THE HIGH COURT

RECORD NO. 2010/298MCA

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

BETWEEN

MICHELLE GABRIEL AND NOREEN GABRIEL

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

GE CAPITAL WOODCHESTER FINANCE LIMITED

TRADING AS GE MONEY

NOTICE PARTY

Judgment of Mr. Justice Hanna delivered on the 27th day of July, 2011.

1. This matter comes before the Court as an application for relief pursuant to s.57 CL of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004), arising from a determination issued by the respondent, the Financial Services Ombudsman, dated the 18th October 2010. The notice party is the lawful owner of a motor vehicle, the subject matter of a hire purchase agreement entered into between the said notice party and the appellants on 21st February 2008.

Background Facts

2. The appellants are daughter and mother respectively. They reside in Togher, County Cork. In 2008 they decided to purchase a motor car, a 2006 Renault Clio motor car. They took possession of it having entered into a hire purchase agreement with the notice party. They paid an initial deposit of €871 and a documentation fee of €72. Seventeen instalments in the sum of €349.98 were subsequently paid. There was a further single payment of €198.78 and thus, up to August 2009, a total sum of €7,019.44 was paid by the appellants to the notice party.

3. The hire purchase price identified and referred to in the agreement was €18,151.51. This comprised the actual price for the car of €14,950, together with a cost of credit in the form of interest payments in the sum of €3,200.

4. The first named appellant, in reality the active hirer of the motor car, unfortunately, ran into financial difficulties in 2009. She found that she was unable to meet the requisite payments under the agreement. She turned for advice to the local Money Advice and Budgeting Service (MABS). MABS is an organisation covering the entire country and offering free, independent and confidential advice to people who are in debt or at risk of getting into debt. Their client base consists in the main of persons in lower income groups. Ms. Gabriel was advised to notify the notice party to the effect that she no longer wished to continue with the agreement and wished to avail of her entitlement to terminate the agreement in accordance with s.63 of the Consumer Credit Act 1995. Acting upon that advice, the appellants wrote to the notice party a letter dated 21st August 2009. The letter stated as follows:-

"Ref: 957434790

Date: 21st Aug. 2009.

To whom it may concern,

I wish to terminate the Hire Purchase agreement accord to my statutory right under section 63 of the Consumer Credit Act 1995 against the above agreement number.

You can collect the vehicle at the above address. Please advise time and date of collection.

Please forward me a statement with outstanding balance after termination.

Regards.

Michelle Gabriel

Noreen Gabriel."

It appears from the affidavit of Steven Pickering filed on behalf of the notice party that the letter was received.

5. Having been received, the letter was not, however, acknowledged. There then followed a letter bearing the title "final notice" from the collection manager of the notice party. The letter was addressed to the first named appellant and it stated as follows:-

"21 September, 2009

Agreement Number: 957434790

Late Payments:	€703.18
Charges:	€ 15.27
Total:	€718.45

FINAL NOTICE

Dear Ms. Gabriel,

Despite our repeated attempts to advise you that there is a serious situation with your account, you have failed to make the outstanding payment. As a result of these actions we are now proceeding to terminate your agreement with us.

To solve this problem, you must phone our Collections Department immediately on 1890927900 (9am to 6pm Monday to Friday, and 9am to 5pm on Saturdays).

Please have your agreement number ready so we can deal with your call as quickly as possible. Your agreement number is at the top of the page.

Yours sincerely,

Elaine Hayes,

Collections Manager."

As is evident from the stance adopted by the notice party, it took the view that the appellants had not lawfully terminated the hire purchase agreement. I say "evident" because they simply ignored it.

6. At this point, although dealing here with the background narrative, it is useful to set out the wording of s.63 of the Consumer Credit Act 1995.

> "63(1) A hirer shall at any time before the final payment under a hire-purchase agreement falls due, be entitled to determine the agreement

by giving notice of termination in writing to the owner or any person entitled or authorised to receive the sums payable under the agreement.

