

APPROVED

[2022] IEHC 46



THE HIGH COURT

2021 No. 1 MCA

**IN THE MATTER OF THE FINANCIAL SERVICES AND PENSIONS
OMBUDSMAN ACT 2017**

BETWEEN

FLAVIO JR SUAREZ

APPLICANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 8 February 2022

INTRODUCTION

1. The Applicant seeks to challenge a decision of the Ombudsman to refuse to investigate a complaint made against a financial services provider. The Ombudsman's decision had been to the effect that he is statutorily precluded from investigating the complaint in circumstances where the same matter had

been the subject of parallel Circuit Court proceedings between the same parties. The Circuit Court proceedings have since been discontinued without there having been any adjudication on the merits.

2. The Applicant disputes both the Ombudsman's characterisation of the Circuit Court proceedings, and his interpretation of the statutory provisions governing jurisdiction. The Applicant also contends that the provisions of the Financial Services and Pensions Ombudsman Act 2017 should not be applied retrospectively to a complaint made prior to the commencement of the Act.
3. The Ombudsman has raised a procedural objection to the form of these High Court proceedings. It is submitted that the Applicant should instead have gone by way of judicial review pursuant to Order 84 of the Rules of the Superior Courts.
4. For the reasons which follow, I have concluded that the procedural objection is well founded and that these proceedings should be dismissed as improperly constituted.

HISTORY OF THE COMPLAINT

5. The complaint the subject-matter of these proceedings relates to a housing loan mortgage entered into by the applicant and his wife with Permanent TSB plc ("*the financial services provider*"). The Applicant submitted a complaint to the office of what was then the financial services ombudsman on 22 September 2016.
6. The financial services provider subsequently commenced proceedings in the Circuit Court on 9 January 2017. These proceedings were by way of Civil Bill for Possession. The applicant and his wife delivered a document entitled

“*Replying Affidavit and Counterclaim*” on 16 May 2017. This document attached, as annexes, a number of documents which had previously been submitted to the (former) ombudsman as part of the complaint. This form of pleading had been irregular in that the proceedings before the Circuit Court were summary proceedings: it was not permissible, therefore, to raise a counterclaim in the absence of an express order remitting the proceedings to plenary hearing.

7. The Circuit Court proceedings were adjourned generally, with liberty to re-enter, on 9 May 2018. Thereafter, the Circuit Court proceedings were struck out on 31 July 2019. The circumstances in which the proceedings came to be struck out is itself a source of controversy. The Applicant has instituted separate judicial review proceedings against the financial services provider in this regard: *Suarez v. Permanent TSB plc* (2021 No. 320 JR). The High Court refused leave to apply for judicial review on the grounds of delay, and that decision has recently been upheld by the Court of Appeal: *Suarez v. Permanent TSB plc* [2021] IECA 349.
8. The Deputy Ombudsman made a decision on 18 December 2020 that the Applicant’s complaint fell outside the Ombudsman’s jurisdiction as a consequence of section 50(3) of the Financial Services and Pensions Ombudsman Act 2017. This section provides, in relevant part, as follows:
 - “(3) The Ombudsman shall not investigate or make a decision on a complaint where—

[...]
 - (b) there are or have been proceedings (other than where the proceedings have been stayed under section 49) before any court in respect of the matter that is the subject of the investigation,”

9. The Deputy Ombudsman held that the Applicant had raised the same matters before the Circuit Court as in his complaint to the Ombudsman:

“While it may be the case that you were seeking different remedies before the Court and from this office, this does not alter the fact that you were asking this office and the Court to determine the same matters, to ultimately arrive at a decision as to whether a remedy is merited from the court with respect to your counter-claim and also whether a direction from the FSPO is warranted with respect to your complaint to this office.”

10. The decision concluded by stating that it would not be possible for the Ombudsman to proceed with a formal investigation of the merits of the complaint.
11. The Applicant instituted the within proceedings on 6 January 2021. The proceedings took the form of an originating notice of motion and affidavit, purportedly issued pursuant to Order 84B of the Rules of the Superior Courts.

WHICH VERSION OF THE LEGISLATION APPLIES?

