Neutral Citation [2015] IEHC 466

THE HIGH COURT

[2013/342 MCA]

IN THE MATTER OF AN APPEAL FROM A DETERMINATION OF THE PENSIONS OMBUDSMAN

BETWEEN

THE MINISTER FOR EDUCATION AND SKILLS
AND THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

APPELLANTS

-AND-
THE PENSIONS OMBUDSMAN

RESPONDENT

-AND-
MARGARET McDERMOTT

NOTICE PARTY

JUDGMENT of Mr. Justice Max Barrett delivered on 16th July, 2015.

PART I

BACKGROUND

1. In November 2003, Ms McDermott was granted a divorce by the Circuit Court from her since-deceased husband. Following an appeal concerning the ancillary arrangements made consequent upon that divorce, the High Court ordered, *inter alia*, on 4th December, 2003, that:

> *"In the event that the plaintiff [Ms McDermott's ex-husband] dies a widower then the order in respect of the Pension adjustment order herein shall not have effect and the defendant is deemed to be the spouse of the Plaintiff for the purposes of a spouses pension entitlements under the plaintiff pension scheme…".*

2. In short, if Mr McDermott died first, and he was a widower on his death, then Ms McDermott was to be paid the spousal benefit payable under her husband's pension scheme.

3. Mr McDermott, regrettably, died on 17th September, 2009, and was at that time a widower. On 12th November, 2009, Ms McDermott requested payment of her spousal pension. This was declined. On 26th May, 2010, Ms McDermott made complaint to the Pensions Ombudsman. On 6th July, 2010, the Ombudsman made his first determination favouring Ms McDermott. On 24th October, 2011, the High Court remitted the first determination to the Pensions Ombudsman for fresh consideration. On 8th October, 2013, the Ombudsman made a second determination in favour of Ms McDermott.

4. The last-mentioned final determination is a detailed document which had the effect that a spousal pension fell to be paid to Ms McDermott back-dated to the day after her late ex-husband died. The within proceedings commenced on 19th December, 2013, and were, no doubt, an unwelcome Yule-time present for Ms McDermott.

5. In broad terms, the appellants contend as follows in the within appeal. First, that the Pensions Ombudsman has acted *ultra vires* in directing the award of a pension in alleged contravention of s.17 of the Act of 1996. Second, that the respondent has acted *ultra vires* in his statutory jurisdiction, as provided for in s.139(1) of the Pensions Act, 1990. Third, that the respondent has acted *ultra vires* in making a finding of maladministration which is not supported by the evidence. Section 17 of the Act of 1996 is concerned with the issue of pension arrangements consequent upon divorce. Section 139(1) of the Pensions Act, 1990, empowers the Pensions Ombudsman to make determinations, to give such directions as he considers necessary or expedient for the satisfaction of a complaint or the resolution of a dispute, and makes certain related provision. Mention is made in the outline written submissions that the Pensions Ombudsman also did not conform with certain time requirements applicable under s.131(4) and (5) of the Pensions Act 1990. This last ground of contention was not pursued at the hearings; however, it appears in any event to be a procedural issue that, for the reasons outlined later below, the court considers the appellants cannot now rely upon due to acquiescence and/or estoppel.

PART II

THE PENSIONS OMBUDSMAN

6. Before proceeding further, a brief excursus on the nature of the role and jurisdiction exercised by the Pensions Ombudsman is required.

7. The role of the Pensions Ombudsman is to act as an independent and impartial medium for the resolution of complaints alleging financial loss occasioned by an act of maladministration and of disputes of fact or law in relation to occupational pension schemes and Personal Retirement Savings Accounts (PRSAs).

8. It is clear from the Pensions Act, 1990, as amended, that the Pensions Ombudsman is entitled to set his own procedures. (As the present Pensions Ombudsman is a man, the court will use the masculine form throughout this judgment; clearly a woman could be an Ombudsman). Section 138 of the Pensions Act 1990, as amended, provides that:

> *"Subject to the provisions of this Part and regulations thereunder, the procedure for the making of complaints, the reference of disputes, and the conduct of investigations under this Part shall be such as the Pensions Ombudsman considers appropriate in all the circumstances of the case, and he may, in particular, obtain information from such persons and in such manner, and make such enquiries, as he thinks fit."*

9. In *Square Capital v. Financial Services Ombudsman* (Unreported, High Court, 27th August 2009), McMahon J. observed, at p.7 of his judgment, in respect of the Financial Services Ombudsman that *"From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions."* McMahon J. continues, at pp.8–9 of his judgment:

> *"[I]t is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the Court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal, where, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature and functions of the Financial*

Services Ombudsman as laid down by the Oireachtas."

