Neutral Citation Number [2012] IEHC 367

THE HIGH COURT

[2011 No. 264 MCA]

IN THE MATTER OF THE CENTRAL BANK ACT 1942 (AS AMENDED) AND,

IN THE MATTER OF PART VIIB THEREOF, AND

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57CL THEREOF

BETWEEN

IRISH LIFE AND PERMANENT PLC (trading as PERMANENT TSB)

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

CHRISTY THOMAS AND JOSEPH THOMAS

NOTICE PARTIES

(TOGETHER WITH THREE OTHER RELATED STATUTORY APPEALS INVOLVING PAT AND MARY FOLEY, DEREK HEALY AND JOANNA HEALY AND DAMIEN LAVERY AND LINDA LAVERY-WHELAN RESPECTIVELY AS NOTICE PARTIES)

JUDGMENT of Mr. Justice Hogan delivered on the 3rd August, 2012

1. What are the duties of a Bank towards a customer who seeks advice in relation to a mortgage product? This is one of the fundamental issues which are presented by a series of four appeals brought to this Court by the appellant, Irish Life and Permanent plc ("ILP") against decisions of the Financial Services Ombudsman. Before considering these broader questions, it is necessary to set out the background to the various appeals, each of which present a slightly different factual background, but all of which raise broadly similar legal issues.

2. Before proceeding any further, I should record at the outset that I am customer of the appellant Bank, a fact which I disclosed to the parties at the outset of the hearing once this appeal was assigned to me. Neither party objected to my hearing these appeals and, on that basis and in the light, therefore, of that express and mutual waiver of any objection, I agreed to hear and determine it.

3. 1 propose to outline the background facts of each of the appeals before then to examine the legal issues which arise. All of the appeals arise from events which took place mainly in 2009 and 2010 where many customers of the ILP first switched out of fixed-interest tracker mortgages (i.e., a mortgage interest rate tracking or following the European Central Bank refinancing rate) to variable interest rates, but then subsequently found that when the original fixed period had expired, they could not elect to switch back to tracker mortgages. This is a common feature of these appeals, as the customers in question maintained in their complaints that they were either poorly advised by ILP or that by maintaining a studied silence, ILP tacitly encouraged them to break the tracker rate contract.

4. It should be said that these tracker rates were originally offered in a completely different financial era, prior to the onset of the financial turmoil and banking crisis which beset the country in late 2008 and the subsequent emergence of the Eurozone debt crisis. The latter has meant that tracker mortgages interest rates are at record lows (and thus very advantageous for customers), while the Bank's costs of funds has risen. Virtually all tracker mortgages are currently loss-making and the product has since been withdrawn from the market.

5. A further consideration is that a computer failure in early 2009 meant that many ILP customers were- from the Bank's perspective- wrongly allowed to switch from fixed to variable interest rates without financial penalty. This also is a key factual background to three of the four appeals. By this stage the ECB had lowered interest rates in response to the financial crisis and many mortgage holders were examining ways of exiting fixed rates agreements in order to avail of the lower interest rates being charged to variable interest rate customers. It appears that many consumer websites were highlighting the fact that ILP were permitting customers to switch without penalty and the number of customers seeking to avail of this option rose sharply during this period of January and February 2009 until the Bank could satisfactorily address this problem. While ILP honoured the no penalty quotations, the uncontradicted evidence before me was that this computer error was extremely costly for ILP - with a net loss of over €33m.-and that ILP suspended switching in February 2009 when the problem was discovered until it could be rectified.

6. While the facts of the individual appeals vary as to their details, there are two key issues which required to be examined. First, what was the reason why ILP charged no redemption or break fee when permitting certain customers to switch from fixed to variable rates in the early part of 2009? This is a key feature in the Foley and Lavery Whelan appeals and, to a lesser extent, the Healy appeal. It does not feature at all in the Thomas appeal. Second, was ILP under a duty to inform the customers of the consequences of the break, namely, that they could not revert to the tracker mortgage at the conclusion of the original fixed rate term once that rate had been broken by opting for the variable rate?

7. I propose now to consider in detail the facts of each individual case before returning to consider some of the legal issues which arise.

The Healy Appeal

8. Mr. and Mrs. Healy took out a three year fixed residential investment loan in respect of an investment property in Galway City. The mortgage provided for interest only payments for the currency of a fixed term on a principal sum of €425,000.00 over a 25 year period at an interest rate of 4.99%. Condition 5 of the mortgage loan approval agreement stated:-

> "On expiry of the fixed rate period and, where the applicant chooses the option of a tracker mortgage interest rate, appropriate to the balance outstanding on the loan at the expiry of the fixed rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the expiry of the fixed rate period as may be varied in accordance with the variation to the European Central Bank refinancing rate."

