

McCann FitzGerald
Solicitors
Riverside One
Sir John Rogerson's Quay
Dublin 2

Tel: +353-1-829 0000
Fax: +353-1-829 0010
email: inquiries@mccannfitzgerald.ie
Dx 31 Dublin
www.mccannfitzgerald.ie

McCann FitzGerald

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your ref

date 22 November 2006

Ms Mary Keenan
Better Regulation Unit
Department of the Taoiseach
Government Buildings
Dublin 2

BY EMAIL
to
betterregulation@taoiseach.gov.ie

Regulatory appeals consultation – statutory appeals – standard of review

Dear Ms Keenan

I refer to McCann FitzGerald's submission to the Appeals and Penalties sub-group of the Better Regulation Group, dated 31 October 2006.

The firm has since received a copy of the decision of Mr Justice Finnegan, President of the High Court, in *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323. I include (as an appendix to this letter) a note of that decision, taken from the firm's know how system, for the information of the sub-group. It seems to me that this decision is significant to the work of the sub-group as it addresses the ongoing uncertainty regarding the standard that it is appropriate to apply in a statutory appeal as compared with an application for judicial review.

To date in statutory appeals, the courts have in each case sought to identify the appropriate standard by reference to the specific statutory provisions. Significantly, in *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman*, Finnegan P has held that a default standard should be applied, unless something in the particular statute under which the appeal is being taken requires otherwise. It will be seen (below) that that default standard is the standard which is expressed in *Orange Communications Ltd v Director of Telecommunications Regulation* [2000] 4 IR 159, namely that:

- (a) the appellant must establish that, as a matter of probability, taking the adjudicative process as a whole, the decision that had been reached was vitiated by a serious and significant error or by a series of such errors, and
- (b) in applying that test, the High Court should have regard to the degree of expertise and specialist knowledge of the deciding body.

Unless the decision in *Ulster Bank Investment Funds* is overruled or modified by the Supreme Court (and in this regard we note that an appeal is being taken), this approach clarifies much of the

Ronan Molony, Richard Rice, David Clarke, Gerald FitzGerald, Daire Hogan, Guy French, Henry Lappin, Colin Keane, William Earley, Petra McDonnell, Timothy Bouchier-Hayes, Helen Collins, Mark Pearson, Michael O'Reilly, Lonan McDowell, Michael O'Brien, Julian Conlon, Damian Collins, John Cronin, Vivienne Bradley, Catherine Deane, Paul Heffernan, Terence McCrann, Muneel Wallis, Roderick Bourke, Grace Smith, Ambrose Loughlin, Niall Powderly, Kevin Kelly, Hilary Marren, Eamonn O'Hanrahan, Roy Parker, Patricia Lawless, Barry Devereux, Geraldine Hickey, Helen Kilroy, Judith Lawless, James Murphy, David Lydon, David Byers, Sean Barton, Colm Fanning, Paul Lavery, Yvonne McNamara, Susan O'Halloran, Julie Quin, Susan O'Connell, Emma Crowley, Alan Fuller, Claire Lenny, Maureen Dolan, Michelle Doyle, Hugh Beattie, Sheila Gibbons, Fergus Gillen, Valene Lawlor, Mark White, Maire O'Connor, Rosaleen Byrne, Eamon de Valera, Joe Fay, Ben Gaffikin, Donal O'Raghallaigh, Karyn Harty, Philip Andrews, Barrett Chapman
Consultants: Max W. Abrahamson, Fergus Armstrong, Robert Burke, Jane Marshall, Brian McLoughlin, Peter Osborne, Michael Ryan (FCA).

Belfast: North South Legal Alliance with L'Estrange & Brett, Arnott House, 12-16 Bridge Street, Belfast BT1 1LS, Tel: +44-28-9023 0426, Fax: +44-28-9024 6396.
Brussels: Avenue de Cortenberg 89, 89 Kortenberglaan, 1000 Brussels, Tel: +32-2-740 0370, Fax: +32-2-740 0371.
London: St. Michael's House, 1 George Yard, Lombard Street, London EC3V 9DF, Tel: +44-20-7621 1000, Fax: +44-20-7621 9000.



