letter from EBS in April 2010, because in this letter the EBS outlined that it intended to adopt a new policy in setting variable interest rates. Three years after receiving this letter, when complaining to the EBS by letter dated 27th May, 2013, they outline the nub of their complaint when they state that having been led to believe that the standard variable rate would rise and fall in line with ECB interest rate changes:-

> "We were subsequently advised by letter on 22nd April 2010 by letter from Dara Deering, Directorship Membership Business that EBS would no longer adjust the variable rate in line with the European Central Bank interest rate movements."

9. The Stowes complaint therefore is that the increase, flagged in this letter of 22nd April 2010, by the EBS to their Top Up Mortgage, which was subject to the Standard Variable Rate, was contrary to the explanation provided to them by Mr. Manuel on or prior to the 12th September, 2006. For the same reason, the Stowes allege that when their five year fixed home loan mortgage rate expired in September 2011, the increase in their interest rate in their Mortgage Agreement which took place after this date, and which was not solely in line with ECB rates, was also in direct contravention of Mr. Manuel's representation.

10. At this stage therefore in April 2010, the Stowes were aware that they were not on the equivalent of a tracker mortgage, but were on a 'traditional' variable rate mortgage. This was contrary to what they say they were led to believe by Mr. Manuel in September of 2006. Therefore, based on the Stowes' account of what happened, on the 22nd April, 2010, the Stowes became aware that there was a breach by EBS of the representation made by Mr. Manuel in September of 2006.

11. These are the facts which formed the basis of the complaint to the FSO, and this Court is now asked to review the decision of the FSO. As regards the proceedings before the FSO, Mr. Stowe completed the FSOB Complaint Form in relation to this issue on 26th July 2013. In making its decision, the FSO considered in particular s 57BX(3)(b) of the Central Bank Act 1942, as amended ("1942 Act"), which provides that:

> "A consumer is not entitled to make a complaint if the conduct complained of…. occurred more than 6 years before the complaint is made".

12. It is stated in the letter of 5th September, 2013, from the FSO to Mr. and Mrs. Stowe, that the signed FSOB Complaint Form dated 26th July, 2013, was received by the FSO on 30th July, 2013. This has not been challenged as nothing turns on whether the complaint was received on the 30th July 2013 or a day or two earlier.

13. On the basis therefore that the complaint was received by the FSO at the end of July 2013, and applying the six year time limit in s. 57BX(3)(b) of the 1942 Act, this means that in the Stowes' case, they cannot make a complaint about conduct which took place prior to the end of July 2007.

14. Applying these principles, the FSO in its finding dated the 25th February, 2014, held that:-

> "As the alleged information was provided by Mr. Manuel more than 6 years before the [Stowes] registered their complaint with this Office, the conduct complained of cannot regarding any such advice/clarification cannot be examined by this Office."

15. The issue for this court to consider is whether this was an correct interpretation by the FSO of s. 57BX(3)(b) of the 1942 Act in the context of the Stowes' complaint.

Claims by the Stowes

16. The Stowes allege that the representation made by Mr. Manuel should have been considered by the FSO, even though it was made prior to the end of July 2007 and that the FSO erred in not doing so. As a secondary claim, the Stowes allege that the FSO's decision not to hold an oral hearing of the complaint was incorrect, since if he had considered the representation made on or prior to 12th September, 2006, he would have seen that there was a conflict between that representation and the written Mortgage Agreement, which conflict would have justified the holding of an oral hearing. The Stowes' claim that there should have been an oral hearing turns therefore on whether the FSO was correct to exclude consideration of the alleged representation by Mr. Manuel.

Legal argument

17. The legal argument made by the Stowes is that the alleged representation made by Mr. Manuel is an oral term which is part of the written documents that make up the Mortgage Agreement. They argue that just as the FSO correctly considered the written documents that make up the Mortgage Agreement and that are dated July and September 2006, even though they are dated prior to the end of July 2007 (the cut-off date for the purposes of s 57BX(3)(b) of the 1942 Act), so too there is no reason for the FSO not to consider oral terms implied into that Mortgage Agreement from September 2006.

