

THE HIGH COURT

[2013 256 MCA]

IN THE MATTER OF S. 57CL OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY S. 16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN

VAL O'DRISCOLL

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

MALLOW MORTGAGE COMPANY LIMITED TRADING AS LIAM MULLINS AND ASSOCIATES

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered the 20th day of October 2014

1. This is an appeal brought by Mr. O'Driscoll, the appellant, against a determination of the Financial Services Ombudsman (F.S.O.) dated the 9th July, 2013, rejecting the appellant's complaint in relation to the investment of €350,000 in the Broad Street Geared and Property Life fund managed by Irish Life.

2. The appeal is one of a large number of such appeals that have come before the courts in recent years. From these cases it emerges that if an appellant is to succeed he or she must establish that viewing the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or by a series of such errors.

3. There are really two aspects to this appeal. One relates to the fact that no oral hearing was conducted, that is an issue that has arisen in quite a number of other appeals and as we will see different conclusions have been reached regarding the necessity for an oral hearing.

4. The second is more case specific. It arises in circumstances where the appellant, had in mind initially to make a complaint against both the notice party, Mallow Mortgage Company Limited trading as Liam Mullins and Associates, and also against Irish Life. His complaint was intended to focus on representations which he says were made to him at a meeting in January 2007. The appellant was advised by the F.S.O. to submit separate complaint forms and this he did. Thereafter, he was advised in the course of a letter dated the 17th September, 2012, that both complaint forms related to advice received at the time of the sale of the policy and that the complaint should only be against the broker. Two days later the appellant agreed to proceed as advised.

5. The effect of all this was that there was no concluded investigation of the intended complaint against Irish Life. After notice of motion issued in the present proceedings dated the 29th July, 2013, seeking an order setting aside the decision of the Ombudsman, the F.S.O., apparently recognising that a mistake had been made, wrote on the 11th December, 2013, indicating that the appellant could proceed with the complaint against Irish Life, but only if the appeal now before the court was withdrawn.

6. While I have referred to the two aspects of the appeal, these are not seen as separate and distinct by the appellant and rather he sees the issues as overlapping and he argues that the misadvice in relation to how to proceed against Irish Life has added an extra dimension to the failure to hold an oral hearing. In these circumstances, it is necessary to look in some greater detail at what is known of the background.

Facts

7. A significant area of disagreement between the appellant and the notice party relates to the circumstances in which the appellant came to make his investment. The appellant claims that he was approached about the possibility of making an investment by Liam Mullins, the managing director of Mallow Mortgage Company Limited. Mr. Mullins, it maybe noted is the first cousin of the appellant. According to Mr. O'Driscoll, Mr. Mullins indicated that the investment he was recommending was an excellent one and that Mr. Mullins then introduced him to an Irish Life representative, Donal O'Connell. Mr. O'Driscoll claims that both Mr. Mullins and Mr. O'Connell told him that they themselves had invested in the fund, which they described as "an unbelievable investment with a blue chip tenant".

8. Mr. Mullins gives a very different account. He says that it was not the case that he approached Mr. O'Driscoll, but rather that he was approached by Mr. O'Driscoll. He says that it is not the case that either he or Mr. O'Connell told Mr. O'Driscoll at this stage that they had invested in the fund. Mr. Mullins does accept that at a later stage in September 2007, he did tell Mr. O'Driscoll that he had made an investment. Mr. Mullin's investment was on the 23rd January, 2007, three days before the appellant made his investment. If Mr. Mullins is correct in his account, then it was a considerable coincidence that just days after he had made an investment in a particular fund, that Mr. Mullins should have been approached by his cousin seeking, without prompting, to invest in the very same fund.

9. Irish Life has not been a party to the investigation as such, but solicitors for the notice party have indicated in correspondence that Mr. O'Connell did not make representations in January 2007 and that he invested only in April 2007. No evidence of meetings or contacts between the appellant and Mr. O'Connell after January 2007 has been presented and it is not clear how Mr. O'Driscoll would have learned of Mr. O'Connell's investment activities if the investment was not made until later.