9. Furthermore, the European standardised information sheet which accompanied the approval letter stated:-

> "The interest rate is 4.99%: this rate is fixed for three years. At the end of the fixed period you may exercise an option to contract for another fixed rate period (if available) or to move to the standard variable rate or to a tracker mortgage rate. If a tracker mortgage rate is chosen the loan will become a tracker mortgage loan and the rate applicable will be the rate appropriate to the balance outstanding on the loan at the time of the expiry of the fixed rate period and may be varied in accordance with the variations to the ECB rate. The payment rates in this housing loan may be adjusted by the lender from time to time (applies at the standard variable rate or tracker rate as chosen).
>
> The lock-in period for this product is a fixed term rate. However, this can be broken subject to the payment of redemption fees as described in the section "Early Repayment below".

10. By early 2009 interest rates had fallen sharply as a result of the financial crisis and towards the end of 2008 and in early 2009, Mr. and Ms. Healy made inquiries of the Bank to its call centre as to whether any cheaper rate other than the fixed rate to which their loan was subject was available. In early January, 2009 Mr. and Ms. Healy then wrote to the Bank instructing them that they wished to break out of the fixed rate in order to avail of the available variable rate. In the course of that letter the Healys stated that:-

> "We understand that we will not incur any penalty in doing this. Please confirm in writing that this has been done."

11. The Bank accepted that instruction and the variable rate of interest was then applied to the mortgage. A critical aspect of the case is that the Healys were not charged a fee in respect of the cost of breaking the fixed rate mortgage. In his ruling the Ombudsman rejected the argument that the Bank disingenuously had not the charged the Healys a break fee in relation to the ending of the fixed mortgage rate in order to encourage them to abandon their tracker mortgage. On this point the Ombudsman opined:-

> "While there is no evidence that the Bank or its staff members were acting in bad faith in that regard, the system problem is of some concern as it appears to have resulted in incorrect information being provided to the complainants at the time, albeit resulting in no breakage fee being applied"

12. The Ombudsman went on to say:-

> "In the context of the apparent reason for the complainants contacting the Bank in early 2009, I consider that there was an onus on the Bank to highlight that they were losing the tracker rate option by availing of the fixed interest rate break."

13. The Ombudsman then continued by saying:-

> "1 note the Bank's argument that it cannot confirm the exact conversation [between the Healys and the call centre] but it argues that the complainants were on notice of the availability of the tracker rate as was stated in the letter of approval. ..I consider that Special Condition 6 does not specifically advise the complainants of the fact that their right to a tracker may be lost if the fixed term is broken, details of how it ends happens at the end of the fixed interest rate period. I acknowledge the Bank's argument that because the complainants chose to break from the fixed interest rate, the fixed rate term did not mature and "therefore the tracker rate was no longer an option...". I also note the Bank's reference to the possible availability of advice from other parties. However, the question arises (and the complainants have submitted) whether or not the Bank should have provided more detailed information as to the complainants options and consequences of their specific request in early 2009...In this instance I consider the Bank should have ensured that the complainants had all relevant information available when making the decision. The Bank's file (particularly the lack of telephone call recordings) and the admitted system error regarding breakage cost does not indicate that the complainants were provided with all relevant information and appropriate advice in that regard. Indeed, I consider that the incorrect information regarding the breakage fee could have had the effect of distorting the alleged positive reasons for breaking from the fixed interest rate early. In that regard, I note the complainants' argument that they were surprised to discover that they could break from the fixed rate without cost. While I reiterate that there is no evidence in bad faith on the Bank's part with regard to breakage fees quotations system, I must bear the above point in mind and put forward same in the context of the Code's general principles that regulated entities must have and employ "effectively the resources and procedures, systems and control checks necessary for compliance with this Code". As noted above, I consider the complainants' request of early 2009 represented more than an execution request in nature. In that regard the Code also provides the regulated entities must act with due skill, care and diligence in the best interests of its customer and "makes full disclosure of all relevant material information ... in a way that seeks to inform the customer". I would point out that each case is considered on its own merits and based on the evidence and submissions put forward. In this case I conclude that the Bank should have specifically discussed the loss of the tracker rate with the complainants in early 2009. There is no evidence that the Bank did so in this case. I have also concerns as to the incorrect breakage cost information being provided. The evidence allows the conclusion that the complainants sought advice from the Bank "in an effort to reduce... monthly outgoings". The impact of availing of the variable rate at that point with the effect the complainants were permanently losing the tracker rate, depriving them of a lower rate at a later stage, should have been discussed with the complainants."

14. The Ombudsman went to substantiate the complaint pursuant to s. 57Cl(2)(g)("...the conduct complained of was otherwise improper") of the Central Bank Act 1942 ("the Act of 1942")(as inserted by s. 13 of the Central Bank Financial Services Authority of Ireland Act 2004).

Damien Lavery and Linda Lavery-Whelan
15. In May, 2004 Mr. Lavery and Ms. Lavery-Whelan received a letter of approval providing that their mortgage loan was to be for

€295,000.00 to be paid over 25 years. The rate of interest was to be prevailing ECB refinancing rate plus a margin of 1.1%. Special Condition H provided that:-

> "where the applicant switches the rate on this loan, a rate which is fixed for a certain period, the applicant must inform Permanent TSB on the expiry of the fixed rate period whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then variable interest rate and may be varied from time to time thereafter."