18. The Stowes allege that by excluding from his consideration of the complaint, this alleged representation by Mr. Manuel in September of 2006, the FSO is mixing up evidence of the breach of the agreement, with the breach itself. The evidence, they say is the parol term of the written Mortgage Agreement which arose in September 2006. The breach, they say, took place in April 2010 when the Stowes were advised that the basis for the calculation of their interest rate was to be changed. They say that the representation in September 2006 is not the 'conduct complained of" since they say that this breach in April 2010 is the 'conduct complained of' for the purposes of s. 57BX3(b) of the 1942 Act and clearly this breach occurred after the cut-off date in July 2007. They say that there should be no exclusion of evidence (outside the cut-off date) in support of a breach of an agreement (where that breach is within the cut-off date). On this basis, the Stowes argue that the FSO was incorrect to exclude from his inquiry any consideration of the alleged representation made by Mr. Manuel. In particular, they say that the FSO was wrong to state in his finding that:-

> "the Complainants have not provided any evidence to support their contention that this definition was provided to them by Philip Manuel Branch Manager of EBS Sutton".

They deny that they did not provide evidence of this representation and say that this exclusion of the evidence was a breach of natural justice.

The Law

19. Before considering these arguments, it is important to consider the legislation establishing the FSO and some of the caselaw regarding the decisions of the FSO.

20. It is clear from the legislation establishing the FSO that this Court is obliged to give it a degree of latitude when it comes to its procedures. For example, s. 57BB(c) of the 1942 Act states that the objects of the relevant Part of the 1942 Act are to establish the FSO as an independent office to deal with complaints regarding regulated financial service providers and to:-

> "enable such complaints to be dealt with in an informal and expeditious manner".

21. The fact that the approach of the FSO to making decisions is statutorily required to be very different from the approach in the courts is also clear from s. 57BK(4) of the 1942 Act which states that the FSO:-

> "when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form".

Indeed, the legislature went so far as to state in s 57BX(1)(c) of the 1942 Act that:-

> "the Financial Services Ombudsman has sole responsibility for deciding whether or not a complaint is within that Ombudsman's jurisdiction."

22. While it is not suggested that this last provision ousts the jurisdiction of the courts in reviewing the decision of the FSO, it seems apparent from the breadth of this section that the legislature sought to grant to the FSO as much autonomy as possible in dealing with its role in resolving complaints. The courts have to date recognised this fact in the degree of deference which is afforded to the decisions of the FSO. This is clear from the words of McGovern J. in De Paor v. Financial Services Ombudsman [2011] IEHC 483, at para. 18, where he states:-

> "The whole purpose of the legislative scheme is to keep the process – so far as possible - out of the courts."

This does not mean that fair procedures do not apply to the FSO's decisions or that decisions are not subject to judicial review but rather that the courts give a very wide berth to the FSO. This is clear from the statement of Hedigan J. in *Smartt v. Financial Services Ombudsman* [2013] IEHC 518, where at para. 12 he states:-

> "It is not for this Court to either agree or disagree with [the FSO's] finding as long as it is reasonably based on the evidence before him."

23. The arguments which the Stowes make is partly one of construction of the terms of the Mortgage Agreement, since they allege that that their contract with EBS is a combination of the written terms of the Mortgage Agreement, as well the oral representation of Mr. Manuel. In this regard therefore, the FSO in reaching its decision had to make a call on the precise terms of the Stowes' agreement, in light of their claim that it was breached by an oral representation made to them at the time it was executed. As pointed out by Finlay Geoghegan J. in Millar v. Financial Services Ombudsman [2015] IECA 126 at para. 18:-

> "The construction of a contract is not a pure question of law. It is a mixed question of law and fact… It is not permissible for the High Court on an appeal pursuant to s. 57CM to 'examine afresh' a contractual construction placed by the Ombudsman on a relevant term of a contract. Rather he should consider whether an appellant has established on the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error."

