

THE HIGH COURT

2011 84 MCA

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

BETWEEN

IRISH LIFE AND PERMANENT PLC

Appellant

and

FINANCIAL SERVICES OMBUDSMAN

Respondent

and

AILEEN FEELEY and DECLAN GALLAGHER

Notice Parties

JUDGMENT of White Michael J. delivered on the 16th of November, 2011

This is a statutory Appeal from a finding of the Financial Services Ombudsman of 21st day of February, 2011 when a complaint made by the Notice Parties was substantiated pursuant to the provisions of Section 57CI(2) of the Central Bank Act 1942 as inserted by Section 16 of the Central Bank and Financial Services Authority Act 2004.

The legal principles governing this statutory Appeal are well settled and are not in dispute between the parties.

The dicta of Keane C.J. in *Orange Communications Limited v. the Director of Telecommunications Regulation* (2000 4 I.R. 159), has been approved by Finnegan J. in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* (2006 IEHC 323), as the appropriate test to follow in Appeals of this nature.

"To succeed on this Appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in Orange v. The Director of Telecommunications & Anor and not that in The State (Keegan) v. The Stardust Compensation Tribunal".

The statutory Appeal while different from Judicial Review has many of its characteristics. It is not a hearing de novo, but an examination of the decision making process, always having respect for the particular role of the Ombudsman, set out in the Act.

Section 57BK(1) "The principle function of the Financial Services Ombudsman is to deal with complaints made under this part by mediation and where necessary by investigation and adjudication.

(4) The Financial Services Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act, free from interference by any other person and when dealing with the 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.

The Notice Parties had a mortgage with the Appellant and complained they had lost the benefit of a preferential rate of interest tied to the European Central Bank (ECB) rate, by switching from a fixed rate to a variable rate.

The Appellant alleges serious errors of law and misstatement of fact".

UNDISPUTED FACTS

Miss Aileen Feeley and Mr. Declan Gallagher applied for a Mortgage from Irish Life & Permanent plc to purchase a property 8 The Grove, Grange Manor, Lucan, Co. Dublin. Loan Approval issued on 17th September, 2007. They were approved for a 100% loan of €395,000 for a term of 35 years at an interest rate of 5.45% fixed for a period of 3 years.

At the end of the fixed rate period the interest rate applicable was to be not more than 1.10% over the ECB refinancing rate as varied by the ECB from time to time. The letter of offer also acknowledged that the fixed rate could be broken subject to payment of a redemption fee as described in the Section on Early Repayment in the Letter of Offer.

Condition 7 of the Loan Approval stated:-

"without affecting the entitlement for the Borrower to apply at any time to fix the rate for a further period(if available) and in variation of general mortgage loan approval Condition 5.1 on expiry of the fixed rate period the interest applicable to the loan will not be more than 1.10% over the European Central Bank refinancing rate(the ECB rate) as varied by the European Central Bank(the ECB) in the event of any variation of the ECB rate the interest rate applicable to this loan will not be more than 1.10% over the ECB rate as varied by the ECB."

The Notice Parties signed an Acceptance of Loan Offer on 24th October, 2007 witnessed by their Solicitor James Sweeney, in which

they acknowledged, their Solicitor had fully explained the Terms and Conditions of the Loan Offer to them.

On 8th January 2009, the Notice Parties contacted Ms. Liz Fleming of the Lucan Branch Permanent TSB by telephone to enquire if they opted for a Variable Rate, would there be a penalty? Miss Fleming sent this query by e-mail to her own Mortgage Department, and received a reply the following day 9th January indicating there would be no redemption penalty on breaking the Fixed Rate. The Notice Parties could avail of a Variable Rate of 4.65%, but a written request had to be forwarded.

Miss Fleming forwarded this e-mail to Brendan O'Neill Asst Manager in the Lucan Office shortly after its receipt on 9th January, 2009. The Notice Parties called into the Lucan office that afternoon and signed a request to switch from the Fixed Rate of 5.2% to the LTV Variable Rate of 4.65% with immediate effect. This was formally confirmed to them by letter from Permanent TSB on 13th January, 2009.

On 16th of July 2009 Aileen Feeley made a written complaint to the Manager Permanent TSB Lucan, about the consequences of the rate change. In that letter Ms Feeley stated that when they attended the Lucan Branch of Permanent TSB their circumstances had changed and they urgently required guidance on their options.

DISPUTED FACTS

What actually transpired in the course of the telephone contact with the Branch on 8th of January 2009 and the meeting on 9th January 2009 is very much an issue between the Notice Parties and the Appellant. In this Appeal the Appellant has argued that the Ombudsman in resolving this conflict of fact has misstated the factual position of the Appellant.