16. In December, 2006 Mr. Lavery and Ms. Lavery-Whelan switched from the tracker rate mortgage to a fixed rate mortgage for a five year period. In January, 2009 Mr.Lavery and Ms. Lavery-Whelan instructed the Bank to switch the mortgage from the fixed to the variable rate of 4.55% with immediate effect. In their complaint the Laverys contend that they were advised over the telephone by one of the mortgage advisers that this was the best rate, albeit this telephone call cannot be traced by Permanent TSB and the Bank was not in a position to confirm the details of the conversation.

17. The Ombudsman found against ILP on the following grounds:-

> "The Bank did not advise [Lavery-Whelans] of the loss of the right to revert to a tracker rate when the application of January, 2009 was approved and considers the content of Special Condition H as adequate warning in this regard. There are two issues that this raises. Firstly, the provision of Special Condition H does no advise the complainants of the fact that the right to a tracker loan may be lost if the fixed term is broken. Therefore, when the decision was made that the complainants made without being provided with information that would explain the actual effects of the decision. Secondly, the issue is exacerbated by the fact that the tracker rates were no longer available to any customer who did not have an existing entitlement to this rate after July, 2008 due to the fact that the Bank withdrew them as an option at this time. Consequently, the circumstances that existed at the time that the complainants entered the original agreement had materially changed as a result of the decision taken by the Bank in July, 2008. Special Condition H lists the option available and informs the customer that if one of the options is not specifically chosen then the default is that the current variable interest rate will apply. No other information is provided. The agreement lacks clarity and certainly does not provide any express information to the complainants from which they could conclude with any certainty that the tracker rate might be at risk."

18. The Ombudsman went on to say:-

> "The Bank did not apply a break fee and notwithstanding the fact that this is contrary to its policy as already stated, the Bank provides no explanation for this decision. When it is considered in the context of the complainants comments in this respect of not being responded to by the Bank, in view of the fact that there is no evidence that the most basic information about the Bank's withdrawal of tracker mortgages after July, 2008 was provided to the complainants at any time after July, 2008 then, in my view, it is reasonable to conclude that the Bank acted consciously and deliberately to encourage the complainants to switch from the fixed rate and lose the right to revert to the tracker rate of interest. The Bank remained silent on the issue in relation to the long term effect of switching the mortgage during the discussion namely, to the tracker rate of interest. This silence on the part of the Bank had the effect of distorting the positive assertion relating to the benefits of the...variable rate an advantage received from the non application of a break fee and thereby constitutes a misrepresentation on the part of the Bank during the discussion leading up to the new agreement. I am satisfied that the Bank offered an inducement to the complainants to enter a new loan arrangement when it decided not to impose the normal break fee. The effect of this together with the misrepresentation identified above is to render the second agreement voidable. The complainants relied on the representation contained in agreement to switch the rate of interest and enter the new contract. The complainants were unaware of the fact that the loan would not now revert to a tracker rate of interest as a result of their decision to accept the offer an unknowingly act to their detriment. The Bank deliberately waived the break fee in order to make the switch more attractive to the complainants while at the same time remaining silent on the fact that the tracker rates were not available anymore. The complaint is upheld and in line with the complainants request in the original complaint the second contract is rescinded."

19. The Ombudsman went to find that the complaint was substantiated pursuant to s. 57C1(2)(b) of the Act of 1942, namely, that the conduct was "unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainants."

Pat and Mary Foley

20. Mr. and Ms. Foley obtained a mortgage in 2006 which was originally issued subject to a tracker rate of interest of 1.10% above the ECB refinancing rate. In July, 2007 the Foleys requested the Bank to fix the interest rate for a three year period. In December, 2008 the Foleys wrote to Ms. Adrienne McKeever ofiLP in the following terms:-

> "As per our conversation on the phone I wish to exit out of our fixed rate
>
> mortgage account...with immediate effect without penalty. I wish to opt for a loan to value variable rate currently at 5.4% and reducing in January to 4.5%."

21. The Bank accepted that instruction and applied the variable rate without charge. However, the fixed rate term had been broken and it considered that Special Condition J did not apply and thus, the rate which applied on the expiry of the term did not apply in those circumstances.

22. Special Condition J provides that:-

> "Please note that where the applicant switches the rate on this loan to a loan which is fixed for a certain period, the applicant must inform Permanent TSB on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate period (if available) or if the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will be switched to the then current variable interest rate and may be varied from time to time thereafter."

23. In his decision the Ombudsman said as follows:-

> "The Bank did not impose a penalty on the complainants when they broke the fixed interest agreement. The Bank admits that this was contrary to its normal policy in this regard but states that it discovered a problem with "our mortgage

system in mid February, 2009 where it was not calculating an exit fees on loans breaking out of the fixed rate early". No explanation is provided for the fact that the approval was granted to the complainants to break their contract in correspondence dated the ih January, 2009, which is a full month before the problem arose with the Bank's mortgage system. It is also of concern that the Bank attempts to explain the issue in terms of a systems defect when the Bank's correspondence with the complainants dated the 2ih July, 2010, states:-

'The Bank permitted you to break out of the fixed rate agreement and we committed to there being no fixed rate exit fee.'