12. There is a fundamental disagreement between the parties as to which legislative scheme governs the Applicant’s complaint. It will be recalled that the complaint had been made to the former financial services ombudsman on 22 September 2016. The legislation in force at that time had been Part VII B of the Central Bank Act 1942 (as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004).
13. It seems that the initial complaint form as submitted on 22 September 2016 had not been signed by either the Applicant or his wife. A signed version was subsequently submitted. Neither party has sought to attach any particular significance to this resubmission. It has not been suggested, for example, that the complaint had not been properly “*made*” until the signed form was submitted.

Rather, both parties argued the case on the basis that the complaint was made on 22 September 2016.

14. The Applicant's complaint had not yet been determined as of 1 January 2018, the date upon which the new office of the financial services and pensions ombudsman was established, and the Financial Services and Pensions Ombudsman Act 2017 was commenced.
15. The Ombudsman contends that the extant complaint fell to be dealt with under the newly commenced legislation. Counsel on his behalf placed particular emphasis on section 48 of the 2017 Act as follows:

“48. The power of the Ombudsman to conduct an investigation under section 47 shall apply to any complaint received by the Financial Services Ombudsman or the Pensions Ombudsman before the establishment day that—

- (a) had not been assessed as to its suitability for consideration by the Financial Services Ombudsman or the Pensions Ombudsman, as the case may be,
- (b) was refused as being outside the applicable time limits in the Act of 1942 or the Act of 1990 respectively and that has been resubmitted, on or after the establishment day, or
- (c) was being investigated by the Financial Services Ombudsman or the Pensions Ombudsman, as the case may be.”

16. Counsel submitted that the Ombudsman's jurisdiction extends to complaints in respect of which no jurisdictional decision had yet been made as of 1 January 2018. These were categorised by counsel as complaints which had not yet been assessed as to their suitability for consideration, and thus had not proceeded to investigation. The Applicant's complaint was said to come within this category.
17. Conversely, the Applicant contends that the former ombudsman had already acquired jurisdiction in respect of the complaint in September 2016, i.e. in

circumstances where, as of that date, there were no parallel legal proceedings in existence. It is said to follow that section 48 is irrelevant because there is no jurisdictional issue to be reassessed.

18. The Applicant further contends that section 49 cannot govern his complaint in circumstances where, on the facts of this case, the time-limit prescribed under that section had already expired prior to the commencement of the Financial Services and Pensions Ombudsman Act 2017. To elaborate: a party who wishes to apply for a stay on legal proceedings pursuant to section 49 is obliged to do so prior to their having delivered any pleadings or taken any other steps in the legal proceedings. The Circuit Court proceedings had been instituted in January 2017. The Applicant, as a defendant to those proceedings, was obliged to deliver his replying affidavit within the time prescribed under the Circuit Court Rules. In the event, the replying affidavit and supposed “*counterclaim*” was delivered on 16 May 2017. Thus, as of the date upon which the 2017 Act was commenced, the Applicant would have been unable to avail of the possibility of applying for a stay on the Circuit Court proceedings. The Applicant submits that the logical consequence of this is that neither section 49 nor the prohibition under section 50 of the 2017 Act can apply to his complaint. It is said that the two sections are inseparable, with section 49 being the built-in remedy to section 50(3)(b), and that the law cannot be applied in part only, if the other part is inoperative.

Decision on transitional issue

19. For the purpose of addressing the procedural objection raised by the Ombudsman, it is only necessary to decide whether the Financial Services and Pensions Ombudsman Act 2017 applies, in general, to the complaint. This will allow the court to determine whether Order 84B applies. It is not necessary, for

the resolution of these proceedings, to address the interesting question of whether the “*stay*” mechanism under section 49 applies to a legacy complaint. This is because the present proceedings have to be dismissed as irregular.

20. The effect of section 48 of the Financial Services and Pensions Ombudsman Act 2017 was to confer “*power*” upon the newly established office of ombudsman to conduct an investigation in respect of certain categories of complaint, notwithstanding that such complaint had been made under the previous legislation.
21. The complaint in the present case falls squarely within subparagraph (a) of section 48, namely a complaint which had not been assessed as to its suitability for consideration by the former financial services ombudsman. It is apparent from the paperwork from the former “*client file*” which has been exhibited in the present proceedings that no determination on the admissibility of the complaint had been made prior to 1 January 2018. Rather, the office of the former financial services ombudsman had expressly flagged that if the financial services provider pursued legal proceedings, then the office might not be in a position to continue to deal with the complaint. (See letter of 23 March 2017).
22. Even if it were the position that, contrary to the finding above, the former financial services ombudsman should be regarded as having made a determination on the suitability (or eligibility) of the complaint, then the complaint would still be caught by section 48. On this alternative analysis, the complaint would fall within subparagraph (c), namely a complaint which was being investigated by the former financial services ombudsman.
23. Put otherwise, section 48 captures both complaints which were at a pre-investigation stage, i.e. pending assessment as to their suitability for

consideration, and complaints which had moved to the investigation stage, as of 1 January 2018. For the purpose of section 48, therefore, it does not matter which stage the Applicant's complaint had reached.

