THE HIGH COURT

[2015 No. 130 MCA]

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

BETWEEN

JEREMIAH COLEMAN AND MARY COLEMAN

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ALLIED IRISH BANKS PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 8th day of April, 2016.

1. In this appeal, the appellants (Mr. and Mrs. Coleman) seek an order setting aside the finding of the respondent ("the FSO") of the 30th of March, 2015. The appellants' core claim concerns the alleged failure of the FSO to hold an oral hearing into their complaint.

Background.

2. Mr. and Mrs. Coleman are both retired. For many years, they had a current account with the notice party ("the bank") at its branch in Ballincollig, County Cork. Mr. Coleman was a painter by trade prior to his retirement. The current account maintained by the Colemans was designated a business account. As such, certain bank charges and fees were levied on this account. In or around March 2013, Mrs. Coleman became aware that an alternative form of current account known as an "Advantage Account" was available with the bank for persons over the age of 65 years which had the benefit of no bank charges or fees being applicable to it. Mrs. Coleman says that she went into the branch with a view to discussing opening such an account.

3. Mr. and Mrs. Coleman's business account, designated as their "No. 1" account was the only account they had with the bank in March 2013. Their bank statements show that as of the 22nd of March, 2013, there was a balance of €9,418 in that account. On the 26th of March, 2013, Mrs. Coleman attended at the branch. She alleges that she did so with a view to completing the necessary forms to open the Advantage account and not for any other purpose.

4. However, the documents furnished by way of evidence to the FSO show that the sum of €9,418 was withdrawn in cash from the Coleman's No. 1 account on that date. A withdrawal form appears to have been signed by Mrs. Coleman for the amount of €9,418. Although there was some dispute as to whether it was her signature on the document, it was ultimately conceded by Mrs. Coleman that it was. The back of the withdrawal form was completed by a teller at the Ballincollig branch, Ms. Carmel Walsh, who has over 30 years experience in her position. The form completed by Ms. Walsh noted that Mrs. Coleman had produced photographic identification in the form of a passport and the passport number was noted by Ms. Walsh who also identified herself by reference to her staff number on the same document. She also wrote a "C" on the docket to indicate that the withdrawal was made in cash. Further, Ms. Walsh confirmed in her statement that the bank's records show that the cash reconciliation at the end of the day's business on the 26th of March, 2013, balanced correctly indicating that a sum of €9,418 had been paid out in cash. Furthermore, the bank's computer records also tally with a cash withdrawal in the relevant amount having been made on the day in question.

5. Mrs. Coleman is adamant that she made no large cash withdrawal from the bank on that date or any other date and has furnished detailed reasons as to why that should be so.

6. However, Mr. and Mrs. Coleman were furnished with a bank statement dated the 28th of March, 2013, two days later, which clearly shows the withdrawal. Mrs. Coleman says that she did not pay any particular attention to this because she assumed that the money had simply been transferred from the No. 1 account to their new Advantage account. Again however, the undisputed evidence is that the Advantage account was not in fact opened until the 17th of April, 2013, some three weeks after the alleged cash withdrawal. The No. 1 account was closed on the 2nd of May, 2013.

7. The Colemans do not appear to have received a bank statement in respect of the new Advantage account until the 17th of October, 2013, and that account has a zero opening balance as of that date and does not show any credit of the €9,418. This appears not to have been noticed by the Colemans and it was not until about a year later, in May of 2015, that Mrs. Coleman says that she realised the money had disappeared. She immediately raised the matter with the bank and asked her solicitor, Mr. Long, to write to the bank setting out their version of events and asking for a meeting to discuss matters. The branch manager responded on the 19th of May, 2014, to Mr. Long's letter setting out the history of the transaction as indicated above. In this letter, the manager, Ms. Cassidy, advised Mr. Long that the Colemans were entitled to have the matter referred to the FSO if they so wished.

8. Mr. Long was thereafter not further involved in the matter as he had a personal conflict. Mrs. Coleman herself lodged a complaint with the FSO about the matter on the 9th of June, 2014.

The Finding of the FSO.

9. The FSO's finding was issued on the 3rd of March, 2015, by Mary Rose McGovern, the officer designated as head of the investigation. In it, the FSO reviewed the complaint and all the evidence adduced by both parties. An oral hearing was not requested by either party and in this regard, the FSO said:

"Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished are sufficient to enable a finding to be made in this complaint without the necessity of holding an oral hearing."