In correspondence the Bank describes the non-application of the fee as a positive decision being made by it as a result of a systems failure. These two positions cannot, in my view, be reconciled as they illustrate a disingenuous approach by the Bank in seeking to infer that a technical error is the reason for the non application of a fee in circumstances where the timeframe for this decision and date of the systems defect do not correspond."

24. The Ombudsman went on to say:-

"The Bank withdrew tracker mortgages as of the 181h July, 2007 and January, 2009 for new customers. Existing tracker mortgages continued to apply but there were no longer offered as a fixed product. The complainants state that when they made inquiries about breaking from the fixed term contract they were never informed that the consequence was the loss of the right to revert to a tracker rate. The complainants were informed that tracker rates were no longer available but were not advised that if they did not break the agreement they could revert to the tracker rate at the end of the term. The complainants' argument is that if the Bank properly advised them of all their options they would have waited until the fixed term expired as to retain the tracker mortgage. The evidence submitted together with the answers provided to the questions raised established the fact that in allowing the complainants to break from the fixed interest term without the imposition of penalty the Bank acted contrary to its own policy. No satisfactory explanation is offered for this departure. The Bank, in waiving the usual penalty offered an inducement to the complainants to break the existing contract, this resulted in the loss of the right to revert to a tracker mortgage. While the contents of Special Condition 1 are noted, to provide an assurance that the tracker rate applies at the conclusion of the fixed rate term, they must be considered in the context of the Bank's representation that tracker mortgages were no longer on offer without specifically clarifying that the Bank would offer an existing entitlement to a tracker mortgage. I am satisfied the complainants did not understand that the tracker rate would have applied at the conclusion of the fixed interest rate term only. Their decision to break the loan agreement was unduly influenced by the lack of clear information in relation to existing agreements and the offer of an inducement in the form of a waiver of normal charge. In accepting the Bank's representations and proposal the complainants unknowingly acted to their own detriment and surrendered their right to revert to a tracker rate of interest."

25. The Ombudsman upheld the complaint pursuant to s. 57C1(2) of the Central Bank Financial Services Authority of Ireland Act 2004.

The Thomas appeal

26. In this appeal the notice parties, Christy and Joseph Thomas ("the Thomases") took out a mortgage with ILP in September, 2007 for €320,000 for a three year fixed term. The Thomases have the benefit of what has come to be known as "a tracker mortgage", that is, a mortgage tracking or following the European Central Bank refinancing rate. Of course, the applicable mortgage rate is critical for many mortgagors, since the fluctuation in the rate can often be critical, not least for hard pressed home owners in a very difficult financial and economic environment.

27. The essence of the Thomases complaint to the Financial Services Ombudsman ("the Ombudsman") was that in February, 2009 they contacted ILP seeking advice in relation to their mortgage payments. It is common case that the Thomases were allowed to switch to a variable rate in return for a redemption fee of some €1,045. However, the Ombudsman found that ILP had not given appropriate advice to the Thomases when they availed of the option to switch. Specifically, the Ombudsman found that the Thomases were unaware of the fact that the loan would not now revert to a tracker rate of interest as a result of this acceptance of the variable rate offer. In this respect, the Ombudsman

found as follows:-

"However, when the Bank informed the complainants of the fact that they could amend the loans to the [loan to value] variable rate, I am satisfied that it did not provide any additional information to the complainants advising them of the fact that they would no longer be entitled to opt for the tracker rate at the conclusion of the fixed rate term, that had previously applied.

The Bank has rejected the complainants' argument that when they selected the variable rate they were advised that they could avail of the tracker rate in September, 20I0, when their fixed rate was originally due to expire. The Bank has claimed that it would not have provided such advice, this was simply not the case. However, I am satisfied that the Bank did not advise the complainants of the loss of the right to revert to a tracker rate when the application of February, 2009 was approved. The Bank considers that the contents of special condition 7 as adequate warning in this regard. It is imperative to note that the provisions of special condition 7 do not advise the complainants of the fact that the right to a tracker may be lost if the fixed term is broken. Therefore, when the decision was made the complainants should have been provided with the information that would explain the actual effect of this decision. No other information is provided. The agreement lacks clarity and does not provide any express information of the complainants from which they could conclude with any certainty that the tracker rate might be at risk."

28. The Ombudsman then went on to find:-

"The Bank should have ensured that the complainants had all relevant information available when making the decision. The Bank remained silent on whether it advised the complainants as to the long term effect of switching the mortgage during the discussion, namely the loss of the tracker rate of interest. This silence on the part of the Bank had the effect of distorting the positive assertion in relation to the benefits of the LTV variable rate."

29. The Ombudsman then went on to base his decision on Chapter 2.12 of the Consumer Protection Code which provides:-

"A regulated entity must ensure that all information provided to the consumer is clear and comprehensible, and that key items are brought to the attention of the consumer."