JURISDICTIONAL OBJECTION: DISCUSSION AND DECISION

24. The Financial Services and Pensions Ombudsman Act 2017 draws a distinction between (i) the pre-investigation stage wherein the eligibility of a complaint is being assessed, and (ii) the investigation and decision-making stage. This distinction flows through to and affects the remedies available to a person who is dissatisfied with a determination—to use a neutral term—reached by the Ombudsman. The statutory right of appeal provided under Part 7 of the Act is expressly confined to a “*decision*” of the Ombudsman under section 60 or section 61. Put otherwise, the right of appeal is confined to a decision made by the Ombudsman following the completion of the investigation of a complaint.
25. Relevantly, the right of appeal does not extend to a decision by the Ombudsman that he does not have jurisdiction to investigate a complaint. Such a threshold decision does not come within the meaning of “*decision*” for the purposes of Part 7 of the Act. This is because, by definition, no investigation will have been completed where the Ombudsman has determined a complaint to be inadmissible on jurisdictional grounds.
26. Section 50(2) of the Act provides as follows:
- “Where a question arises as to whether the Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman whose decision shall be final.”
27. The Ombudsman does not contend that the use of the term “*final*” is an ouster clause, intended to preclude judicial review of a determination by the

Ombudsman on a question of jurisdiction. Rather, it is said that the term simply signifies that the Ombudsman's decision is not amenable to a statutory appeal under section 64 of the Act. The Ombudsman accepts that the decision remains amenable to judicial review pursuant to Order 84 of the Rules of the Superior Courts.

28. In the present case, the Applicant sought to invoke neither the statutory appeal mechanism nor the judicial review procedure. Instead, the Applicant purported to issue an originating notice of motion pursuant to Order 84B of the Rules of the Superior Courts.
29. This form of proceeding is irregular. Order 84B is only available in circumstances where the relevant legislation has provided for the bringing of a particular type of application before the High Court. No such provision is made under the Financial Services and Pensions Ombudsman Act 2017 in respect of a decision on jurisdiction of the type in controversy here. The within proceedings should not, therefore, have been brought pursuant to Order 84B.
30. It does not automatically follow, however, that the proceedings must be dismissed as improperly constituted. The approach to be taken to procedural irregularities is addressed as follows under Order 124 of the Rules of the Superior Courts:

- “1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.
2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion.”
31. As appears, the courts have a wide discretion as to how to treat non-compliance with the Rules of the Superior Courts. This discretion must be informed by the overriding imperative of advancing the interests of justice and ensuring that all sides’ constitutional right of access to the courts is properly respected. The factors to be considered in the exercise of this discretion include (i) the nature and extent of the breach of the Rules of the Superior Courts; (ii) whether the breach has caused prejudice to the other party(s) to the proceedings; and (iii) the purpose which the particular rule which has been breached is intended to achieve.
32. The default position under the Rules of the Superior Courts is that a challenge to a decision by a public authority should be made by way of an application for judicial review. It should be explained, however, that absent specific statutory provisions to the contrary it is, in principle, possible to institute plenary proceedings instead of judicial review. In such a scenario, the moving party would be required to comply, by analogy, with the procedural safeguards otherwise available under Order 84. See, generally, *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1; [2013] 1 I.R. 247.
33. The judicial review procedure under Order 84 entails a number of important procedural safeguards including, relevantly, a three-month time-limit; a requirement to obtain the prior leave of the High Court to institute the proceedings; a requirement to set out the legal basis for the challenge with particularity in a statement of grounds; and a requirement to serve notice of the proceedings on all persons directly affected.

