

The Financial Services Appeal Tribunal¹

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Establishment and constitution

Section 28 of the Central Bank and Financial Services Authority of Ireland Act 2003 inserted a new Part VIIA after part VII of the Central Bank Act 1942; that new Part comprises 52 sections and a new schedule, Schedule 5. According to Section 57B the purpose of Part VIIA was to establish the Irish Financial Services Tribunal (the “Tribunal”) to hear appeals and to exercise any other jurisdiction conferred by law, and to enable proceedings before the Tribunal to be determined in an informal and expeditious manner. The jurisdiction of the Tribunal extends to any “appealable decision”, that is, a decision of the Central Bank made under a designated enactment or designated statutory instrument that has the effect of imposing a sanction or liability of a kind specified in an order made by the Government (Section 57A (2))². The Tribunal has issued thirteen decisions on appeals since 2007³.

The Tribunal consists of a Chairman, a Deputy Chairman and up to five lay members⁴; a person can only be appointed to the position of Chairman or Deputy Chairman if he/she is a former judge of the Supreme Court or the High Court, or a barrister or solicitor of not less than 7 years standing. Lay members may only be appointed if the President (acting on the advice of the Government) is satisfied that the person has special knowledge or skill in relation to the provision of financial services (Section 57E). Temporary appointments for no more than a year in duration are permitted by Section 57F. Schedule 5 to the Central Bank Act 1942, inserted by Section 33 of the Central Bank and Financial

¹ The Tribunal is located at Frederick House, South Frederick Street, Dublin 2.

² It appears that no order, either by way of commencement, amendment or statutory instrument, has been made by the Government under section 57A (2) of the Act of 2003. See: <http://www.irishstatutebook.ie/eli/2003/act/12/section/28/enacted/en/index.html>.

³ Westraven Finance Limited t/a Brinkspeed –v- Irish Financial Services Regulatory Authority, 13 August 2007; Tony Cottrell t/a Ferrybank Financial Services –v- Irish Financial Services Regulatory Authority, 28 April 2009; “X” –v- Irish Financial Services Regulatory Authority, 27 August 2009; Quinn Employees Committee –v- Irish Financial Services Regulatory Authority and Quinn Insurance, 3 September 2010; Mr. “Y” t/a “Y” Financial Services Limited –v- Central Bank of Ireland, 16 December 2011; Claremont Money Transfer Limited –v- Central Bank of Ireland, 14 September 2012; Cearbhaill O’Dalaigh v. Central Bank of Ireland, 22 October 2014; 13 November 2014; Maynooth Credit Union v. The Central Bank of Ireland, 13 November 2014; Colette Murphy v. Central Bank of Ireland, 23 July 2015; Colette Murphy v. Central Bank of Ireland, 3 November 2015; Playtech PLC v. Central Bank of Ireland, 8 December 2015; Markets Limited v. Central Bank of Ireland, 8 December 2015; Teddy Sagi v. Central Bank of Ireland, 8 December 2015; Brickington Limited v. Central Bank of Ireland, 8 December 2015. All these decisions are available on the website of the Tribunal at: www.ifsat.ie

⁴ The Honourable John D. Cooke, Chairperson; Inge Clissman S.C., Deputy Chairperson; Paul Brennan; Geraldine Clarke; Helen Collins; Teresa Pilkington S.C.; Conor Power B.L.

Services Authority of Ireland Act 2003, also contains provisions concerning appointment and tenure of office by members of the Tribunal: a member is appointed of 5 years and may be reappointed (paragraph 2), must take an oath of office on appointment (paragraph 3), and enjoys the same protection and immunities as a Judge of the High Court (paragraph 4). Paragraphs 6, 7 & 8 deal with vacancies in office and with the completion of unfinished matters by members whose term of office has expired. Paragraph 12 deals with the disclosure of conflicts of interest by members.

For the purpose of hearing an appeal, Section 57H states that the Tribunal is constituted by three members one of whom must be either the Chairperson or Deputy Chairperson, and that person presides at the hearing; where there are sufficient members of the Tribunal, it can be separately constituted to hear more than one appeal at the same time. Section 57Y permits the Chairman to reconstitute the Tribunal if a member becomes incapacitated or unavailable, but only if the parties agree. The Chairperson is responsible for directing the business of the Tribunal, and is assisted by a Registrar and such other staff as may be necessary (Sections 57I, 57J & 57K). The Tribunal is empowered to make Rules of Procedure (Section 57AI) and in 2008 it adopted the current rules - the *Irish Financial Services Appeals Tribunal Rules 2008*⁵ (the “Rules”).