(2) Where a hire-purchase agreement has been determined under this section, the hirer shall, without prejudice to any liability which has accrued before termination, have the option to either

(a) pay the amount, if any, by which one-half of the hire-purchase price exceeds the total of the sums paid and the sums due in respect of the hire-purchase price immediately before termination, or such less amount as may be specified in the agreement, or

(b) purchase the goods by paying the difference between the amount already paid under the agreement and the hire-purchase price after the latter amount has been reduced in accordance with section 52 or 53 , or such lesser amount as may be specified in the agreement.

(3) Where a hire-purchase agreement has been determined under this section, the hirer shall, if he has failed to take reasonable care of the goods, be liable to pay for the failure.

(4) Where a hirer, having determined a hire-purchase agreement under this section, wrongfully retains possession of the goods, then in any action brought by the owner to recover possession of the goods from the hirer, the court shall, unless it is satisfied that having regard to the

circumstances it would not be just and equitable so to do, order the goods to be delivered to the owner, without giving the hirer the option to pay the value of the goods.

(5) Nothing in this section shall prejudice any right of a hirer to determine a hire-purchase agreement otherwise than by virtue of this section."

It is the respondent's interpretation of this section that is the main focus of this appeal.

7. The appellants argue that, when they sent the August 21st letter to the notice party, they had, at that point in time, an untrammelled right under s.63 aforesaid to terminate the hire purchase agreement. The notice party, they claim, has not acknowledged their right to do so and have failed to give force and effect to same. They are also very mindful of the fact that the vehicle has been parked outside their property since their purported termination of the agreement. They say it ought to have been collected long since by the notice party.

8. The notice party, on the other hand, acknowledges that the appellants have a right to terminate under the Consumer Credit Act 1995. However, it says that such termination can only take effect when the appellants comply, *inter alia* with the provisions of subs. 2 of s.63 of the said Act. Therefore, the notice party contends that a sum in order of €2,058.32 must be paid by the appellants before their notice of termination becomes effective. The sum is calculated on the basis of half the hire purchase price, being €9,077.76, having subtracted from it the payments already made at the date of purported termination being €7,019.44. The appellants could have proceeded to purchase the car but all parties acknowledge that, in the given circumstances, this was not a practical solution.

9. The appellants had initially proposed repaying the balance due to the notice party by way of monthly instalments in the sum of €65. They attempted to persuade

the respondent to impose this payment schedule on the notice party. This, clearly, he could not do and the said proposal was abandoned at the hearing of the appeal as constituting no more than an offer of a mechanism to extract the appellants from their plight, one which the notice party was entirely within its rights to refuse.

10. There then followed correspondence sent to and emanating from the notice party from the parties setting out their respective stalls. M.A.B.S. entered the fray on behalf of the appellants. Due to the net point with which we concern ourselves in this appeal it would be superfluous to set out here the said correspondence and accompanying documentation.

11. In his finding dated 18th October 2010, the respondent sets out the history of the matter. He sets out the provisions of s.63 of the Consumer Credit Act 1995. He goes on then to make the following finding.

> "Section 63 provides for the breaking of the agreement by the hirer and the return of the goods to the owner. The hirer must give written notice to the owner of his or her intention. The Act allows the hirer to exercise this option on the grounds that the hirer pays the amount equivalent to half of the hire purchase price provided for in the agreement. The Complainants claim that the Act does not place any obligation on the hirer to pay this one lump sum and any such obligation would be contrary the spirit of the legislation as they assert that they can discharge the agreement at any stage.
>
> The Complainants are asserting that the Act gives them the right to unilaterally terminate the agreement on terms that they have proposed, (including monthly payments in the amount of €65.00 that are not provided for in the agreement. It is submitted that this is not a correct interpretation of the provisions of

section 63 of the Consumer Credit Act 1995 as it would create uncertainty and allow the hirer to effectively alter the method payments and the amount of the payments as they wished regardless of the terms of the original agreement that was reached between the parties. The Act place a number of obligations on the hirer that must be met before the agreement can be terminated. Under section 63(2)(a) the Act allows for the determination of the agreement at any stage before the final payment provided the hirer pays all outstanding instalments due and the outstanding amount required to bring the payments up to one half of the hire purchase price. The Complainants have not complied with this obligation as the total payments made to date are only €7,019.44 which is €2,058.32 less than the amount required under the Act. In the absence of the completion of the payments required to bring the total to the equivalent of one half of the hire purchase price provided the Complainant's correspondence of 21 August 2009 and 21 September 2009 alone are not sufficient to satisfy the obligations placed on a hirer by section 63 of the Act. The Complainants actions do not therefore amount to a termination of the agreement in accordance with the provisions of the Consumer Credit Act 1995.