While Millar dealt with an appeal to the FSO's decision, where there was an alleged error on the construction of a contract, more generally the test for the setting aside of a decision of the FSO pursuant to s. 57CL of the 1942 Act is as set out by Finnegan P. in Ulster Bank Investment Funds Limited v. Financial Services Ombudsman & others [2006] IEHC 323 at p. 6 of his judgment, where he stated:-

> "To succeed on this appeal the Plaintiff must establish that 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."

These are the principles of which this Court must be cognisant, in reaching its decision.

Anlaysis

24. Due to the reluctance of these courts to set aside decisions of the FSO, the Stowes have, in the words of Kearns P. in *Willis v. Pensions Ombudsman* [2013] IEHC 352 (albeit that case was in the context of the Pensions Ombudsman), *"a high threshold"* to cross in seeking to set aside the FSO's decision.

25. This Court's considered view is that the Stowes have not crossed this threshold in this case. This is because the Court's view is that the FSO's construction of the Mortgage Agreement, as not including the alleged parol term, does not amount to, in the words of Finlay Geoghegan J., 'a serious error' by the FSO, sufficient to justify the setting aside of his decision. It is also the Court's view that the decision of the FSO not to rely on the evidence of the alleged representation of Mr. Manuel made prior to the end of July 2007 does not amount in the words of Finnegan P., to *'a serious and significant error'*, justifying it being set aside.

26. Since the Stowes' argument that they should have had an oral hearing is based on there being a conflict between this oral representation and the written documents, this Court would also not uphold their claim that the FSO erred in not having an oral hearing in this case - since there is no conflict, if this representation is held to be the *"conduct complained of"* and thus outside the six year time limit.

27. The Court has reached this decision because it is this Court's view that the representation of Mr. Manuel was the "conduct complained of". It has reached this decision because if the Stowes' complaint was to be upheld by the FSO, it is the Court's view that at the very core of their complaint was the fact that Mr. Manuel's alleged representation turned out to be false (that their Mortgage Agreement was effectively subject to a tracker rate upon expiry of the fixed term). Indeed, the first written complaint by the Stowes to the EBS on 27th May, 2013, makes this clear, since in that letter, the Stowes state that they:-

> "wish to make a formal complaint on the basis of EBS mis-selling us a mortgage".

28. There is, in this letter therefore, a very clear characterisation by the Stowes of the representation of Mr. Manuel in September

2006 as *"mis-selling".* It is difficult for this Court to avoid the conclusion therefore that such an allegation of mis-selling is *"conduct complained of"* for the purposes of the time limit in s. 57BX3(b). Since this alleged act of mis-selling took place in September 2006, it is outside the six year time limit for a complaint brought in July 2013. On this basis, this Court does not think that the FSO made a serious and significant error in deciding not to consider this aspect of the Stowes' complaint.

29. In addition, this Court does not believe that it is a correct approach to seek to apply s. 57BX3(b) of the 1942 Act to the circumstances of this case by claiming that the alleged misrepresentation by Mr. Manuel was 'evidence' of the "conduct complained of" and/or a parol term of the Mortgage Agreement and therefore not caught by the six year time-limit. Such an interpretation of s. 57BX3(b) would, in the Court's view, circumvent what appears from the clear wording of the 1942 Act to be one of its policy objectives, namely to limit to 6 years the period during which the FSO is obliged to investigate complaints.

30. This is because if the Stowes' interpretation was correct, it would mean that every oral representation that was made, no matter how long ago, could be alleged to be part of a written agreement and/or evidence of a later breach of the written agreement, and therefore subject to inquiry by the FSO. Thus, to take an extreme example, in a case involving a complaint about a 30 year mortgage, it could be alleged, if this approach was correct, that in relation to an alleged breach of the mortgage in the final year of that 30 year mortgage, that a misrepresentation made 29 years earlier needs to be considered by the FSO. This Court does not believe that this could have been the intention of the legislature when it was enacting s. 57BX3(b) and so does not favour this interpretation which is being put upon that section by the Stowes.