10. As it is with the Financial Services Ombudsman, so too, it would seem to follow by analogy, it is with the Pensions Ombudsman. Thus it does not behove the court to review the Pension Ombudsman's final determination as though it were reviewing the procedures of a lower court. Nor should the court apply the same standards of procedure as it would to a court. Though neither, of course, is a judge required to leave wit with wig back in chambers: such task as now remains to the court does not entail a wholesale abandonment of the judicial role, nor does case-law suggest this to be required.

PART III

APPLICABLE TEST FOR APPEAL

11. Section 140 of the Pensions Act, 1990, as inserted by s.5 of the Pensions (Amendment) Act, 2002, provides as follows:

> *"(1) A party to an investigation before the Pensions Ombudsman under this Part may appeal to the High Court from a determination of the Pensions Ombudsman within 21 days from the date of the determination.*
>
> *(2) The High Court, on the hearing of an appeal under this section may, as it thinks fit, annul the determination concerned, confirm the determination or confirm the determination subject to such modifications as it considers appropriate."*

12. The court does not propose to recite the familiar 'holy trinity' of High Court cases – *Ulster Bank, Hayes and Orange* – to which the court is so often referred when it comes to this area of the law, and which, since the recent judgment of the Court of Appeal in *Financial Services Ombudsman v. Millar*[2015] IECA 127, now carry the imprimatur of that court. (The reader is referred to: the decision of Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323 at p.9; the decision of MacMenamin J. in *Hayes v. Financial Services Ombudsman and Others* (Unreported, High Court, 3rd November, 2008); and the judgment of Keane C.J. in *Orange Telecommunications Limited v. The Director of Telecommunications Regulation & Anor.* [2000] 4 I.R. 159 at p.184 (as applied in *Ulster Bank* by Finnegan P.)).

13. Some consideration of the recent decision in *Millar* is perhaps merited. That was a successful appeal from a decision of the High Court (Hogan J.) in which a meaning had been ascribed by Hogan J. to a particular clause in a set of consumer banking terms and conditions; his interpretation differed from the meaning ascribed the same clause by the Financial Services Ombudsman. In his judgment for the Court of Appeal, Kelly J. indicates as follows, at paras.27–38 of his judgment:

> *"27. A survey of the case law which has built over the years on appeals to the High Court from the Ombudsman demonstrates a rather deferential attitude on the part of the courts….*
>
> *33. I am of the view the [deferential] approach identified in the decisions just cited is the correct one. Indeed, I do not understand the trial judge to have taken any different view. The question which troubled him was whether deference should be shown to the Ombudsman when the issue before him involved a pure question of law….*
>
> *34. I am of the view that the trial judge was correct in his conclusion that no curial deference is to be shown to the Ombudsman on what he [the trial judge] described as 'purely legal questions'. That is not so merely for the reasons which were relied upon by the trial judge, but also because such an approach is entirely consistent with the statutory scheme underpinning the jurisdiction of the Ombudsman….*
>
> *36. Having correctly, in my view, concluded that pure questions of law ought not to be shown curial deference, the trial judge then went on to carry out an exercise in construing the provisions of clause 3 of the agreements in suit.*
>
> *37. It is at this stage in his judgment that I take the view that the trial judge fell into error.*
>
> *38. I am of the view that the issued raised by the Millars complaint was not a pure question of law, but rather a mixed question of both law and fact."*

14. As most complaints to the Financial Services Ombudsman, and perhaps also the Pensions Ombudsman, seem likely to concern a difference of interpretation of contractual arrangements or documentation, the effect of *Millar* appears to be that unless the Financial Services Ombudsman, clothed in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final. There is perhaps a risk in such deference for people of limited or middling means who are effectively forced by financial circumstance into availing initially of the services of an Ombudsman: they will find on coming to court that the judge's role is considerably constrained. This being so, and so it seems to be, it would appear appropriate that Ombudsmen operating in the financial services arena should consider whether they need prominently to advertise to consumers that invocation of the assistance of an Ombudsman may have constraining ramifications for those consumers if and when they later seek to invoke the protection of the courts.

15. In any event, there seems little, if any, doubt that the reasoning in *Millar* is also applicable, by analogy, when it comes to the Pensions Ombudsman. The particular significance of this is that the appellants in this case query whether the Pensions Ombudsman ought to have proceeded on the basis that he was giving effect to the court order of 4th December, 2003. However, this query appears to the court to raise questions of fact (is there a High Court order?) and mixed questions of fact and law (have the facts referred to in the Order occurred and, if so, what consequences now follow?), and these questions of fact or of fact and law, are precisely the types of issue that *Millar* puts squarely out of the reach of this Court in the within appeal.

PART IV

THE CHALLENGE TO THE MERITS OF THE FINDING

16. At the core of the appellants' appeal on the merits in the within proceedings appear to be two key propositions. First, that the Ombudsman was bound by the letter of the law and not entitled to fashion a recommendation in accordance with fairness. Second, that the introduction of what is now the standard public service spouse's scheme by way of the HETAC Pensions Scheme involved maladministration.