The Tribunal has its own seal (Section 57AP), and judicial notice is taken of both the seal and the signatures of the Chairperson, Deputy Chairperson and Registrar (Sections 57AP and 58AR). The Chairperson is responsible for the preparation of an annual report at the end of each financial year (Section 57AW) and the Registrar is charged with the keeping of proper accounting records for the Tribunal (Section 57AY), as well as being responsible for the records of the Tribunal and the establishment and management of the Register (Rule 15). The costs of running the Tribunal are met by the Central Bank on the basis of an estimate prepared by the Chairperson in advance of the forthcoming financial year, which must be approved by the Minister before the Bank is obliged to pay (Section 57AX).

Hearing and determination of appeals

An “affected person” – that is, a person whose interests are directly or indirectly affected by an appealable decision (Section 57A)– may appeal to the Tribunal against a decision of the Central Bank. The interpretation of “affected person” arose for consideration in *Quinn Employees Committee –v- Irish Financial Services Regulatory Authority and Quinn Insurance Limited*⁶. In March 2010 the regulator had directed Quinn Insurance to avoid taking on new business or renew existing business in the UK. Some weeks later Dara O’Flynn and Davis O’Donnell, claiming to be representatives of the Quinn Employees Committee, lodged a “purported “ Notice of Appeal against that decision. The Tribunal decided that Quinn Insurance was an affected person within the meaning of Section 57A, and ordered that it be joined as a respondent to the “purported “ appeal. The appeal

⁵ S.I. 224 of 2008

⁶ 3 September 2010

was withdrawn in June 2010, without the Tribunal deciding whether the applicants were “affected persons” but the language in report of the case – which refers twice to the “purported” appeal - suggests that it had its doubts.

Assuming there is a legitimate affected person, Section 57L designates the Central Bank as the respondent in all appeals, which must be lodged within 28 days of notification of the decision to the affected person, and be accompanied by a fee (€5,000 –Rule 5[1]). If it is necessary, the Tribunal can decide whether the interests of a person are affected by a decision of the Central Bank, and Section 57M states that if it decides that a person’s interests are affected, that decision is conclusive and no appeal can be taken to the High Court. Conversely, if the Tribunal decides that the interests of a person are not affected, that person may appeal the decision to the High Court. If the Central Bank makes an appealable decision, the affected person may request a statement setting out the reasons for the decision; Section 57N requires the Central Bank to respond within 28 days with a statement highlighting the findings on material questions of fact and evidence, its understanding of the applicable law, and its reasoning processes in arriving at the decision.

Section 57 O permits the Central Bank to refuse to provide reasons for a decision if it believes: (1)(a) that the person is not entitled to be given a statement; (b) the request for a statement, in connection with a decision the terms of which were recorded in writing and delivered to the claimant, was not made within 28 days; or (c) the request was not made within a reasonable time. However section 57P allows the Tribunal, on application by the affected person, to order that the person was entitled to be given reasons, in a case falling under Section 57 O(1)(a), and to order that a request for reasons was made within a reasonable time, within the meaning of Section 57 O(1)(c). An appeal against a decision of the Central Bank does not suspend the effectiveness of the decision, or the entitlement of the Bank to take measures to implement it; but it is open to the appellant to apply for a stay pending the determination of the appeal, and Sections 57R and 57S address the variation and revocation of staying orders. However, the Central Bank must be afforded the opportunity to be heard on any application for a stay, and both parties must be heard on any variation or revocation.

The Tribunal may determine its own procedure, subject to Part VIIA and the Rules; but according to Section 57V

- It is not bound by the rules of evidence and may inform itself on any matter as it thinks fit, subject to the rules of natural justice
- It is not limited to considering only the evidence or grounds on which the Central Bank based its decision, or applying any sanction the Bank imposed in a decision
- It is required to act with as little formality as the circumstances of the case permit, without regard to technicalities or legal form, but according to equity, good conscience and the substantial merits of the case
- It is required to act as expeditiously as is practicable, and to require evidence to be presented in writing, to decide the issues on which it will

hear oral evidence, and to limit the time within which presentations of the parties can be made.