The complaint is upheld.

Conclusion

The complaint is not substantiated pursuant to Section 57CL(2) of the Central Bank and Financial Services Authority of Ireland Act 2004."

12. The appellants, being dissatisfied with the decision of the Ombudsman, brought appeal proceedings by a notice of motion dated 5th November 2010.

Material Principles of Law

13. A number of decisions of the High Court have discussed and set out the principles which guide this Court in dealing with appeals from the Financial Services Ombudsman. They are succinctly set out in the following extract from the decision of MacMenamin J. in *Molloy v. Financial Services Ombudsman and Others* (Unreported, High Court, 15th April, 2011) which I happily adopt:-

> "26. The starting point for the consideration of the legal principles in cases of this kind was identified by Finnegan P., as he then was, in the case of *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman & Ors.* [2006] IEHC 323, (Unreported, High Court, Finnegan P., 1st November, 2006). There, the then President laid down the threshold test for these appeals in the following terms (at p. 9):-
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> "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 Regulation and Anor** and not that in **The *State (Keegan) v. Stardust Compensation Tribunal*** [[1986] I.R. 642]." *[Emphasis added]*
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> 27. This widely accepted principle contains the following elements:
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> (i) the burden of proof is on the appellant;
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> (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 – put in simple terms, the question is if the errors had not been made, would it reasonably have made a difference to the outcome; 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 F.S.O.

28. It has been repeatedly pointed out that hearings of this type are not *de novo* appeals, where the court is to look to all the material *ab initio* and make its own determination (see *Orange v. The Director of Telecommunications Regulation and Anor.* [2000] 4 I.R. 159). Instead, this Appeal Court must apply the deference which arises from a reluctance to interfere with decisions of specialist bodies. This is well established in the jurisprudence: *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 at pp. 37 to 38, Hamilton C.J.; and *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 I.R. 406 at p. 431, Barr J.

29. Thus a statutory appeal such as this is not a judicial review and the decision maker is to be seen as acting within his own area of professional expertise; the test set out by Finnegan P. in *Orange* suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as the error falls

short of being one which is serious and significant. There, the court may intervene.

30. The decided cases emphasise the disparity in function between the F.S.O. and a court: the former is enjoined not to have regard to technicality or legal form. The F.S.O. resolves disputes using criteria which would not usually be used by the courts such as whether the conduct complained of was "unreasonable" simpliciter; whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with law, it was unreasonable or otherwise improper. It is well established that it should not be expected that a decision of the F.S.O. should be as detailed or formal as a court judgment. Decisions of this type should be not subject to a minute analysis or a "cherry picking" exercise in order to identify some error, howsoever insignificant: see the observations of O'Flaherty J. in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 at p. 111; and the judgment of McMahon J. in *Square Capital Ltd. v. Financial Services Ombudsman & Anor.* [2009] IEHC 407, (Unreported, High Court, McMahon J., 27th August, 2009).

31. I would re-emphasise the simple fact that it is not the function of the Court to "place itself in the shoes" of the F.S.O. The jurisprudence militates against such a course of action. The test, therefore, is whether the decision was vitiated by a *serious* error of a series of such errors.

32. In *Square Capital*, McMahon J. stated at pp. 8 to 9 :-

> '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 here, 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 the functions of the Financial Services Ombudsman as laid down by the Oireachtas.'"