10. Mr. O'Driscoll says that when he was approached he referred to the fact that he had previously lost money in an investment and

that what he was interested in was a safe investment.

11. A subsidiary, though a significant issue is whether the appellant should be regarded as an experienced or indeed sophisticated investor. In that regard a letter from Ronan Daly Jermyn solicitors for the notice party of the 22nd February, 2013, commented that "it is clear that the Complainants' investment portfolio is quite considerable and that he is advised by multiple professional financial agencies". The appellant on the other hand depicts himself as a farmer while acknowledging that the farm is a very valuable one because of its location at Little Island on the fringe of Cork City, with a very limited investment history. He had, he says, made three investments, two of which, one in 2004 and one in 1991, were arranged with the notice party. The 2004 investment, which was the substantial one, saw the appellant investing €527,368 which was 90% capital secure. When the fund came to an end in February 2010, the appellant received only €484,801 or 90% of the original investment.

12. A further issue that divides the appellant and notice party is that the notice party contends that the arrangement was on an "execution only" basis and that this was reflected in a reduced commission for the notice party.

13. The finding of the F.S.O. having summarised and recited the cases made by the claimant and the respondent, observed that the submission and evidence submitted does not disclose a conflict of fact such as would require the holding of an oral hearing to resolve such conflict and that rather the situation was that he was satisfied that the submissions and evidence submitted were sufficient to enable him make a finding.

14. The F.S.O. then concluded that he did not believe that the complainant had any basis for his complaint that the financial adviser was negligent in failing to properly advise him in relation to aspects of the investment. He comments that by his own admission, the complainant refused information about his financial situation to Mr. Mullins, who is his cousin, as he did not wish his cousin to know his business. The F.S.O. was of the view that a financial adviser cannot give advice on the suitability of a product if he is not provided with all the relevant information. In these circumstances, said the Ombudsman, there can be no liability levelled against Mr. Mullins for negligent advice.

15. The Ombudsman was satisfied that the complainant was provided with all the relevant information about the risks associated with the product. He does not accept that the complainant was looking for a safe investment or a guaranteed investment. The finding then goes on to quote from a portion of the fund documentation under the heading "Geared Property Risk".

16. The finding then refers to the contention by the complainant that it was represented to him prior to making his investment that both Mr. Mullins and Mr. O'Connell had invested in the fund. The F.S.O. comments that this is disputed and records Mr. Mullins as saying that these representations were made subsequent to the investment when in fact the investment had already suffered a loss. The Ombudsman observes that the evidence is undisputed that Mr. Mullins had invested in the product, the only question being when he invested. The F.S.O. was of the view that nothing turns on that controversy considering his earlier finding that the complainant had made the decision to invest without providing the financial adviser with all relevant information relating to his own financial position. The approach of the Ombudsman in that regard might be seen as more than a little surprising. There was a major disagreement as to how the investment came about and one would have thought that addressing this issue of what was said about whether Mr. Mullins, in particular and also Mr. O'Connell had invested, would bring the Ombudsman a long way down the road towards resolving that issue. However, in any event the F.S.O. was satisfied that the complainant knew the risks involved in the investment and made the investment on his own initiative after discussing it with Mr. Mullins and Mr. O'Connell.