A party may represent him/herself or be represented by an agent⁷, and the while this obviously includes a barrister or solicitor, others can perform that role: in "*X*" -v- *The Financial Services Regulatory Authority*⁸ the applicant was represented by chartered accountants. If necessary the Tribunal may arrange representation for an incapacitated person (Section 57U).

The hearing of an appeal will be held in public unless the parties agree to hold it in private; Section 57W allows the Tribunal to decide that the hearing may be conducted wholly or partly in private and to prohibit the disclosure of any matter that may identify a person appearing at the hearing. In "*X*" -v- *The Financial Services Regulatory Authority* the respondent refused the application of the Appellant for a moneylender's licence because he had been convicted on four counts of indecent assault more than twenty years previously and was not therefore a fit and proper person to carry on the business of moneylending. The Tribunal had to decide whether the appeal should be heard in private. It noted from the certificate of conviction that the Trial Judge had expressly prohibited publication of the identities of any of the parties involved (presumably to protect the innocent victim) and it accepted the contention that irrespective of the outcome of the appeal, publication of the conviction of "*X*" would be extremely damaging to his business, stating that "...it is doubtful whether it could survive such disclosure." Accordingly it ordered that the hearing be held in private. Once the decision was made to hear the matter in private, the Tribunal had to consider whether the prior conviction precluded the applicant from being considered a fit and proper person to carry out the business of moneylending. It noted that Section 93 of the Consumer Credit Act allowed the Central Bank to refuse an application where the applicant had been convicted in the past five years of an offence of carrying on business without a licence; if it was possible to procure a licence in cases where there had been a conviction more than five years previously, then there had to be a doubt whether a conviction for any other offence (whether inside or outside the five year period), could be a ground for refusal. But as the applicant expressly accepted that any significant danger to the public should be taken into account when considering his application, the Tribunal then had regard to a psychiatric report and concluded that the applicant was unlikely to have unsupervised access to the children of clients. It remitted the matter for reconsideration by the regulator.

At any stage of the proceedings the Tribunal can remit a decision to the regulator for its reconsideration, and if it does so Section 57X requires the Central Bank to reconsider a decision and either affirm or vary the decision, or substitute a new decision in its place. Where a decision is varied or substituted an appellant may proceed with the appeal against the decision as varied or substituted or

⁷ In *Collette Murphy -v- Central Bank*, 23 July 2015, the appellant represented herself, but was represented by a solicitor in *Collette Murphy -v- Central Bank*, 3 November 2015. In both instances the proceedings were dismissed because the appellant had failed to identify an "appealable decision".

⁸ 27 August 2009.

withdraw the appeal. Apart from the “X” case, the Tribunal has remitted four other decisions for further consideration.

In 2011 it remitted for reconsideration the case of *Mr. “Y” trading as “Y” Financial Services –v- Central Bank*⁹. The applicant had applied for registration as an insurance intermediary and as a mortgage intermediary under the European Communities (Insurance Mediation) Regulations 2005 and the Consumer Credit Act 1995 respectively. His application had been made very shortly after he had been dismissed by his employer for a number of compliance transgressions, but he had not referred to this in response to questionnaires that sought information on previous employment, including dismissal. Once it became apparent to the regulator that he had been dismissed by his former employer (a fact that came to light when a reference was provided in respect of one of his applications) the response was to cancel and revoke his various registrations, *inter alia* because he was not a fit and proper person and because the registration had been obtained by means of a false and misleading representation. Despite the failure to be completely open and transparent with the regulator, the Tribunal found that there was some lack of clarity and consistence in the various application forms that Mr. “Y” had completed, leaving an applicant in a situation where the obligation to be frank was not fully appreciated, and that it was inappropriate to have included among the grounds for revocation a road traffic conviction, when there was no reference in the booklet “Fit and Proper Requirements” to motoring offences under the heading “Convictions” – the offences mentioned were all connected with dishonesty or fraud. The Tribunal further observed that the Central Bank had not checked the references proffered by the applicant until after he had been registered and authorized. Finally, the Tribunal noted that no consideration had been given to making the various registrations subject to conditions: a director of a Life company had testified that he had no concerns about the activities of Mr. “Y” as a tied agent and was satisfied with the additional mechanisms put in place to provide additional supervision once he had been contacted by the Central Bank.

