Neutral Citation No: [2013] NIQB 12

Ref: **HOR8728**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **04/02/13**

2011 No 140551/1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Walker's Application [2013] NIQB 12

IN THE MATTER OF AN APPLICATION BY JOSEPH WALKER FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE FINANCIAL OMBUDSMAN SERVICE LIMITED

HORNER J

Introduction

[1] The applicant in this case attacks the Final Decision ("the Final Decision") of Mr Ingrams, the Financial Services Ombudsman ("FSO") dated 8 September 2011 in respect of a complaint made by the applicant about the behaviour of the Bank of Ireland ("the Bank"). This complaint related to monies lent by the Bank to the applicant and secured on property owned by the applicant. He seeks an order quashing the Final Decision, a declaration that this was unlawful and an Order of Mandamus requiring the FSO to come to a different conclusion.

Background Facts

[2] The applicant lived at 43 Hillside Crescent, Belfast. He is apparently indebted to the Bank in a sum in excess of £2M. It is not disputed by the applicant that he received substantial advances from the Bank secured on the various properties he owned. Unfortunately the money was borrowed by the applicant to invest on the property market just as property prices had reached their zenith. With the collapse of the property market, the applicant's indebtedness became insupportable. The Bank applied for possession of the properties upon which the loans were secured. The applicant resisted possession on the basis, inter alia, that:

(a) An employee of the Bank had forged his signature on the initial facilities letter and other documents;

(b) He had been given a commercial mortgage in respect of 43 Hillside Crescent whereas he should have had a residential one governed by the Mortgage Conduct Of Business Regulations ("MCOB").

[3] The claim for possession was heard originally before Master Ellison. He rejected the applicant's defence. The appeal was heard by the Chancery Judge on 10 October 2011. He affirmed the order of the Master. In that ex tempore judgment he said:

> "On the one hand the order for possession was granted by the Master and the Bank seeks to defend it because the appellant borrowed some £440,000 to purchase 43 Hillside Crescent, Belfast originally. He contends that it was to be a residential mortgage but he also accepts that because it had an extensive site garden that he might have developed it and that might explain why it was treated as a commercial mortgage by the Bank."

Deeny J also said in describing the applicant's financial difficulties:

> "He, at the height of, or perhaps even slightly past, the height of the property excitement in Northern Ireland, had invested in a wide range of properties."

[4] The applicant having lost before the Chancery Judge appealed the case to the Court of Appeal. The Court of Appeal dismissed the appeal. In its judgment the Court stated, inter alia, that:

> "The facilities letter was forwarded with the draft mortgage deeds to the solicitors acting for the appellant. Mr Walker makes no complaint against his solicitors although he says that he did not see the facilities letter. He was however provided with at least three other facilities letters in which the subject property was stated to be part of the security for other loans obtained by Mr Walker for his property business. Each of them was admittedly signed by him."

The court then went on to conclude that he had no defence to the claim for possession in respect of the mortgaged property although it did suggest he might have a claim for damages under Section 150 of the Financial Services and Markets Act 2000 ("the Act"). It specifically pointed out that Section 151(2) of the Act made it

clear that contravention of the MCOB Regulations did not invalidate or make unenforceable a mortgage.