10. It is this determination in particular to which the Colemans take exception. They also dispute the substantive finding made at page 8:

"Having carefully examined and considered the submissions made by the parties to this complaint, I am satisfied based on the evidence before me that, despite the provider's employee not completing the "*large cash request/withdrawal check list*" and stamping the withdrawal docket, the first complainant made a cash withdrawal in the sum of €9,418 on the 26th of March 2013, over three weeks before complainant's new current account was opened on the 17th of April 2013. It is clear that the complainants were put on notice of the recording of the withdrawal of the sum of €9,418.00 by the provider, when it issued the complainants business current account statement to them on the 28th of March 2013. I also note that the provider issued statements for the complainants' business current account to them on 5 April 2013, 12 April 2013, 19 April 2013, 26 April 2013 and 2 May 2013 without any issue whatsoever being raised. Furthermore, the complainants were put on notice that the sum of €9,418.00 was not transferred to their new Advantage current account when the provider furnished them with statements for this account.

Consequently, while I sympathise with the complainants for the stress they have encountered, I am satisfied that the complaint that the provider has wrongfully refused to refund the complainants the monies withdrawn from their account in 2013 as a result of the disputed transaction, cannot be upheld. The evidence confirms that this withdrawal was authorised by the first complainant and the debit correctly applied to the account."

The Arguments.

11. Ms. O'Connell S.C. for the Colemans submitted that where a clear conflict of fact emerged in an appeal before the FSO, there was an obligation to hold an oral hearing and that has been recognised in many recent authorities including *Davy v. FSO* [2010] 3 I.R. 324, *Hyde v. FSO* (unreported High Court 16th of November, 2011), *Murphy v. Financial Services Ombudsman* (unreported High Court 21st of February, 2012) *Lyons v. FSO* (unreported High Court 14th of December, 2011) and *Smith v. FSO* (unreported High Court 4th of February, 2014). The fact that an oral hearing was not requested by an applicant without legal representation did not relieve the FSO of the obligation to hold one where same was required to determine the issues that arose. Counsel also submitted that the finding could not be allowed to stand in circumstances where it amounted to a significant attack on the truthfulness and/or integrity of Mrs. Coleman in circumstances where she was never heard. Further the appellants had no opportunity to cross examine the bank's witnesses.

12. Mr. McDermott S.C. for the FSO submitted that the authorities establish that the principles to be applied to an appeal to the High Court from a decision of the FSO are closely akin to those applied in judicial review applications and the applicant must establish that there has been a serious and significant error, or a series of such errors, before the court can intervene.

13. A complaint to the FSO does not take the form of a hearing before the court. It is designed as an informal process that is accessible to the lay person and is shorn of many of the trappings of litigation. In addition, it has the considerable advantage over litigation that it is free, private and reasonably expeditious.

14. It was well within the FSO's discretion to decide not to hold an oral hearing, particularly in the circumstances of this case where it could not have resolved the apparent conflict that arose. Mrs. Coleman alleged certain facts. In response, the banks were entirely reliant on the documentary evidence and a statement by the teller, Carmel Walsh who had no recollection of the transaction and could only say what her normal practise was. Whilst CCTV footage might have proved decisive, the bank only retained that for 30 days and the complaint was made a year later despite the bank's terms and conditions making clear that any discrepancies must be immediately brought to its attention.

15. It also had to be born in mind that in considering an oral hearing, the FSO had to have regard to the fact that if Mrs. Coleman was alleging fraud on the part of the bank, this was not something that the FSO can determine having regard to s. 57 BZ (1) (d) of the Central Bank Act 1942. Clearly the FSO cannot make determinations of criminal liability as to do so would impinge unconstitutionally on the function of the courts.

Discussion.

16. In *Hyde*, Cross J. described the test for an appeal in the following terms (page 3):-

"In *Ulster Bank v. FSO & Ors* [2006] IEHC 232, Finnegan P. (as he was) set out the following test for an appeal pursuant to s. 57 of the Act:-

> '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. Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v. Stardust Compensation Tribunal*.'

This test was followed by MacMenamin J. in *Molloy v. FSO* (15th of April, 2011) where he broke down the requirements into the following distinct elements:-

> '(i) the burden of proof is on the appellant;
>
> (ii) the standard of proof is the civil standard;
>
> (iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;
>
> (iv) the onus is on the appellant to show the decision reached was vitiated by a serious and significant error or a

series or such of errors; and

(v) in applying this test, the court may adopt what is known as a deferential stance and may have had regard to the degree of expertise and specialist knowledge of the Ombudsman.'

I accept this standard and indeed the breakdown as suggested by MacMenamin J."

17. Although the appellants submitted in this case that the FSO made a number of errors in determining the facts, that, without more, is not something that can ground an appeal to this court. In commenting upon such a complaint in *Smartt v. FSO* [2013] IEHC 518, Hedigan J. said:

> "It is not for this Court to either agree or disagree with his finding as long as it is one reasonably based upon the evidence before him." (at para. 12)

18. The same judge expressed similar views in *Governey v. FSO* [2013] IEHC 403 (at para. 5.7):

> "This Court can only intervene if it comes to the conclusion that on findings of fact he had no relevant evidence before him upon which he could reasonably conclude as he did. This Court does not sit as a court of appeal on the facts. It may not assess the evidence and interpose its own judgment for that of the expert body charged by the Oireachtas with doing so. This Court has neither the jurisdiction nor the competence to do so."