31. The Stowes may have felt that the statement by the FSO in his finding, that the Stowes had:-

> "not provided any evidence to support their contention that this definition was provided to them by Philip Manuel"

amounts to a clear breach of fair procedures, on the grounds that they patently did provide *"evidence"* to the FSO in this regard. At first blush and when read out of context, there might appear to be an element of unfairness in the FSO's statement to that effect. However, this statement needs to be read in context, and in particular in the context of the statement elsewhere in the finding that *"the alleged information was provided by Mr. Manuel more than 6 years before the [Stowes] registered their complaint with this Office".* On this basis, it is clear that what the FSO is saying is not that there was no evidence, but that the conduct complained of, namely the alleged provision of this definition to them by Mr. Manuel, occurred outside the six year time limit and therefore could not be considered by the FSO.

32. In this case, as previously noted, the last date on which the representation by Mr. Manuel could have been made was the 12th September, 2006. On this basis (and based on this Court's finding that this representation was the "conduct complained of"), the Stowes would have had to complain to the FSO prior to the 12th September, 2012, for this misrepresentation or act of mis-selling to be considered by the FSO.

33. In light of this cut-off date of 12th September, 2012, it is worth noting that in Mr. Stowe's letter of complaint dated 27th May, 2013, to the EBS he stated:-

> "It was explained to me at the time of the mortgage offer from EBS, the standard variable rate could both rise and fall in line with interest rate changes set by the European Central Bank. We were subsequently advised by letter on 22nd April 2010 by letter from from Dara Deering, Director Membership Business that EBS would no longer adjust the variable rate in line with the European Central Bank interest rate movements."

34. It is clear from this letter therefore that on the 22nd April, 2010, the Stowes became aware that the alleged representation that had been made to them in September 2006 was false, or to use their own expression, that they were mis-sold their mortgage. If they had complained to the FSO in April of 2010 or indeed by September 2012, a further 2 years and 4 months later, the FSO would not be in a position to claim that he could not consider the alleged representation of Mr. Manuel which had been made in September 2006.

35. The imposition of limitation periods, such as in this case, can lead to unavoidable hardship in certain cases because by their very nature there has to be a cut-off point at some stage, e.g. a claimant might be one day on the wrong side of a cut-off date or be unaware that they have a complaint until it is too late. Despite this hardship, there are good reasons for having limitation periods, since otherwise, a dispute resolution body, whether the courts or a body like the FSO, could be open to claims and challenges *ad infinitum.* Indeed, in the context of limitation periods for other claims, six years for complaints to the FSO is a relatively long period. Unfortunately it means that consumers like the Stowes may, through no fault of their own, fall on the wrong side of the limitation period.

36. However, it is this Court's view that this is not a case where the statutory time limit causes the Stowes undue hardship. This is because in April 2010, the Stowes were aware that they had a complaint against the EBS and they had 2 years and 4 months to complain to the FSO in relation to the alleged misrepresentation. They chose not to make the complaint to the FSO for a full three years, by which stage they were outside the time limit.

37. It is also worth noting that the option of litigating the complaint, rather than using the FSO complaint process, was very much to the forefront of Mr. Stowe's mind when dealing with this complaint. This is clear from that fact that he expressly refers to the possibility of litigating his claim (as distinct from pursuing his complaint with the FSO) in his email of the 9th September, 2013, to the FSO (which was almost five months before the FSO made its decision in February of 2014). In that email, when referring to the six year limit, he stated:-

> "we believe that the circumstances of the original sale of the mortgage to us which were less than six years prior to our first and indeed subsequent complaints on the issue, would be admitted by a court of law and EBS would not be allowed to hide behind the six year time limit where the six year is applied to a period during which EBS illegally caused undue delay in having the complaint referred to your office. As with all disputes in contract law, the contract itself and the circumstances of its creation will be a key consideration in any legal resolution and under the specific circumstances, if your office is unwilling, unable to admit or indeed prohibited from considering any relevant material, we would reserve all of our legal rights to have the matter dealt with in a legal forum where such prohibition does not apply."