14. Adopting and following the principles set forth in the judgment of MacMenamin J. in *Molloy*, there is, of course, one important feature in this case and that is that it involves essentially an interpretation of the law by the Ombudsman. Therefore, although the appellants still retain the onus to display an error or series of errors affecting the outcome, the requisite approach of the Court may not be quite as deferential as would otherwise be the case. At p. 286 of *Statutory Interpretation in Ireland* by David Dodd it is stated:-

> "11.13 *Secondly*, specialised Tribunals and public law bodies may be required to interpret enactments in the course of carrying out their functions and some bodies may give written determinations as to their interpretation of enactments. While the courts can show considerable defence to the fact and policy based determinate of specialised Tribunals and other public law bodies, generally no such deference arises in respect of questions of statutory interpretation. While this is the general approach, there are rare cases where judges view the ordinary meaning of words as a matter of fact rather than law *Maher v. An Bord Pleanála* [1999] 2 I.L.R.M. 198 provides an example of the general approach. An issue arose relating to the meaning of "pig" and in particular whether weaners and finishers were "pigs" for the purposes of calculating the capacity of a proposed development. Kelly J. held that the

question of the proper interpretation of the regulations was a matter of law that must be determined by the court. The previous approach of the respondent to the interpretation of the relevant enactment was irrelevant. However, the courts are slow to, for example, intervene in interpretations by Tribunals in Inquiry established by the Oireachtas in respect of their own terms of reference. It has been held that the interpretation of the terms of reference is a function of such Tribunals and primarily is not a matter to be determined by the court. So, for example, if the terms are vague or ambiguous or capable of two or more meanings, it is for the Tribunal to interpret the terms. The court may review interpretations when as a matter of law, a Tribunal is clearly wrong."

Decision

15. For ease of reference when dealing with s. 63 of the Acts of 1995, I will refer to the owner or any person entitled or authorised to receive the sums payable under an agreement as the "Finance Company". In my view, s. 63(1) in its natural and ordinary meaning gives what amounts to a stand alone right to the hirer in a hire purchase agreement to terminate in writing the said agreement at any time before the final payment falls due to the Finance Company. Subsection (2) then goes on to provide two options to the hirer. He or she can either pay half the hire purchase price less the amount already paid prior to the termination or such lesser amount as may be specified in the agreement. Alternatively, the hirer can purchase "a motor car". Accordingly, if the hirer does not purchase the goods from their legal owner, the Finance Company, the latter is entitled to the return of the said goods, and the erstwhile hirer is obliged, pending this, to look after the goods. The Finance

Company is entitled to sue for the return of the goods and any money owning under the contract having regard to s. 63(2)(a).

16. Importantly, however, subsection (2) provides that the options available to the hirer at (a) and (b) arise when the agreement ". . . has been determined". Thus, in my view, subs. (1) of s. 63 should be read as giving what I have above referred to as a stand alone right to terminate the Hire Purchase Agreement.

17. Such a right, of course, has consequences as set out in s. 63. The Finance Company's rights to recover would appear to kick in immediately. No time limit is specified. The notice party should have taken steps to recover the car if it wanted it back. In any event, it was the lawful owner of same with or without section 63. I appreciate, of course, that it contended for a different interpretation of the section. Thus, it would be inappropriate for me at this juncture to express any view as to the implications of the failure on the part of the financing company to recover possession of a motor vehicle when it is offered to them with the attendant possible deterioration in the condition of the goods by the passage of time.

18. Neither can the former hirer unilaterally seek to impose terms and conditions as to the rate and regularity of payment of monies due and so forth. The money that falls due by operation of the 1995 Act falls due forthwith. The Finance Company is entitled to paid and, if not paid, to sue. If some arrangement can be made between the parties, well and good. If not, the Finance Company is perfectly within its rights to refuse to enter into any arrangement such as staged payments.

19. In my view, in making his finding, the Ombudsman fell into significant error in interpreting subs. (2) as constituting a pre-requisite of termination of the hire purchase agreement. In my opinion this is incorrect. The Finance Company is, of course, entitled to have all liabilities met by the hirer as set forth in subsection (2).

But this arises when ". . . (the) hirer- purchase agreement has been determined under this section". To insert the precondition of discharge of liabilities, would, in my view, amount an to an effective amendment to the legislation, something which neither the respondent nor this Court is entitled to do. If it was the intention of the Oireachtas to render termination of a hire purchase agreement contingent upon discharge of liabilities it would have said so.

20. For the reasons stated I find for the appellants and hold that their letter of 21st August to the notice party terminated the agreement between them and the notice party. I allow the appeal.

Approved.
27. 07. 2011