[5] The applicant made a complaint against the Bank to the respondent in a complaint form dated 23 February 2010. The complaint was investigated by the adjudicator employed by the FSO who received evidence and submissions from both sides. Following this investigation, the adjudicator issued a Provisional Assessment on 6 August 2010 not upholding the complaint. The applicant made further representations to the adjudicator and the adjudicator issued an updated Provisional Assessment on 20 October 2010 which considered in detail the additional arguments addressed by the applicant and essentially reached the same conclusions as in the previous Provisional Assessment. The applicant again disagreed with this Provisional Assessment and the adjudicator carried out further investigations and received further material from both parties. A further Provisional Assessment was issued on 17 January 2011. The adjudicator dealt with the further issues and made a series of detailed findings. The overall conclusion remained the same as in his previous Provisional Assessments The complaint was then referred to the FSO for investigation. During the course of this the applicant sent two emails to the adjudicator. The first of these emails listed what the applicant contends were 9 separate complaints but now accepts that there were only 8 complaints. The final decision was issued on 8 September 2011. The overall conclusion was that the complaints made by the applicant were rejected. There was further correspondence between the applicant and the FSO but the applicant has neither accepted nor rejected the Final Decision and therefore under the relevant legislation is deemed to have rejected the Final Decision. Accordingly the decision is binding on neither the applicant nor the Bank. There is, however, a complaint by the applicant that the FSO has failed to consider further evidence which the applicant has obtained from an expert banking witness, Mr Harrison, after the Final Decision of the FSO who he had asked to reopen his complaint.

Adequate Remedy

[6] The FSO complains that this court should not agree to judicial review as there is in existence a suitable alternative remedy. Larkin and Scoffield in Judicial Review in Northern Ireland at 8:02 state:

> "The cardinal principle is that where a statutory appeal is available it will normally not be proper to seek to challenge by judicial review a decision that can be challenged through the statutory appeal process".

In R (On the application of Duff) v Financial Service Ombudsman [2006] EWHC 1704 Admin Collins J said at paragraph 7:

> "… It would, in my view, be a very rare case – I am reluctant always to say *never* in this jurisdiction because then one finds facts which are exceptional – for it to be appropriate for there to be judicial review of an ombudsman's decision by an applicant whose claim had not been upheld. It is different with an insurance company because of course the decision is binding upon the insurance company and therefore one can see that the insurance company would have a proper interest in setting it aside."

[7] In Re DPP's Application [2000] NI 174 the Divisional Court in Northern Ireland expressly approved six guiding principles to guide the discretion which should be applied to questions of alternative remedy. These principles which Beloff and Mountfield had highlighted from the English authorities are set out as follows:

> "(a) The existence of an alternative statutory machinery will mean that Courts will look for `special circumstances' before granting an alternative remedy;
>
> (b) There are, however, a number of factors which may amount to special circumstances and the Court should be astute not to abdicate its supervisory role;
>
> (c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and the respondent before the court, but also the wider public interest;
>
> (d) Whether the allegedly alternative remedy can in reality be equally efficacious to solve the problem before the court having regard both to the interest of the parties before the court, the public interest and the overall working of the legal system;
>
> (e) In determining the most efficacious procedure the scope of enquiries should be considered. It may be that fact-finding is better carried out by an alternative Tribunal. However, if an individual case challenges a general policy the relevant evidence may be more readily admissible if the challenge is brought as judicial review. An allegation that a prosecution is unlawful because brought in pursuit of an over-rigid (sic) policy can scarcely be made out on the facts of one case; and

(f) Expense of the alternative remedy or delay may constitute special circumstances."

[8] I cannot find any subsequent case in which the decision of Collins J has been followed. Further it seems to me that the decision of the FSO is not a statutory appeal process and therefore a judicial review cannot fall foul of the cardinal principle set out above. In addition, there is much force in the criticisms made by Julian Davis of the Duff decision in [2010] JR at 263 where he said at paragraph 6:

> "The judge concluded that the preserved right to sue the FSP (Financial Services Provider)" was an available alternative remedy for the purposes of the alternative remedy rule. It is, however, surely inappropriate to regard that right as a relevant form of alternative remedy in relation to a judicial review application against the Financial Ombudsman Service ("FOS"). The cost and risk of having to sue an FSP is the very peril from which the FOS scheme is meant to try to protect the complainant. Moreover, the judge's approach provides no relief to the consumer in respect of the failure of the FOS itself to provide the statutory ADR service in accordance with its statutory duty. The scheme exists, above all, for the benefit of consumer complainants (generally individuals of much more limited resources) as a mechanism designed to give them a fair chance of avoiding the costly and lengthy process of civil proceedings against FSPs (generally bodies of substantial resources). If the courts are reluctant (save in extremis) to supervise the FOS in the performance of its duties for the benefit of consumers individually (and, thereby, indirectly collectively), the FOS is largely unaccountable and may ignore its duties towards consumers. The underlying legislative purpose is thereby frustrated."