19. Although the authorities demonstrate that the court must show a significant degree of deference to determinations of expert decision makers when acting within their field of expertise, by the same token the requirement for deference will not arise where the issue under consideration is not one which calls for the application of the decision maker's expertise. One such instance would be a pure question of law. Another is whether the holding of an oral hearing is essential to determine disputed facts. Having said that, the FSO undoubtedly enjoys a broad discretion as to whether or not to hold such an oral hearing – see *Ryan v. FSO* (unreported High Court 23rd of September, 2011) at p. 35.

20. In *Davy*, the Supreme Court cited with approval the views of Costello P. expressed in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240 which concerned a decision by the Appeals Officer not to hold an oral hearing. Costello P. said:-

> "The statute gives an express power to hold an oral hearing and to examine witnesses under oath; a request for an oral hearing was made. What I have to decide is (as Keane, J. had to decide, in *The State (Boyle) v. The General Medical Services (Payments) Board* [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.
>
> I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case."

21. The cases relied upon by the appellants are all cases where the decision of the FSO was set aside because he had failed to hold an oral hearing. The critical issue in each of those cases was that a dispute of fact arose which could only be determined by the holding of an oral hearing as in *Galvin*. It must follow in my view that the requirement to hold an oral hearing is predicated on the assumption that the holding of such a hearing will enable the FSO to determine the issue in dispute and make a finding of fact. Such an issue commonly arises where there is a dispute about some representation made by a financial institution verbally or the content of a conversation where each side gives a different version of events. One can readily appreciate how an issue of that nature could not be resolved in the absence of hearing oral evidence from the respective parties and having it tested if necessary by cross examination.

22. Clearly even where there is a dispute of fact, an oral hearing will not always necessarily facilitate the resolution of that dispute. As Hedigan J. remarked in *Star Homes (Middleton) Ltd v. The Pensions Ombudsman* [2010] IEHC 463 (at para. 7.1):

> "The Ombudsman has a discretion whether or not to hold an oral hearing and in these circumstances the Ombudsman was entitled to take the view that the conflict surrounding the P45 was not such as to require him to hold an oral hearing. The applicant has also failed to satisfy this court that it had an explanation which required an oral hearing to adjudicate upon. If an oral hearing were granted in this case its effect would simply be to allow the applicant to re-iterate what the applicant had already submitted to the respondent in writing, therefore fair procedures did not require the holding of an oral hearing in this case."

23. The English High Court expressed a similar view in *Calland, R (on the application of) The Financial Ombudsman Service Ltd* [2013] EWHC 1327 (Admin) where Males J. said (at para. 110):

> "The existence of a disputed issue of fact does not by itself mean that there must be an oral hearing. Rather, there need be an oral hearing only where the dispute cannot fairly be resolved without hearing oral evidence. It follows that if an oral hearing is unlikely to assist materially in resolving any such dispute, no such hearing need be held."

24. I respectfully agree with those views. It cannot be the case that the FSO has an obligation to hold an oral hearing merely because there is a conflict of fact. The requirement to hold an oral hearing can only arise where the fact in issue cannot be resolved without such hearing. It seems to me that the FSO has a significant discretion in considering this issue to decide whether in fact the holding of an oral hearing would be likely to be of any assistance.

25. In the present case, the FSO was confronted with a statement from Mrs. Coleman that she did not make any withdrawal from the bank on the 26th of March, 2013. On the other hand, the bank relied upon its own documents and a statement from the teller on duty that day who had no recollection of Mrs. Coleman or her transaction but could merely say what her normal practice was and how it applied to the completion of the withdrawal docket. I fail to see how an oral hearing could have advanced this state of affairs. Mrs. Coleman would presumably say what she had already said on many occasions in writing. The bank would simply rely on its documents as it had done already. Even if Ms. Walsh gave evidence, it is difficult to see how she could be expected to respond to something of which she had no recollection, i.e. that Mrs. Coleman withdrew no cash. It is difficult to see therefore how an oral hearing would have advanced matters one way or the other and to my mind, in reaching such a conclusion the FSO acted within jurisdiction. It would

clearly have been well outside the remit of the FSO to arrange to have various witnesses from the bank called to be asked if they had misappropriated the appellants' funds. That is clearly not a matter upon which the FSO could have embarked. Such an issue would be one for An Garda Síochana were a complaint to be made by the appellants.

26. For these reasons therefore, I must dismiss this appeal.