30. The Ombudsman then went on:-

> "When the complainants contacted the Bank for advice regarding interest rates in obtaining a lower one than their current fixed rate, I believe that the Bank should have specifically discussed the loss of the tracker rate to the complainants. There is no evidence that the Bank did. Considering the complainants contacted the Bank seeking assistance in the form of a lower rate, the effects of permanently losing the tracker rate, thus depriving the complainants of a much lower rate at a later stage, should have been discussed with the complainants. Due to the financial disadvantage of tracker rates for financial institutions, the Bank removed the tracker rate for new customers from its suite of products in July, 2008 and for existing customers in August, 2009. I direct the Bank to apply the tracker rate to the complainants mortgage and to backdate it to September, 20I0."

31. The Ombudsman grounded that decision on s. 57CI(2)(g)("otherwise improper") of the Act of 1942. I propose first to take the Foley and Lavery-Whelan appeals together, since they share common characteristics.

The Foley and Lavery-Whelan appeals
32. It is clear from the reasoning of the Deputy Ombudsman in the Foley appeal that the substantiation of the complaint rested in large part (albeit not exclusively) on his conclusion that the Bank's explanation for the failure to charge the break fee was "disingenuous" and that this amounted to an "inducement" to the Foleys to break the existing contract and exit from the tracker mortgage. In the context of a statutory appeal of this general kind, it is clear from the comments of Kenny J. in *Mara v. Hummingbird Ltd* [1982] I.L.R.M. 421 and those of Laffoy J. in *Canty v. Private Residential Tenancies Board* [2007] IEHC 243 that this Court is bound by the findings of fact made by the administrative decision-maker unless there is no evidence to support them or, in the words of Hamilton C.J. in *Henry Denny & Sons (Ire.) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34, 36, these findings can be regarded as "unsustainable."

33. Applying, therefore, the test adumbrated in cases such as *Hummingbird, Henry Denny and Canty,* one is driven to conclude that the findings of the Deputy Ombudsman in the Foley case regarding the conduct of ILP in not charging a break fee are clearly not supported by the evidence. The uncontradicted evidence before the Court was that the Bank had experienced a computer systems failure in late 2008 and early 2009 so that customers were not being charged a break fee. As the number of customer requests for a switch grew during the course of January 2009 and into February 2009, ILP realised that something was seriously awry. On 6th February 2009, ILP suspended requests for a switch pending a review. By 25th February a new methodology was being implemented manually and by 4th March the new methodology had been implemented on to the computer system. ILP decided that it should honour all quotations given during this period which involved no penalty switching, even though this decision proved to be extremely costly for the Bank.

34. In these circumstances there was no basis for the Deputy Ombudsman's finding that ILP's behaviour had been disingenuous. Quite the reverse: the Foleys' request for a no-penalty switch had been accommodated in early January 2009, but the actual systems error had only been *discovered* by ILP in February 2009. Counsel for the respondent, Mr. McDermott, argued that ILP had put forward new evidence on this appeal not hitherto available to the Deputy Ombudsman on this issue, but it seems to me that the essence of the Bank's response had already been conveyed in the Bank's letter of 9th May 2011 when it stated:-

"It is not Bank policy to offer a break from a fixed rate term without the imposition of a penalty. We discovered a problem with our mortgage system in mid-February 2009 when it was not calculating an exit fee on loans breaking out of a fixed rate early. At this time the Bank suspended requests from customers until the problem was rectified. This was rectified in early March 2009."

35. It is true that the evidence supplied to this Court by ILP on this vital issue was certainly more fulsome than that supplied to the Deputy Ombudsman. I also feel certain that had this material been available it would have been of considerable assistance to him. Nevertheless and contrary, therefore, to what was stated by the Deputy Ombudsman, ILP had, in fact, provided an adequate explanation as to why the Foleys had not been charged for the switch, even though this was contrary to the Bank's own policy and even if one must concede that a more comprehensive reply has been supplied on affidavit to this Court. In these circumstances, there was no evidential basis at all for the finding that the decision not to charge a fee was the result of a "positive decision being made by it rather than as a result of a systems failure."

36. In the light of this conclusion, it follows that other derivative findings equally cannot stand. The Deputy Ombudsman thus expressly found that ILP "in waiving the usual penalty, offered an inducement [to the Healys] to break the existing contract." That finding is obviously premised on the earlier conclusion that ILP had been disingenuous and that by a clever tactical manoeuvre had waived its break fee in order to induce the Healys to abandon the valuable tracker mortgage.

37. Given that these findings are unsustainable in law and are central to the decision, it follows equally that I must therefore set aside this finding and remit the matter to the respondent. This does not necessarily mean that the respondent cannot uphold the Healys' complaint- a subject on which I express no view. It merely means that the respondent cannot do so on the basis which was done in this case by finding that ILP's conduct was disingenuous or that it had cunningly induced the Healys to make the switch by deliberately refraining to charge a break fee.

38. Turning next to the Lavery- Whelan appeal, it will be seen that this turns on two key elements:-

i. First, that the applicable clause in the mortgage (Condition H) did not clearly specify that the tracker mortgage entitlement would not thereafter be available if fixed rate agreement was broken by the customer during that period.

ii. Second, that ILP did not apply the break fee and that it had provided "no explanation for this decision." It followed that ILP had "acted deliberately and consciously to encourage [Mr. Lavery and Ms. Lavery-Whelan] to switch from the fixed rate" and that it had "offered an inducement" to them to do so.