34. The procedure purportedly adopted by the Applicant in the present case involved the issuance and service of an originating notice of motion. It is of assistance in considering the prejudice, if any, suffered on behalf of the Ombudsman by the use of this irregular procedure to examine the chronology of the proceedings as follows:

18 December 2020	Ombudsman's Determination
6 January 2021	Originating notice of motion issued out of Central Office of the High Court
13 January 2021	Papers served by registered post
1 February 2021	Motion first returnable before the High Court

35. Perhaps paradoxically, the use of the incorrect procedure had the result that the Ombudsman was notified of the existence of proceedings challenging his decision *earlier* than had the judicial review procedure been followed. Under the judicial review procedure, the Applicant would have had three months from the date of the decision (18 December 2020) to make an application for leave, and would have had seven days thereafter to serve papers on the Ombudsman. On this timeline, the Ombudsman might not have been notified of any judicial review proceedings until towards the end of March 2021. In the event, papers were actually served in mid-January 2021.
36. It is correct to say, as the Ombudsman does, that the failure to go by way of judicial review has resulted in there being no statement of grounds delivered in these proceedings. This omission has not, however, caused any actual prejudice to the Ombudsman. This is because the Applicant had set out his grounds of challenge in detail in his verifying affidavit. This affidavit had been included as part of the bundle served on the Ombudsman in mid-January 2021. It would

have been obvious to the Ombudsman from that date as to what was the basis of the challenge to his decision. Moreover, the grounds of challenge had been presaged by the numerous submissions made to the Ombudsman by the Applicant in the context of the processing of the complaint between September 2016 and December 2020.

37. The most significant consequence of the invocation of the incorrect procedure is that the mandatory requirement to serve notice of the proceedings on all persons directly affected has not been complied with. Had the Applicant pursued an application for judicial review, then in accordance with Order 84, rule 22, notice of the proceedings would have had to be served on the financial services provider the object of the complaint, namely Permanent TSB. The financial services provider is a person directly affected in that the precise purpose of the proceedings is to seek to reagitate a complaint made against it. Were the Applicant to have succeeded in any judicial review proceedings, then a complaint which had previously been ruled inadmissible by the Ombudsman would be reanimated. This would have the consequence that the financial services provider would be arraigned once again before the Ombudsman in respect of the same complaint. The financial services provider would have been entitled to notice of, and to participate in, judicial review proceedings seeking such an outcome. The failure on the part of the Applicant to pursue proceedings in proper form has denied the financial services provider its right to fair procedures.
38. Thus, the non-compliance with the Rules of the Superior Courts in this case is no mere technical breach, but has caused potential prejudice to the financial services provider. The breach cannot be overlooked. Instead, the within

proceedings must be set aside in their entirety. This is similar to the approach adopted in *Hosford v. Ireland* [2021] IEHC 133.

CONCLUSION AND FORM OF ORDER

39. The within proceedings should not have been brought pursuant to Order 84B of the Rules of the Superior Courts. The form of procedure employed is irregular and has caused potential prejudice to the financial services provider. The proceedings will, therefore, be set aside in their entirety.
40. As to costs, my *provisional view* is that each party should bear their own costs. This provisional view is informed by the following considerations. The procedure to be invoked by a person aggrieved by a decision of the Ombudsman on a question of jurisdiction is not readily apparent from the Act. Whereas a statutory right of appeal is prescribed in respect of other types of decision, the Act is silent as to how to challenge a decision on a question of jurisdiction. It is not immediately apparent that judicial review is the appropriate procedure. Indeed, on a literal reading of section 50(3), it might be thought that judicial review is excluded.
41. Unlike another case which came before this court recently (*Trustees of the Vodafone Ireland Pension Plan v. Financial Services and Pensions Ombudsman* [2022] IEHC 47), the impugned decision of the Ombudsman in the present case offered no guidance as to the procedure to be followed. The decision-letter did not explain, for example, that the only procedure for challenging the decision would be by way of judicial review proceedings. This is so notwithstanding that the Applicant had consistently maintained the position before the Ombudsman that the jurisdictional question should be referred to the High Court. In all the

circumstances, one cannot but have some sympathy for the predicament that the Applicant found himself in in attempting to identify the appropriate procedure to be followed.

42. If either party wishes to contend for a different form of costs order than that provisionally suggested above, then that party should file written legal submissions within three weeks of the date of this judgment.

Appearances

The Applicant represented himself

Mark William Murphy for the Ombudsman instructed by Eversheds Sutherland

Approved
Gareth S. Mans