17. Perhaps the most germane decision when it comes to the challenge made to the merits of the Pension Ombudsman's final determination in the within proceedings is that of *Willis v. Pensions Ombudsman* [2013] IEHC 352, in which Kearns P. dismissed an

appeal against the merits of a decision of the Pensions Ombudsman. In his judgment, Kearns P. stated as follows, at pp.30–31:

> *"A high threshold must be crossed by any appellant from a decision of a financial/pensions ombudsman. The Court has no difficulty in accepting that the relevant test for a statutory appeal against a decision of the Pensions Ombudsman should be the same as that provided for in respect of the Financial Services Ombudsman as laid down by Finnegan P in Ulster Bank…".*

18. This Court would add by way of judicial gloss to the just-quoted observation of Kearns P. that it would have some difficulty were it to be suggested, and the court does not understand this to have been suggested by Kearns P., that the threshold would-be as high for (a) someone who is a consumer unskilled in financial services matters, or (b) a consumer who proceeded with his or her complaint in the first instance without the benefit of legal advice, as it would be for an appellant who is skilled in financial matters or who acts with the benefit of proper legal advice. Were matters otherwise that could run the risk of exposing a consumer to an unfairness of procedures within the portals of the very courts that exist to ensure that fair procedures generally pertain.

19. Notably, Kearns P. continued, at pp.35–36 of his judgment, as follows:

> *"I accept as I must, that…the Pensions Ombudsman could not, regardless of the merits of the case, legitimately make a decision which the law did not permit. But subject only to that consideration, he enjoys a significant discretion to allow and achieve a fair outcome in relation to complaint….[T]here can be no doubt but that his decision achieved a fair result insofar as this particular complainant was concerned."*

20. When it came to Ms McDermott's case, the Pensions Ombudsman (twice) arrived at a final determination that the law permits (not least in terms of what the High Court had ordered on 4th December, 2003) and which accords with fairness. Helpfully, this was a case in which what was fair was particularly obvious. In some future case, the issue of what is the legal benchmark of 'fairness' may perhaps require to be teased out in greater detail. However, in the within case, the decision of the Ombudsman patently achieved a fair result insofar as Ms McDermott was concerned.

21. As to the proposition that the Ombudsman was bound by the letter of the law and not entitled to fashion a recommendation in accordance with fairness, it is difficult to see how such a proposition could stand in circumstances where the Pensions Ombudsman was in effect giving effect to an order of the High Court, especially when the courts have made clear (*inter alia* in *Willis*) that an Ombudsman may have regard to general considerations of fairness when making a decision on a complaint.

22. As to the second proposition, *i.e*. that the introduction of what is now the standard public service spouse's scheme by way of the HETAC Pensions Scheme involved maladministration, it appears to the court from the argument at the hearings that the Pensions Ombudsman may have erred in this regard. However, to paraphrase Finnegan P. in *Ulster Bank*, it does not appear to the court that the entirety of the decision reached therefore falls to be considered as a decision that has been vitiated by a serious and significant error. Error there may be, but the entirety of the reasoned determination reached by the Pensions Ombudsman is not vitiated thereby.

PART V

THE PENSION ADJUSTMENT ORDER CONTENTIONS

23. As the court understands the appellants' contentions as regards the High Court order of 4th December, 2003, they are, in essence, that if one takes the order to be a pension adjustment order made under s.17(2) of the Family Law (Divorce) Act, 1996, (a) it does not follow the typical form of such order, (b) it appears to have been made without advance notice being given to the pension trustees pursuant to s.17(18) of the Act of 1996, or at the least the fact of such notice has not been proved, (c) the trustees were not heard prior to the order being made, and (d) a copy of the order made by the High Court appears not to have been served on the trustees.

24. A difficulty that the appellants face is that none of the issues just mentioned appears to taint the validity of the High Court order. A further difficulty that the appellants face is that case-law makes clear that this Court in this application has a very limited role, and such contentions as the appellants make regarding the order of 4th December, 2003, appear to the court to raise questions of fact (is there a High Court order?) and mixed questions of fact and law (have the facts referred to in the Order occurred and, if so, what consequences now follow?). These questions of fact and of fact and law, appear to the court to be precisely the types of issue that the decision of the Court of Appeal in *Millar* put squarely out of the reach of this Court in the within appeal.