39. In my view of my conclusions in relation to the Healy appeal, it is equally clear that these findings here in relation to ILP's conduct cannot stand, as they are equally a central feature of the entire conclusion. As we have just seen, ILP did offer such an explanation for the failure to charge the break fee and there is simply no evidence to support the finding that ILP had deliberately and consciously acted to encourage Mr. Lavery and Ms. Lavery-Whelan to switch out of the tracker rate.

40. In these circumstances, it is unnecessary for me to consider any of the other arguments advanced on behalf of ILP, including arguments in relation to a breach of fair procedures and the adequacy of the reasons given by the Ombudsman. Just as with the Healy appeal, I propose to remit the matter to the Ombudsman for further consideration in the light of this judgment. None of this means that Mr. Lavery and Ms. Lavery Whelan's complaint necessarily cannot succeed. Again, I express no views on the merits of

that complaint, save to say that Ombudsman would not be entitled to find against the Bank on the basis that it had offered no explanation for the failure to charge the break fee or that it had deliberately sought to induce the couple to switch by failing to charge a break fee.

The Thomas appeal

41. Turning next to the appeal by Mr. Thomas and Ms. Thomas, it will be seen that their case is different from the Foleys and the Lavery-Whelans in that they were, in fact, charged a redemption fee. The complaint was nevertheless upheld on essentially two distinct grounds:

1. That the contents of the applicable special condition (special condition 7) was not sufficiently clear so as to advise Mr. and Ms. Thomas "of the fact that the right to a tracker rate may be lost if the fixed term is broken" and that the agreement lacked clarity as a result.

ii. That when the Mr. and Ms. Thomas contacted ILP "for advice regarding interest rates", the Bank "should have specifically discussed the loss of the tracker rate" with them and there is no evidence that it did so.

The construction of the special condition

42. So far as special condition 7 is concerned, I cannot disagree with the Ombudsman's finding that the clause lacks sufficient clarity on the key question of whether a break in the fixed rate would affect the entitlement of the borrower to revert to the tracker rate. In fact, special condition 7 says nothing which would alert even a prudent borrower to the fact that he or she would not be entitled to a tracker mortgage at the end of the otherwise fixed period if the previously agreed rate had been broken. It is true that special condition 7's commitment to the tracker rate is prefaced by the words "on expiry of the fixed rate period." The Bank contend that these words ("...on expiry ...") necessarily mean- or perhaps imply- that the commitment subsists only for so long as the borrower does not switch during that period, because otherwise the fixed rate period would not have "expired".

43. This, undoubtedly, is a sophisticated and clever argument which, for example, had it been advanced in an undergraduate law examination would have attracted high praise from the examiners as an original demonstration of legal craft and skill. But this type of argument should really have no place in the construction of financial documents involving retail customers, even if- as the Bank contends, but the Healys deny- the customers are to be regarded as experienced investors and even if (as here) they had access to independent legal advice. Given the huge implications for the customer, if a key clause of this kind is to bear this sophisticated construction, it behoves the Bank to spell this out in plain language for the benefit of all customers, and not simply those who have either an amateur or professional interest in the niceties of the law relating to the construction of contracts who might otherwise be able to glean this vital piece of information unaided. Or, at all events, the Ombudsman is entitled so to think.

Whether the Bank should have advised its customers in relation to the possible adverse consequences of the switch

44. One common theme running through this- and, indeed, the other appeals- was that the Bank owed no fiduciary duty to advise its customers and that it had, not, in fact done so. There is no doubt but that the lender/borrower relationship does not generally impose fiduciary duties on the lender. The whole object of a fiduciary is based upon a recognition that certain categories of persons owe duties to others over and above conventional contractual obligations by virtue of the special nature of their profession, occupation or position, so that, in Professor Delany's graphic words, such persons "are obliged to act in a completely selfless manner": see *Delany, Equity and the Law of Trusts in Ireland* (4th.ed,)(at 213). Trustees, agents, directors and partners are among those normally regarded as fiduciaries.

45. While the categories of fiduciaries are never closed, there is, I think, a reluctance to extend their boundaries beyond the traditional categories because to do so would effectively impose super-added duties of utmost good faith and complete disclosure to persons who never contracted to do so and thus potentially frustrate the ordinary workings of the commercial world. While all who enter into contracts are obliged to discharge them honestly and in good faith, it cannot be supposed, for example, that a retailer is under a positive obligation to disclose to a customer that he or she is aware that exactly the same goods can be purchased for a lower price from a nearby outlet. That would, however, be the position in law if, for example, a retailer were held to be a fiduciary.

46. Accordingly, save in the special case of where the mortgagee enters into possession of mortgaged property it is clear that the mortgagor/mortgagee relationship is not a fiduciary one: see, e.g., *Irish Life and Permanent pic v. Financial Services Ombudsman* [2011] IEHC 439,per Michael White J. Nor can it be said that there is there a general duty on a Bank to insist that customers take independent advice in relation to Bank dealings: see Bank of Ireland v. Smyth [1996] I I.L.R.M. 241, 249 and Breslin, *Banking Law* (2nd. Ed.)(at 125).