He then went on to refer to the decision of R (Wetherspoon) v Guildford Borough Council [2006] EWHC 815 (Admin) where Beatson J summarised the position thus:

> "The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the *adequacy*, *effectiveness* and *suitability* of an alternative remedy: see Ex p Cowan, R v Devon CC, Ex p Baker [1995] 1 All ER 73 at 92. In R v Leeds CC, Ex p Hendry [1994] 6 Admin LR at 443 it was said that the test could be boiled down to whether *the real issue to be*

> *determined can sensibly be determined* by the alternative procedure and in R v Newham LBC, Ex p R [1995] ELR 156 at 163 that it is whether the *alternative statutory remedy will resolve the question at issue fully and directly."*

It seems to me that proceedings against the bank do not fulfil the necessary criteria to allow them to be considered as an adequate remedy. Any proceedings against the bank are going to be lengthy and expensive. The applicant with limited means is going to be at a very real disadvantage against the bank, which has very substantial means. It will be an unequal struggle. For all those reasons, it cannot be said that such proceedings are adequate, effective or suitable. I therefore reject the FSO's argument that I should not hear this judicial review because there is an adequate remedy available to the applicant elsewhere.

Legal Framework and Discussion

[9] The respondent is established and operates pursuant to Part XVI of, and Schedule 17 to, the Financial Services Markets Act 2000 ("the Act"). This Act applies not only to England and Wales but also to Northern Ireland; see Section 430 of the Act. The respondent provides an independent and informal complaint resolution procedure for the financial services industry that permits complaints to be made about the provision of financial services without the necessity of a court hearing. The objective of the procedure is set out in paragraph 225 of the Act which states:

> "This Part provides for a scheme under which certain disputes may be resolved quickly and with minimal formality by the independent person."

By Section 228(2) of the Act the FSO is required to determine such complaints "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case." In other words the FSO does not look at the strict legal rights of the parties but determines such complaints on the basis of the evidence and his own expertise of what is "fair and reasonable in all the circumstances of the case". Obviously every decision the FSO makes is fact sensitive and heavily dependent on the context in which it arises.

[10] Section 228(3) of the Act requires the Ombudsman when he has determined a complaint to give a written statement of his determination to both parties. By Section 228(4) the statement must, inter alia, require the complainant to notify him in writing, before a date specified in the statement, whether he accepts or rejects the determination. By Section 228(5) if a complainant accepts the determination within the time specified, it is binding on both parties and final. By Section 228(6), if a complainant does not accept the determination within the specified period he is treated as having rejected it and it does not bind either party.

[11] There can be no doubt that a disappointed claimant can seek a judicial review of the decision of an FSO. In R (Keith Williams) v Financial Ombudsman Service [2008] EWHC 2142 Mr Justice Irwin discussed the limits of the Ombudsman's powers:

> "The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate. He can depart from the common law if justified, but must explain the extent to which the reasons (sic) for any such departure. Next he can import his knowledge of good industry practice at the time, that being stipulated in the rules and emphasised by the judgment of Stanley Burnton LJ in the Heather Moor case."

It is ,however, important to note that it is not the role of a court on a judicial review to examine the merits. It is a court's duty to ensure that the process has been carried out lawfully. However, a court will intervene where the judgment is perverse, or irrational. In R (Keith Williams) v Financial Ombudsman Service Irwin J noted that the ombudsman:

> "Cannot be perverse or merely subjective, and will be susceptible to judicial review if he is, both as to the manner in which the decision is reached and as to the outcome."