PART VI

THE PROCEDURES ADOPTED BY THE OMBUDSMAN

25. The courts have recognised that the Pensions Ombudsman has a wide discretion when it comes to the procedures that he adopts during the course of an investigation. So, for example, in *Murray v. The Trustees and Administrators of the Irish Airlines* (General Employees) Superannuation Scheme [2007] IEHC 27 at p.21, Kelly J. observed that *"[T]he procedures of the Ombudsman are undoubtedly less formal than those of a court".*

26. In the present case, there have now been two investigations in which the parties have had an opportunity to make submissions. It is therefore difficult to see any basis on which the matter could reasonably be sent back for a third investigation to occur. Given the length of the proceedings and the advanced age of Ms McDermott, it seems to the court more appropriate that it focus on the merits of the final determination rather than on such procedural complaints as have been raised. In any event, it seems to the court that the procedures adopted by the Pensions Ombudsman in this case were fair and complied with statutory obligations. It is clear that the appellants were sufficiently on notice of the central issues in the case, in particular as a result of the first determination.

27. As to any allegation of pre-judgment, it appears from the second and final determination that the Pensions Ombudsman approached the issues arising appropriately and with an open mind.

28. Finally in this regard, it appears to the court that the reasons set out in the Pension Ombudsman's second and final determination are more than adequate. A finding of an Ombudsman is not in any event expected or required to be as detailed or formal as one would expect a Court judgment to be. The court is mindful in this regard of the observation of O'Flaherty J. in *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107 at p.111 that:

> *"[W]hen reasons are required from administrative tribunals they should be required to give only the broad gist of the basis of their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."*

29. Of course, the point might be made that O'Flaherty J.'s observations were made in an age when, for example, the court was expected, pursuant to the near-contemporaneous judgment of Hamilton C.J. in *Henry Denny and Sons v. Minister for Social Welfare* [1998] 1 I.R. 34, to bring a respectful deference to the decisions of expert administrative tribunals, but when it was not perhaps so clear as it is now that the courts are very significantly constrained in the role that they perform in appeals from Ombudsmen. Be that as it may, the court finds no deficiency or error in the procedures of the Pensions Ombudsman in the within proceedings as would require a remittal of his decision for fresh consideration.

30. In any event, it appears that the appellants did not at any point prior to the within appeal raise any complaint concerning the procedures adopted by the Ombudsman. This being so, it is difficult to see how why the court should do anything other than hold that the appellants are guilty of acquiescence and/or estopped from raising procedural objections to the determination of the Ombudsman; and so the court holds. That it is open to the court to make this last holding is clear from decisions such as those of MacMenamin J. in *Hayes*, Dunne J. in *Bandon Medical Hall Ltd. v. Pensions Ombudsman* (Unreported, High Court, 21st December, 2010), MacMenamin J. in *Ryan v. Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011), and Fennelly J. in the Supreme Court case of *Rotunda Hospital v. Information Commissioner* [2011] IESC 26.

PART VII

FACTORS THAT LIKELY RENDER THIS CASE UNIQUE

31. Before the court turns to its conclusions, the court pauses to consider the possibility that the present judgment opens a Pandora's Box from which all manner of miseries will now be visited on pension trustees who will be deluged with innumerable petitions from divorced persons staking a claim to a survivor's pension after an ex-spouse dies. The court does not consider this to be a realistic possibility. This is because there are a number of factors that likely render the present case unique. So, for example:

- this case revolves to a large extent around an order that was previously made by the High Court and which stands extant today; it is unlikely that there are many, if any other persons who are the beneficiaries of an order akin to that made in Ms McDermott's favour by Geoghegan J. on 4th December, 2003;

- instead of challenging the order of 4th December, 2003, the appellant Ministers have brought the within appeal against the second determination of the Pensions Ombudsman. There is abundant case-law which indicates that there are significant constraints on what the High Court can and cannot do in the event of such an appeal. If those constraints did not exist, this case might have ended with a different result, but they do exist.

- some emphasis was placed by the Pensions Ombudsman on the significant discretion that he enjoys – as recognised in *Willis* – to achieving a fair outcome in relation to complaints that present before him. Even if there were a rich abundance of cases with similarities to the present case now coming before the Pensions Ombudsman – and there is no indication that there is– the Ombudsman might quite legitimately arrive at a very different conclusion as to how rightly to exercise his jurisdiction in any one such case. In passing, the court notes that the Pensions Ombudsman appears to have had no little regard in his reasoning to the existence of the court order of 4thDecember, 2003, an order that is in a form which seems likely to be rare, if not unique.

32. The court is conscious that at the bottom of Pandora's Box, hope was found. However, the court does not consider this case to hold out any hope for ex-spouses that they will generally be able to claim a spousal pension when their former husband or wife dies. The court order that favoured Ms McDermott and the form of the appeal which the Ministers have elected to pursue, and the acquiescence/estoppel that the court considers to arise all have the result that this case, on its facts, is likely *sui generis*.

PART VIII

CONCLUSION

33. For the reasons outlined above, the court considers that the final determination made by the Pensions Ombudsman as regards Ms McDermott's complaint should stand.