47. While all of this is true, at the same time some measure of realism must also temper this analysis. The banking system is, by its nature, a highly regulated one which, is- or, at least, ought to be- based on trust: see, e.g., *Director of Corporate Enforcement v. D 'Arcy* [2006] 2 I.R. 163, 177, *per* Kelly J. The *laissez-faire* rules which might apply in the case of the borrowing and lending on the international capital markets cannot be applied in exactly the same way in the case of the domestic mortgage market, given that these are matters which gravely affect the long term welfare of most members of the general public. The very fact that the Office of the Financial Services Ombudsman was established by the Oireachtas is itself living testimony ofthis.

48. All of this means that the engagement by a Bank with its customers in relation to the domestic mortgage market must be viewed in this light. Just as with the construction of contractual documents, it would be unrealistic to suppose that retail customers should be aware of the finer points of the law in relation to fiduciaries. Nevertheless, it is important to recall that in all four appeals, the customers dealt with representatives of ILP's "Mortgage Advice Department" and these representatives were frequently described by the Bank as "mortgage advisors" or "advisors": see*, e.g.,* the letter from ILP to the Ombudsman on 161h May 2011 in relation to the Healy appeal. The voluminous documentation accompanying these appeals are replete with references (by both customer and Bank alike) to mortgage advisors.

49. While counsel for the Bank, Mr. Murray SC, emphasised that ILP saw its role as simply giving information and not advice, this is not quite the picture which emerges from the documentation, or, again, at least, the Ombudsman- who, after all, is possessed of special skill and competence in this area - was entitled so to think. Nor does any of this necessarily involve a radical change in the law.

50. It is true that the oft-cited decision of Mocatta J. in *Schoiler v. National Westminster Bank* [1971] 2 Q.B. 719 is regarded as authority for the proposition that a Bank is under no duty to give advice to its clients. But even that case needs to be viewed in its proper context. That was a case where a Guernsey-based Bank transferred Malaysian dollar denominated dividends to the United Kingdom for encashment without reference to the plaintiff or her advisers because they did not have the requisite foreign exchange facilities to change Malaysian dollars. The plaintiff, a Danish non-resident, found that these proceeds then suffered United Kingdom

tax by reason of that transfer, even though this would not have occurred had the funds not been so transferred.

51. It is important to stress that this was an action for negligence and breach of contract, which, despite the judge's evident sympathy for the plaintiff, ultimately failed. Critically, however, the plaintiff did *not* contend that the Bank owed her any duty with regard to tax advice. Accordingly, it was in that context that Mocatta J. held that the suggestion that the bank owed the plaintiff any such duty would be placing an "impossible burden upon a Bank and would therefore be unreasonable to imply such a duty from the facts here": see [1971] 2 Q.B. 719,727. It is, however, one thing to say that a bank is not under a duty to give tax advice in relation to the rather specialist matters of the taxation of foreign dividends. It is quite another to say that a bank did not hold itself out as having given advice in relation to matters peculiarly within its own knowledge and expertise, such as the consequences of switching between its own various mortgage products.

52. Indeed, one does not have to go much further than *Hedley Byrne & Partners v. Heller & Co.* [1964] A.C. 465 to see how a bank can assume a liability for advice gratuitously given. Of course, the mere fact that a bank might evaluate, for example, the commerciality of a particular project in order to assess the credit risk does not *in itself* place the Bank under any duty of care to the customer. There are, however, a series of English cases where it has been stated that banks who take it upon themselves to advise customers can be placed under a duty of care as a result: see, *e.g., Wood v. Martins Bank* [1959] 1 Q.B. 55; V*erity v. Lloyds' Bank, The Independent Law Report,* 4th September 1995 and *Frost v. James Finlay Bank Ltd*. [2001] EWHC Ch. 404.

53. The decision in *Verity* is of some interest because there the defendant bank had produced a leaflet advising customers to ask their bank manager for advice which was "frank, professional and yours for the asking." The defendant was held liable based on this advice given in relation to a buy to let investment which failed. In the present cases ILP - with its reference to mortgage advisors and a mortgage advice centre - appears to have created something of a similar aura and expectation on behalf of customers. In these circumstances, I consider that the Ombudsman was entitled to hold that Mr. and Ms. Thomas had contacted ILP for advice as well as for information in relation to their mortgage products and that the Bank's response should be judged against that background. The Ombudsman was, moreover, entitled to find that the Bank had not given the appropriate information as to the implications of a switch.

54. For good measure I would also add that the Ombudsman was entitled to invoke Chapter 2.12 ofthe Consumer Protection Code (2006) which provides that:

> "A regulated entity must ensure that that all information it provides to a customer is clear and comprehensive and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."