However a court should treat a decision of the FSO with respect and give it a reasonably generous margin of appreciation in order to reflect the particular expertise which the FSO has and which he will make use of in reaching any conclusion.

[12] It is accepted by both parties that in looking at the question of irrationality or "Wednesbury unreasonableness" context is very important: see also the decision of McCloskey J in the case of Re DXF's Application [2008] NIQB 138. A court cannot attempt to "second guess" the FSO who is undoubtedly much better qualified than the court to say what is fair and reasonable in circumstances which relate to the financial services industry. That test is likely to be a more generous one to the complainant than the test of whether or not a bank has breached a complainant's strict legal rights. In R (On the application of IFG Financial Services Ltd) v Financial Ombudsman Service Ltd & Anor [2005] EWHC 1153 the court said:

> "The ombudsman is required to determine a complaint by reference to what is, in his opinion fair and reasonable in all the circumstances of the case. The words *in the*

> *opinion of the ombudsman* themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case. Of course, if his opinion as to what is fair and reasonable in all the circumstances of the case is perverse or irrational that opinion, and any determination made pursuant to it, is liable to be set aside on conventional judicial review grounds."

[13] In De Smith's Judicial Review (6th Edition) paragraph 11-018 the Wednesbury principle is treated as follows:

> "That formulation attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground. In exercising their powers of review, judges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were themselves the recipients of the power. For that reason, Lord Greene in Wednesbury thought that an unreasonable decision under this definition *would require something overwhelming* (such as a teacher being dismissed on the grounds of red hair)."

This seems to be an admirably clear statement of the Wednesbury principle.

[14] The final complaint relates to the reasons given by the FSO for his decision. I accept the law as accurately stated by Megaw J in Re Poyser & Mills' Arbitration [1964] 2 QB 467 when he said:

> "The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised … I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked."

[15] In R (On the application of IFG Financial Services Ltd v Financial Ombudsman Services Ltd & Anor (See supra) the court said:

> "… it is sufficient for an ombudsman to make clear that which he considers to be fair and reasonable in the circumstances, at least in a case such as this. What is fair and reasonable will often be a matter of judgment and may be difficult to articulate why one result is considered to be fair and other (sic) to be unfair or insufficiently fair. I am therefore not surprised that the ombudsman did no more than to say that lack of recovery in the present case would have been neither fair nor reasonable."

In R (On the application of Williams) v Financial Ombudsman Service, Irwin J said:

> "The ombudsman has a duty to give clear and comprehensible reasons for his decision. However, he is fully entitled to adopt the findings and the conclusion of an adjudicator who has reported on the case without elaborate adoption of this or that specific sentence, or this or that particular point. These reports are reports, not pleadings."

[16] Finally, it was suggested in Duff that a complainant would be able to "make a fresh application to the Ombudsman on the basis that certain new material which she had put before the court was fresh material which could have a real chance of changing the Ombudsman's view." It is respectfully suggested that this is incorrect and that there is no legal basis for such a proposition. In its own consumer fact sheet the FSO asserts:

> "An ombudsman's decision is final … It will not be possible for (the Financial Ombudsman Service) to look at the case again."

Once the FSO has made his decision on the merits, then he is functus officio. He does not have any power to change his decision and the only relief available to a disappointed complainant is to apply to the court to quash his decision by way of judicial review.

Discussion

[17] Mr McCleave, the applicant's counsel, in an admirably succinct but comprehensive submission, helpfully grouped the grounds of complaint of the applicant as follows:

(i) The FSO failed to conclude in the applicant's favour in respect of the Bank forging his signature on the original facilities letter and other documents.

(ii) The mortgage in respect of 43 Hillside Crescent should have been an MCOB regulated residential mortgage and not a commercial mortgage.

(iii) The FSO failed to reconsider his Final Decision on receipt of a report from a banking expert retained by the applicant.

(iv) Finally the FSO failed to give proper and adequate reasons.

I will deal with these sequentially.