38. Indeed, this is not Mr. Stowe's only reference to litigation, since in his later email of the 7th February, 2014, when complaining that internal communication in the EBS was not provided to him, he states:-

> "Clearly the required communications exist, and are in fact available (they would become 'available' very quickly with a court order for discovery)".

39. Therefore the Stowes were aware of the differences between litigation and making a complaint to the FSO and possibly also aware of the low costs and other advantages (e.g. privacy) which attach to making a complaint to the FSO (in contrast to the considerable expense and the publicity attaching to High Court litigation). Against this background, they chose to pursue their complaint through the FSO, notwithstanding that they knew several months in advance of the finding by the FSO, that the FSO would not consider the alleged misrepresentation from 2006. Consumers such as the Stowes need to be aware that choosing to pursue one's complaint through the FSO process has consequences in relation to the appeal of that decision, if the decision of the FSO is not to one's satisfaction.

40. Some consumers in the position of the Stowes who are trying to decide whether to litigate or take their complaint to the FSO may feel that if the FSO finding goes against them, they have a second bite of the cherry in appealing the decision of the FSO, or to put it another way, that the FSO offers them a 'free go' in the sense that there are no legal costs involved in the FSO complaint, and if it goes against them, they can always appeal that decision to the High Court.

41. However, it is important for consumers to realise that an appeal from a finding of the FSO is not a true second bite of the cherry, unlike say an appeal from the Circuit Court to the High Court. In a Circuit Court appeal, there is a complete re-hearing of all the facts and the judge makes a decision based on this re-hearing. For this reason, one could argue that an appellant in a Circuit Court appeal has the exact same chances on his appeal in the High Court, as he had on his initial hearing in the Circuit Court, in the sense that the appellate court is hearing the same evidence with the same evidential burden as in the first instance case, the only difference being that it is a different person hearing the evidence. In contrast, it could not be said that an appeal of the decision of the FSO to the High Court has the exact same chance of success as the initial case before the FSO and consumers need to be aware of this fact before undertaking the expense of a High Court appeal of the decision of the FSO.

42. This is because, as previously noted, there is high threshold for the High Court to set aside decisions of the FSO. The FSO has the right to get the decision wrong, by which this Court means that even if the judge in the High Court hearing the appeal of the FSO's decision would have reached a different decision to the FSO on hearing the details of the consumer's complaint, this is not grounds for the decision of the FSO to be set aside, provided that the FSO did not make a serious and significant error in reaching his decision. In many other appeal situations, such as in an appeal from the Circuit Court to the High Court, the decision-maker being appealed is not in the slightly exalted position of the FSO, of having the right to get the decision wrong. Accordingly when consumers are deciding to take a complaint to the FSO rather than litigating their complaint because of the very significant cost and other advantages that the FSO process possesses over litigation, they need to be aware that if the decision of the FSO goes against them, their decision to opt for the FSO complaint process means that they have an uphill struggle to have the FSO's decision set aside and it is not the case that on appeal, it will be a simple rehearing of their case by a different person. Of course, looking at it from the other perspective this can be viewed as a further advantage of the FSO process, since if the consumer were to have a successful outcome before the FSO, then the financial services provider will be discouraged from appealing, since it will be harder to achieve success than on a appeal based on a re-hearing of the case.

43. It follows that before consumers choose the FSO complaint process, with its many advantages over litigation, they need to be aware that while that process may be a 'free go' in the sense that it does not cost consumers money to make the complaint and there is no risk of costs being awarded against them if they lose, it is not a 'free go' in the sense that if the decision goes against them, it is not simply a case of them appealing to the High Court with the same probability of success as they had in the FSO case, but now with a different person, namely a High Court judge, hearing the case.

44. This Court would emphasise that the foregoing point is of general application and is not a criticism of the Stowes in taking their case, since they made out an arguable case that a serious and significant error had been made in their case. However, they needed to prove on the balance of probabilities that a serious and significant error had been made and for the reasons previously stated, they failed to do so and accordingly the relief is refused in this case.