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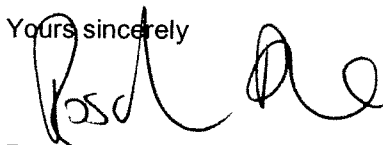
uncertainty that has existed to date regarding the appropriate standard in a statutory appeal in respect of which there is not yet a precedent decision of the courts.

On a related issue, we understand that the Minister for Justice, Equality and Law Reform is currently considering proposed amendments to the Rules of the Superior Courts which are intended to establish a generic procedure for statutory appeals to the High Court.

Please revert to me if McCann FitzGerald can provide further assistance to the sub-group in its important work.

Kind regards

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rosaleen Byrne', written over the typed name.

Rosaleen Byrne
McCann FitzGerald

Appendix

Administrative Law

Statutory appeal – Financial Services Ombudsman – investigation or adjudication – appeal by complainant or regulated financial service provider – High Court – question of law – scope of appeal – contrasts with judicial review – curial deference – appropriate standard to be applied in appeal – evidence – admission of additional evidence – s57CL and s57CM Central Bank Act 1942 (inserted by s16 Central Bank and Financial Services Authority of Ireland Act 2004)

Ulster Bank Investment Funds Ltd v Financial Services Ombudsman (McCarren and Ors, notice parties) [2006] IEHC 323: High Court (Finnegan P): 1 November 2006: Pursuant to s57CL Central Bank Act 1942, UB appealed to HCt a decision of the Financial Services Ombudsman ("FSO"). A preliminary issue arose as to the proper scope of that appeal. **Held**, determining the preliminary issue, that (1) it was established that, in a statutory appeal, the provisions of each statute conferring that right of appeal had to be considered in detail, and it would not be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the Oireachtas must have intended that HCt would have powers in addition to those already enjoyed at common law, *Dunne v Minister for Fisheries and Forestry* [1984] IR 230 considered; (2) typically, in a full appeal on the merits, the deciding body would not be a party while, typically, in a judicial review, the deciding body would be a party or at least a notice party. In providing that an appeal might be taken under s57CL of the 1942 Act and that under s57CL(2), in any particular case, the FSO could be a party to it, the Oireachtas was indicating, albeit not strongly, that the procedure was intended to be more akin to a review than to a full appeal on the merits. Further, it seemed from s57CM(4) that an appeal to HCt was not confined to one on a question of law; (3) it was desirable that there be consistency in the standard of review that HCt applied on statutory appeals. Accordingly, unless the words of a particular statute were to mandate otherwise, the appropriate standard of review was that enunciated in *Orange Communications Ltd v Director of Telecommunications Regulation* [2000] 4 IR 159, namely that (a) the appellant must establish that, as a matter of probability, taking the adjudicative process as a whole, the decision that had been reached was vitiated by a serious and significant error or by a series of such errors, and (b) in applying that test, HCt should have regard to the degree of expertise and specialist knowledge of the deciding body; (4) there was nothing in s57CL of the 1942 Act to mandate the taking of a different approach, *Orange Communications Ltd* applied; and (5) having regard to the standard of review under s57CL, the appeal should proceed on the basis only of the materials that were before the FSO. However, the court had a discretion to admit further evidence in any particular case if the court were to be satisfied that it was necessary or appropriate to do so, in the interests of justice. When considering whether to admit additional evidence, the interests of justice required that regard should be had to the nature of the deciding body the decision of which was being appealed, because it may be that, for reasons of the relative informality of the proceedings in the deciding body, an issue could properly arise on appeal which could not have arisen at the hearing, such as the extent of the actual expertise of the relevant deciding body. *Obiter*: the appropriate deferential standard for the purposes of the curial deference that a court should display was not that applied in *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 ('so manifestly unreasonable as to be contrary to common sense'), and so *Keegan* would be distinguished.