[18] It is clear that for the reasons set out in the judgment of the Court of Appeal that the forging of the applicant's signature on the first facilities letter had no legal significance in respect of the enforcement by the Bank of its security. It is also clear beyond doubt that money was lent to the applicant to purchase properties, the applicant has had the benefit of that money, and that accordingly the money has to be repaid whether this is considered in the context of a contractual claim or a quasi-contractual one. The provisional assessments displayed an understandable reluctance to rule on whether a signature had been forged because not only did these raise criminal issues but the process itself is not designed to resolve such contentious factual disputes. The FSO did conclude in his Final Decision that if the letters with a forged signature did not reflect the applicant's wishes then "I would have expected him to say rather sooner that he had received funding in error."

[19] The fact is that the applicant had received the money from the Bank and subsequently signed further facilities letters which made it clear that 43 Hillside Crescent was to be part of the security for loans obtained by the applicant for his property business. The FSO reasonably concluded in all the circumstances that the complaint had not been made out. It was, it could quite reasonably be argued, perfectly fair to require the applicant to pay back a loan in respect of which he had obtained the benefit; to enforce a mortgage which had been witnessed by his solicitor and signed by him. The Court of Appeal seems to have come to a similar conclusion. It is simply not possible to say that the FSO was not entitled to reach the conclusion he did.The real problem was not the alleged behaviour of the Bank, but the catastrophic fall in the price of property which meant that the applicant had overpaid for the properties which he had acquired and was not in a position to discharge his indebtedness. If the price of property had continued to rise rather than fall, it is inconceivable that the applicant would have had any complaint about the behaviour of the Bank.

[20] In respect of the second complaint there is a dispute about whether or not it was fair and reasonable to permit the applicant to take out a commercial mortgage

on 43 Hillside Crescent, instead of a residential mortgage governed by MCOB. Mr Justice Deeny in his judgment said:

> "He contends that it was to be a residential mortgage and he also accepts that because they had an extensive site garden that he might have developed it and might explain why it was treated as a commercial mortgage by the Bank."

The FSO reached a similar conclusion when he said:

> "The property included a substantial plot of land on which Mr Walker planned to build a six bedroomed house. So, even if it was his intention to use the existing house as his family house, there was a substantial commercial element in the borrowing"

[21] In the circumstances I consider that the conclusion of the FSO on this issue was not Wednesbury unreasonable. It was one which the FSO was entitled to reach on the facts and indeed on its face seems to have been one that found favour with the Chancery Judge, who is also extremely experienced in these matters. I, of course, accept the Judge was looking at this case from a legal perspective. However the FSO was entitled to conclude that the behaviour of the Bank was neither unfair nor unreasonable.

[22] The third complaint was not pursued as it is accepted by Mr McCleave it had no substance. Clearly the FSO was functus officio when he made his Final Decision. It was certainly not unreasonable or unlawful for him to have refused to reopen the complaint because the applicant had obtained another expert's report. Indeed, for the reasons previously given, if the FSO had reopened the Final Decision, then the Bank would have cause to complain that he had acted unlawfully.

[23] When one considers both the Provisional Assessments and the Final Decision together, it is perfectly clear, and should have been clear to the applicant, why his complaints were being rejected by the FSO. Indeed, even if the Final Decision is taken on its own, the FSO sets out quite clearly the basis upon which he has determined the different categories of complaints made by the applicant. This court cannot see any substance in this allegation. The applicant when he received the Final Decision, especially in the light of the earlier provisional assessments, can have been left in no doubt about the FSO's determination of his complaints against the Bank and why the FSO did not make a finding against the bank .

Conclusion

[24] In the circumstances of this case I conclude that the FSO acted lawfully in considering and determining the complaints of the applicant. I therefore dismiss this judicial review. The applicant was advised by the Court of Appeal that the only claim he had against the Bank was a right to claim damages under Section 150 of the 2000 Act. I note that the applicant has issued proceedings against the Bank although these have not been pursued.