FINDING OF THE OMBUDSMAN

The Ombudsman found that the Bank was in a position of a fiduciary relationship with its customer, especially when the customer was seeking to discuss variations of existing Agreements which it had previously entered into. He quoted an extract from an English case *Bristol and West Building Society v. Mothew* [1998] C.A. 1. describing the obligations of a fiduciary.

The Ombudsman went on to state that:-

"In a way this is an issue about whether the silence of the Bank in this matter was in effect a misrepresentation." The ombudsman quoted an extract from the Consumer Protection Code August 2006, and an extract from a Judgment *Doolan v. Murray* Judgment of the High Court Keane J. 21st December, 1993, [1994] WJSC-HC where he quoted from Page 455

"the authorities suggest that there are three categories of cases in which silence can amount to misrepresentation giving rise to a cause of action. One of them, where a Contract requires uberrima fides ... The others are where silence distorts a positive representation and where a fiduciary relationship exists between the contracting parties".

The Submissions put forward on behalf of the Appellant are:-

- (1) the relationship between the Notice Parties and the Appellants has been misdescribed as a fiduciary relationship,
- (2) the principle of misrepresentation by silence has been misapplied,
- (3) the factual assertions by the Appellant were misstated by the Ombudsman, and he did not resolve the factual dispute between the Notice Parties and the Appellant.

The Submissions on behalf of the Financial Services Ombudsman contend:-

- (1) The Ombudsman decided the case properly on the facts, that he had to come down on one side or the other and came down on the side of the Complainants.
- (2) The unique role of the Ombudsman should be considered as a function performed in a different manner from that of a Court, and he should not have regard to technicality or legal form. By focusing narrowly on the issue of fiduciary duty the Appellant is taking the type of legalistic technical approach to the issue that the Ombudsman's scheme is designed to avoid.
- (3) It is within the scope of the Ombudsman's jurisdiction to decide that fiduciary –type duties may arise on the facts of a particular case, particularly when a bank provides a customer with financial advice.
- (4) A new Consumer Protection Code 2012 is due to come into force on 1st January 2012, and whilst it was not before the Ombudsman it shows that the Ombudsman's finding is fully in line with norms of consumer protection.
- (5) The Court must take the adjudicative process as a whole to see if the decision made was vitiated by a serious and significant error.

THE LEGAL PRINCIPLES APPLIED

The Court was informed, there is no Judgment of the Irish Superior Courts defining a fiduciary relationship as it relates to a Mortgagor and Mortgagee.

Two legal text books have been opened to the Court. Snell's Equity 32nd Edition and Equity and the Law of Trusts in Ireland 4th Edition by Hilary Delaney.

At Page 213 of Delaney the text states:-

"While it is not possible to provide an exhaustive definition of the categories of persons who occupy fiduciary positions, generally speaking such individuals can be distinguished from those who are merely bound by contractual obligations by

the fact that those in the former category are obliged to act in a completely selfless manner. The most commonly encountered examples of fiduciary relationships are those existing between trustee and beneficiary, agent and principal, director and company and between partners, and although these categories are not closed, some limitations have been imposed on the extension of these obligations. There has been a considerable divergence between the views expressed in England and in other common law jurisdictions on the question of the extent to which fiduciary obligations should be extended to commercial transactions. Certainly in England there are increasing signs of a reluctance on the part of the Judiciary to impose the higher standards of conduct demanded by equity on transactions where the parties are dealing with each other at arm's length and on a relatively equal footing. This attitude is exemplified by the following statement of Lord Mustill in the decision of the Privy Council in Re Goldcorp Exchange (1995 1AC 74, 98)".

"No doubt the fact that one person is placed in a particular position vis-à-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself. Their Lordships have not heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary, the company was obliged honestly and conscientiously to do what it had by contract promised to do. Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences far exceeding those foreseen by Atkin L.J. in Re Wait (1927) 1 CH 606."

A Mortgagee and Mortgagor have traditionally not been in a fiduciary relationship with each other, other than in the specific incidence of a Mortgagee entering into possession of a property, when on sale, the Mortgagee becomes a fiduciary for the proceeds of sale, exceeding the amount due to the Mortgagee. These monies are held on a constructive trust for whoever is entitled to the equity of redemption.

There may certainly be circumstances where a Mortgagee positively places himself in a position of fiduciary. The categories of fiduciary are never closed, and it is open to the Ombudsman and this Court in particular situations to make such a finding.