55. It is true that while s. 117 of the Central Bank Act 1989 gives the Central Bank power to adopt codes, that section is silent on the legal consequences of a breach of the Code. While it is not necessary here to essay the full dimensions of the Code's precise legal import and status, it is sufficient to note that they are not entirely a species of"soft" law, i.e., purely precatory statements not susceptible oflegal enforcement. Thus, for example, in *Stepstone Mortgage Funding Ltd. v. Fitzell* [2012] IEHC 142 Laffoy J. refused to make an order for possession of a family home where the lender was not in compliance with the Code for Mortgage Arrears (20I0). These codes can certainly inform - in principle, at any rate - the thinking of regulatory authorities in assessing appropriate standards for credit institutions.

56. It follows, therefore, that the Ombudsman was entitled to think that the present case came within s. 57CI(2)(g), so that the conduct here was "otherwise improper" in the sense used in that sub-section. In other words, the Ombudsman was entitled to conclude that a retail Bank should properly alert its customers- if only in the most general of terms - of the potentially serious adverse consequences of a particular decision, especially where it seems clear where those customers were seeking advice and guidance from the Bank's mortgage advice centre and that these are standards which modem retail Banks might reasonably be expected to uphold.

57. It would, I think, have been advantageous and desirable for the Ombudsman to have spelled out precisely why the conduct was considered to be so otherwise improper in this statutory sense for all the reasons set out by Finnegan J. in *J.& E. Davy v. Financial Services Ombudsman* [2010] IESC 30, [2010] 3 I.R.324, 370. But just as in *J & E Davy*, I consider that the reasons given by the Ombudsman are perfectly clear and obvious in the context of the elaborate reasoning contained in the decision and ILP cannot be said to have been prejudiced by this omission

58. For all of these reasons, I would dismiss the appeal in the Thomas case.

The Healy Case
59. Finally, it remains to consider the Healy case. They too elected to break their fixed rate mortgage in January, 2009 following discussions by telephone with the Bank's call centre. While ILP could not source a copy of these telephone conversations, Ms. Healy's letter of gth January, 2009, stated that she understood that they "will not incur any penalty in doing so". This in tum might be thought to suggest that the Healys had gleaned this information from discussions with Bank officials where, clearly, they were seeking to make the best decision as was in their immediate financial interests.

60. The Ombudsman observed that:

> "In the context of the apparent reason for [the Healys] contacting the Bank in early 2009, I consider that there was an onus on the Bank to highlight that they were losing the tracker rate option by availing of the fixed interest rate break."

61. For my part, applying the *Hummingbird* test, I am of the view that the Ombudsman was entitled to reach these findings and draw these inferences, not least given that the whole context of the Healys approaching ILP was to seek advice and guidance as to what was best for them and to reduce their monthly outgoings. The Onmbudsman was also clearly entitled to take the view that the applicable special condition (in this instance, special condition 6) did not sufficiently spell out the consequences of exiting early from the fixed rate condition.

62. The Ombudsman, however, also went to say that:-

> "Moreover, the Bank refers to a systems problem which quoted ...no fee for breaking from the fixed rate interest early. While there is no evidence that the Bank or its staff members were acting in bad faith in that regard, the system problem is of some concern as it appears to have resulted in incorrect information being provided to [the Healys] at the time, albeit resulting in no breakage fee being applied....Indeed, I consider that incorrect information regarding the breakage fee

could have had the effect of distorting the alleged positive reasons for breaking from the fixed interest rate early."

63. In my view, however, the reasoning in this passage is unsustainable. While the Ombudsman was entitled to be critical of systems failures at the Bank, he was not entitled to make these observations in their present form. The gravamen of the objection was that the Healys were not *informed* ofthe consequences of exiting early.lfthe Healys had been so informed, then the fact that they were charged a break fee or not was really immaterial once they had been made aware of the critical long term consequences of so doing. Albeit not as explicit as the unsustainable findings on this point which were made in the Foley appeal, there are nonetheless undoubtedly shades here of a suggestion that the Bank tacitly encouraged the Healys to exit the tracker mortgage.

64. While this matter has given me some anxiety, in the end I have concluded that these observations are not central to the conclusions in the same way as they were in both the Foley and Lavery-Whelan appeals. In this regard, therefore, I propose to adopt the approach taken by Hanna J. in *Caledonian Life v. Financial Services Ombudsman* [2010] IEHC 384. I will, therefore, uphold the finding, albeit for somewhat different and more confined reasons than those actually given by the Ombudsman. In this regard I propose, therefore, to direct that the Ombudsman's finding be amended by removing the passage in question.

Conclusions
65. In summary, therefore, I have concluded as follows:-

A. In Foley appeal I propose to make an order pursuant to s. 57CL(2)(b) of the Act of 1942 setting aside the findings and direction of the Ombudsman, together with an order pursuant to s. 57CL(2)(c) remitting the finding to the Ombudsman.

B. I propose to make an identical order in the Lavery and Lavery-Whelan appeal.

C. In the Thomas appeal I propose to make an order pursuant to s.57CL(2)(a) affirming the finding of the Financial Services Ombudsman.

D. In the Healy appeal I propose to make an order pursuant to s. 57CL(2)(a) affirming the finding of the Financial Services Ombudsman, but I will also direct that certain passages (the nature of which I will discuss with counsel) stand edited and removed from the decision of 9th August, 2011.