17. The question of whether an oral hearing is required has been considered in a number of decisions in recent years and it must be said that the conclusions reached have diverged. Therefore, on one side of the fence we have decisions requiring oral hearings: *Cross J. in Hyde v. Financial Services Ombudsman* [2011] IEHC 422 (Unreported, High Court, 16th November, 2011); *Peart J. in Murphy v. Financial Services Ombudsman* [2012] IEHC 92 (Unreported, High Court, 21st February, 2012); *Hogan J. in Lyons v. Financial Services Ombudsman* [2011] IEHC 454 (Unreported, High Court, Hogan J., 14th December, 2011); *Hogan J. in O'Neill v. Financial Services Ombudsman* [2014] IEHC 282 (Unreported, High Court, Hogan J., 27th May, 2014); and *Charleton J. in J & E Davy v. Financial Services Ombudsman*, [2008] IEHC 256 (Unreported, High Court, Charleton J., 30th July 2008) a decision upheld by the Supreme Court in *J & E Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324; and *Barrett J. in Smyth v. Financial Services Ombudsman* [2014] IEHC 40 (Unreported, High Court, Barrett J., 4th February 2014). While on the other side of the fence there are decisions such as: *Ryan v. Financial Services Ombudsman* (Unreported, High Court, MacMenamin J., 23rd September 2011); *Molloy v. Financial Services Ombudsman* (Unreported, High Court, MacMenamin J., 15th April 2011); *Cagney v. Financial Services Ombudsman* (Unreported, High Court, Hedigan J., 25th February 2011); *Star Homes (Midleton) Limited v. Pensions Ombudsman* (Unreported, High Court, Hedigan J., 21st December 2010); *Carr v. Financial Services Ombudsman* [2013] IEHC 182 (Unreported, High Court, O' Malley J., 26th April 2013); *Twomey v. Financial Services Ombudsman* (Unreported, High Court, Feeney J., 26th July, 2013); and *Ní Mhathúna v. Financial Services Ombudsman* [2014] IEHC 10 (Unreported, High Court, White J., 15th January 2014).

18. An unusual and it seems significant aspect of this case is that Mr. O'Driscoll was provided with wrong advice and information in relation to processing a claim against Irish Life. I do not doubt that the F.S.O.'s office was well intentioned in giving the advice that it did, but the fact remains that there has been no substantive investigation of the complaint against Irish Life. I accept that ultimately Mr. O'Driscoll must accept responsibility for the decisions that he takes as to how to process his claim, but nonetheless the fact that an unrepresented party is in receipt of advice from the body charged with investigating his complaint is a matter of very considerable significance.

19. It is the case that there is a major disagreement between Mr. Mullins and Mr. O'Driscoll about the background to the investment, including in particular, the question of who approached whom. It seems to me that that issue is fundamental and, indeed, that in comparison to that issue Mr. O'Driscoll's reluctance to give information to his cousin about his finances on which the Financial Services Ombudsman attaches such importance pales into insignificance. It is obviously the situation that there will be many cases where deciding to withhold information from a financial adviser will be of major significance and, indeed, will be determinative of the outcome. However, the extent of its real significance in the present case can only be determined by reference to the circumstances in which the investment came to be made.

20. In these circumstances, it seems to me that a fair resolution of the complaint would require specific findings about the circumstances in which the investment came to be made and specific findings as to what if any representations were made by Mr. Mullins and Mr. O'Connell to Mr. O'Driscoll before he invested. It would seem that the disagreement between Mr. O'Driscoll and Mr. Mullins is so stark that it would be difficult to resolve it without an oral hearing.

21. Now, I accept that the decision whether to hold or not to hold an oral hearing is one where the Ombudsman enjoys a broad discretion. Mr. O'Driscoll did not specifically request an oral hearing and this is a very relevant consideration. However, while relevant, given that Mr. O'Driscoll was not legally represented before the Ombudsman, too much should not be made of this. Given the extent

to which the parties, in particular, Mr. O'Driscoll and Mr. Mullins were in fundamental disagreement, an oral hearing would have been desirable.

22. The fact that there was no oral hearing and no specific conclusion reached on some aspects of Mr. O'Driscoll's complaint is compounded by the fact that there has been no investigation of the complaint against Irish Life. The office of the F.S.O. has to accept some responsibility for this because of the nature of the advice and information it provided.

23. Viewed in the round, what has occurred has to be seen as unsatisfactory to the extent that it has to be seen as a process vitiated by a series of significant errors. The cumulative effect of these is that the decision cannot stand and the appeal must be allowed.

24. Accordingly, I will quash the decision of the 9th July, 2013, and remit the matter back to the Financial Services Ombudsman for further consideration.