In this case, the Notice Parties contacted the Appellant seeking to change the Contract of Mortgage from a Fixed Rate of interest to a Variable Rate. The complaint made against the Appellant, is of an information deficit, where the Notice Parties allege the consequences of changing from a fixed to a variable rate was not explained to them.

While there is a contention by the Notice Parties that they were seeking financial advice and guidance, even on the most favourable interpretation of the facts in favour of the Notice Parties, this Court is of the view that the parties were not in a fiduciary relationship, with each other, as in law the Appellant was entitled to have regard to its own financial interest. Any change in the interest rate, had financial consequences for both the Notice Parties and the Appellant.

MISREPRESENTATION BY SILENCE

In dealing with this matter the Financial Services Ombudsman outlined provisions of the Consumer Protection Code and an extract from a High Court Judgment *Dolan v. Murray* 21st December, 1993 Keane J.

From a consideration of his finding, apart from the Consumer Protection Code, the Ombudsman made the finding of silence of the Bank being misrepresentation, as following on from the finding that the parties were in a fiduciary relationship. This legal issue is somewhat complicated by the dispute of fact, as the Appellant contended, that there was not silence but that the consequences of changing from a Fixed Rate to a Variable Rate would have been explained to the Notice Parties.

I am of the view that the responsibilities placed on the Appellant were in accordance with the Consumer Protection Code, rather than any duty as a fiduciary, and insofar as there was a finding that there was misrepresentation by silence, because of a fiduciary relationship, that is not a correct finding in law.

DISPUTE OF FACT

The informality of the Ombudsman's procedures, allows him to make those decisions based on any written material available to him, or if he so wishes he has power to have the relevant parties give sworn evidence. The Court is of the view that the decision to call oral evidence is a matter entirely for the Ombudsman, and is not a matter appropriate for this Court to comment on.

In considering a statutory Appeal, it is open to this Court, to come to a conclusion, as to what matters of fact were open to the Ombudsman to decide.

The dispute of facts centre around what was said to the Notice Parties by Miss Fleming in the initial telephone contact from them to the Branch on 8th January 2009, and the meeting between the Notice Parties and Mr. Brendan O'Neill at the Branch Office on the afternoon of 9th January, 2009.

There is no dispute, that the Ombudsman's findings were based on the correspondence between the Appellant and the Notice Party, and the internal e-mails between the Lucan Branch and the Mortgage Department of the Appellant, and the subsequent written documentation generated as a result of the complaint.

It is useful to compartmentalise the written record as between the documentation in being prior to the complaint being made and the documentation generated by the complaint. The relevant primary documentation available to the Ombudsman, before the complaint was made to the Ombudsman was as follows:-

(1) Original Letter of Approval 17th September, 2007 from Irish Life and Permanent plc to Declan Gallagher and Aileen Feeley in respect of 8 The Grove, Grange Manor, Lucan, Co. Dublin.

(2) Acceptance of Loan Offer dated 24th October, 2007.

(3) Internal e-mail from Liz Fleming, Lucan Branch to Mortgage Services 8th January, 2009 15.06

(4) Internal e-mail Mortgage Services to Liz Fleming 9th January, 2009 15.19.

(5) An internal e-mail from Liz Fleming Lucan Branch to Brendan O'Neill, Assistant Manager Lucan Branch 9th January, 2009. 15.26

(6) Written request from Aileen Feeley and Declan Gallagher 9th January, 2009 to Mortgage Services to change the interest rate from Fixed Rate of 5.2% to LTV Variable Rate of 4.65%.

(7) Written confirmation from Irish Life Permanent TSB to Declan Gallagher and Aileen Feeley dated 13th January 2009 confirming in writing change of rate.

(8) Letter of complaint of 16th July, 2009 from Aileen Feeley to the Manager Permanent TSB Lucan.

(9) Letter of reply 17th July, 2009 from Orla Brady Lucan Branch Permanent TSB to Aileen Feeley and Declan Gallagher.

(10) Replying letter 23rd July, 2009 to Orla Brady Permanent TSB from Aileen Feeley.

(11) Letter of 25th August, 2009 from Permanent TSB to Aileen Feeley and Declan Gallagher dealing with the complaint made by them.

The relevant correspondence and documents passing between the Notice Parties, the Ombudsman and the Appellant are as follows:-

(1) Letter of complaint to Financial Services Ombudsman 19th March, 2010.

(2) E-mail 26th March, 2010 Customer Relations Department Irish Life & Permanent plc to the Ombudsman confirming that the letter of 25th August, 2009 can be used as the final response letter from the Permanent TSB.

(3) Letter 13th April, 2010 Permanent TSB to the Ombudsman declining mediation.

(4) Letter 16th April, 2010 from the Notice Parties to the Ombudsman.

(5) Letter 2nd December, 2010 Permanent TSB to the Ombudsman responding in detail to the complaint.

(6) Response from the Notice Parties to the Ombudsman 14th December, 2010.

(7) Complaints procedure document.

(8) Complaint form dated 30th March, 2010.

(9) Summary of complaint dated 30th November, 2010.

(10) Undated Memo of Brendan O'Neill, Assistant Manager, Lucan Branch.

In the original letter of complaint of 16th July 2009, referring to Point 7 in the Special Conditions of the Loan Approval, Miss Feeley stated:-

"we were advised that the above Declaration was not applicable in this case. However we were not advised that by amending the rate on the date of the 12th January, 21009 we had effectively waived the right to any option stated under the original Agreement and under the Special Conditions."

In a reply dated 17th July, 2009 the Manager of the Lucan Branch Orla Brady stated:-

"if at that time you brought with you your Letter of Offer and were querying Point 7 of the Special Conditions, we would have advised you that moving off the fixed rate when you were on a tracker price promise would have meant that you would have lost this price promise. Your letter is a little unclear as you state initially that you were told this Condition would no longer be applicable to you, yet at a later stage you say that you were not made aware that this was the case. I can absolutely confirm that all our Mortgage Advisors would have confirmed to you that by moving to the Variable Rate, the rate applicable going forward would be Variable at the Bank's discretion and would in no way be linked to ECB or any Tracker Rate".

In her letter of 23rd of July 2009 Miss Feeley stated that she had brought the original Letter of Offer to the Lucan Branch on the date of their appointment, but that the query regarding the effect of the Rates in Point 7 was not clearly answered by the TSB employee.

"It was not clearly stated to us that once we signed to switch to the LTV Variable we would lose the price promise".

In their final response to the complaint by letter of 25th August, 2009 Maureen Cremin of the Customer Relations Department of Permanent TSB stated *"Miss Fleming would have advised that the Tracker Rate would not be available to you when you switched to the Variable Rate. We note in your letter of the 23rd July, 2009 that you indicated that it was not clearly stated to you. It would not have been possible that the Rate applicable after the expiry of the Fixed Rate period would remain when you switched to the LTV Variable Rate."*

In respect of the documentation generated as a result of the Notice Parties' complaints to the Financial Services Ombudsman, there was a further exchange in respect of the events of 8th and 9th January, 2009.

In their letter of 19th March, 2010 to the Ombudsman, Miss Feeley stated *"the core issue is that at no stage was the fact explained to Declan and I that once we signed to switch to the LTV Variable Rate a price promise would be lost."*

We did not understand the Clause and specifically queried the Clause at Point 7 under the Special Conditions in the Mortgage Agreement during the meeting at the Lucan Branch. Permanent TSB have stated that the employees "would have" advised us of the effect. "Would have does not confirm that the employees did in fact explain the Point. I can confirm that our right to select a Tracker Rate if we waited until the end of the Fixed Term was not explained prior to signing to amend the Rate."

In a further letter to the Ombudsman of 16th April, 2010 Miss Feeley stated *"the duration of the meeting with the Mortgage Advisor at the Lucan Branch was less than 10 minutes. Therefore a discussion in relation to our right under Point 7 under the Special Conditions in the Mortgage Agreement or any other financial implications did not take place"*.

In a letter of 2nd December, 2010 Permanent TSB in a letter to the Ombudsman stated:-

"When the Complainants called into the Lucan Branch they had already made the decision to break their Fixed Contract and wanted assistance with the procedures for making the change. The customers were advised of the prevailing Variable Rate which they would switch into if they came out of their Fixed Rate before the expiry of the Fixed Rate period. I enclose in Schedule of Evidence 4 a handwritten note by Brendan O'Neill, Assistant Manager in Permanent TSB Lucan, advising that switching from Fixed to Variable Rate was very popular at that time and he would clearly have stated to the Complainants that once a switch was affected, any price promise regarding Trackers would be null and void."

This letter went on to state:-

"in the Complainants' letter dated the 16th July, 2009 they stated that they queried Point 7 under the Special Conditions in the Mortgage Agreement (this Condition confirms their right to a Tracker Rate on expiry of the Fixed Rate Period) and that they were told that the above Declaration was not applicable in this case". While no member of staff in the Lucan Branch recalls having seen their Letter of Offer, the Complainants' Statement actually confirms that they were advised that they would no longer be able to avail of a Tracker Rate if they switched, as this Condition could no longer apply."

There is no doubt, from an examination of the correspondence, there was a conflict of evidence between the Notice Parties and the Appellant, as to what exact information was conveyed to the Notice Parties on 8th and 9th January, 2009.

The position of the Notice Parties changed during the course of the correspondence from their letter of 16th July, 2009 when they stated:-

"we were advised that the above Declaration was not applicable in this case".

To their letter to the ombudsman on 16th April, 2010 when they stated:-

"that no discussion in respect of Point 7 of the Special Conditions took place".

The position of the Appellant, was that although there was not a specific recall of the discussions by Miss Fleming and Mr. O'Neill, the Appellant asserted they would have been told that once the Fixed Rate Contract was broken, there was no price promise for a future Tracker Rate.

This conflict of evidence is not dealt with in the finding of the Financial Services Ombudsman, and on this issue of fact, there were various findings open to him.

He found:-

"that the Bank should have advised the Complainants that a move from a Fixed Rate to a Variable Rate would bring their option of a Tracker Rate to an end."

The Respondent through Counsel has argued that because the response of the Appellant was in the conditional rather than the definitive, the conflict would have to be resolved in favour of the Notice Parties. The issue of the change of position of the Notice Parties during the course of the written communication, was not addressed by the Ombudsman.

The issue in this case was the degree of responsibility of the Appellant, in respect of the information conveyed to the notice parties.

In a new Consumer Protection Code due to come into force in January 2012, regulated entities, will have a responsibility to provide information on paper or on other durable medium, as to the long term effects of changing from a Tracker Interest Rate. There will also be an obligation to issue the customer with a Warning Statement as follows:-

"Warning, if you switch to an alternative interest rate you will not be contractually entitled to go back onto a Tracker Interest Rate in the future."

These provisions are set out at 6.9 of the new Code. At 6.10 of the Code a regulated entity must allow the personal consumer at least one month to consider any proposed change and the consumer must be advised of this. In the event of the consumer waiving the one month period the regulated entity must receive written confirmation from the consumer confirming that the consumer has been provided with the relevant information and that the consumer understands that he or she is waiving the cooling off period".

This is a very desirable development as it gives consumers information in writing and prescribes a cooling off period of one month, and would have helped the notice parties considerably, as they were making financial decisions at a time of great stress.

The Ombudsman in his findings made no reference to applying the standards in this new Code, to the case in issue.

This Court is not entitled to apply Provision 6.9, 6.10 or 6.11 of the Consumer Protection Code 2012 issued by the Central Bank of

Ireland, to this case.

This Court is of the view that the Financial Services Ombudsman, in considering the complaint of the Notice Parties should have applied the provisions of the Consumer Protection Code August 2006, the obligations of the Appellant under its own Rules, Regulations and Code of Conduct, and general consumer law. It is not appropriate for this Court to comment on the likely outcome if that had been applied.

In applying the provisions of the Consumer Protection Code, it was conflated with other legal findings, which the Court has found the Ombudsman was not entitled to make.

Once a complaint has been admitted, and mediation declined, the Ombudsman having considered the matters set out in Section 57BZ of the Act has to adjudicate pursuant to Section 57CI, and the written finding is a formal decision.

If there is a dispute of fact, which has a direct bearing on the outcome of the complaint, it should be addressed.

If applying legal principles, and defining legal relationships between parties which have a direct bearing on the outcome, those legal principles should be applied correctly.

It follows that if there are errors in an Ombudsman's finding as to fact or legal issues, which do not have a direct bearing on the outcome, those can be ignored.

The Court in this regard is following the dicta of Hamilton C.J. in *Henry Denny & Sons v. Minister for Social Welfare* [1998] 1 IR 34 at 37-38.

"The Courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected."

I am in agreement with the submission of the Respondent that the provisions of Section 57BK(4) the provision directing the Ombudsman 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, should not be undermined by this Court, however when adjudicating on complaints in accordance with Section 57CI the Ombudsman is engaged in a formal process.

This Court is of the view that there were a combination of serious and significant errors in the finding of the Financial Services Ombudsman dated 21st February 2011, in that the conflict of evidence between the Notice Parties and the Appellant in respect of the events on 8th and 9th January 2009, was not addressed, and the legal relationship of fiduciary was incorrectly applied to the parties, and as a result of this a finding of misrepresentation by silence was incorrectly made

The Court is of the view that the appropriate remedy is to remit the matter back to the Financial Services Ombudsman for review.

The Court makes an Order pursuant to Section 57 CM (2) (c) remitting the finding of 21st February, 2011 to the Ombudsman for review.