*Claremont Money Transmission Limited -v- Central Bank of Ireland*¹⁰ was a case involving the rejection of the appellant’s application for authorization of a payment services business, a sector that had not been regulated before the implementation of Section 29 of the Central Bank Act 1997 and which was subject to greater regulation on the passage of the European Communities (Payment Services) Regulations, 2009. However some confusion arose concerning the application of transitional measures to accommodate persons who had been engaged in business before the Regulations were adopted, and whether a concession for Small Payment Institutions had been implemented by the Central Bank. The Central Bank responded to written observations made on behalf of the applicant by offering to remit the matter to the Bank on terms set out in the letter, which was not accepted by the applicant, but that outcome was agreed by the applicant following a hearing by the Tribunal, provided it did not prejudice the right of the applicant to apply to the High Court against any refusal.

⁹ 16 December 2011

¹⁰ 14 September 2012

In three recent cases the Tribunal allowed the appeals and remitted the decisions of the Central Bank for reconsideration on ground of error in the Central Bank's decision-making process¹¹, without identifying what the errors were; in each of the cases the Tribunal ordered the actions to be heard in private. This is regrettable because practitioners, and the public, would have benefitted from an open discussion of the errors in the decision making process, which can best be described as being opaque.

Section 57Z states the options open to the Tribunal when determining an appeal: it can affirm the decision, vary the decision, or substitute for the decision any decision that the Central Bank could lawfully have taken. It can set aside the decision and remit the matter for reconsideration by the Central Bank, or it can dismiss the appeal if the appellant has failed to attend a hearing. The Tribunal may reserve its decision (Section 57AB) and is required to give reasons for its decision within 28 days of deciding. In the absence of unanimity any matter will be determined by the majority – except where a question of law arises, when the presiding member alone decides (Section 57AA). The Tribunal may award costs in respect of proceedings before it and Section 57AH makes it clear that “costs” includes the costs of or incidental to the proceedings giving rise to the appeal; this suggests that an appellant can recover its/his costs of representation at an inquiry held by the Central Bank that resulted in a sanctioning decision.

Section 57AC deals with the temporal effect of a determination of the Tribunal: a decision of the Tribunal takes effect on the date on which it is given; if the determination varies, or is made in substitution for, a decision of the Central Bank it is taken to be effective from the date of the original decision of the Central Bank. It is also open to the Tribunal to make amendments to the proceedings at any stage, and Section 57AD also states that while any failure to abide by the Act or the Rules is to be treated as an irregularity that does not nullify the proceedings, the Tribunal can wholly or partly set aside the proceedings.

In terms of the hearing itself, the Tribunal has extensive powers concerning witnesses, and Section 57AF enables it to call witnesses of its own volition, to examine or cross examine a witness on oath, or require a witness to answer questions; it can endeavor to persuade persons to attend proceedings voluntarily but can issue - through the Registrar – a summons to compel attendance. It is an *offence* not to comply with a summons, punishable on summary conviction by a fine not exceeding €2,000 or a term of imprisonment of not more than 3 months, or both. Rule 16 of the 2008 Rules also deals with witness summons and the form of summons is attached to the Rules.

Rule 4 describes how an appeal commences: within 28 days of the notification of the decision of the Central Bank the affected person must submit to the Registrar a Notice of Appeal in the form attached to the Rule, and the notice must state the grounds of appeal in concise form, and how the applicant is an “affected person”.

¹¹ Markets Limited v. Central Bank of Ireland, 8 December 2015; Teddy Sagi v. Central Bank of Ireland, 8 December 2015; Brickington Limited v. Central Bank of Ireland, 8 December 2015.

In its Response the Central Bank – which is always the Respondent - must state whether it accepts that its decision was an “appealable decision” and whether the applicant was an affected person, as well as its reply to the claims of the applicant concerning the circumstances in which the decision was made. Rule 5 states that a notice of appeal must be accompanied by an Appeal Fee of €5,000 in the form of a banker’s draft, but in cases of hardship the Tribunal may waive the fee: *In Tony Cottrell, trading as Ferrybank Financial Services –v- Irish Financial Services Authority*¹² the fee due from the applicant was waived, but the applicant did not comply with the directions of the Tribunal relating to the preparation and delivery of witness statements. When counsel for the applicant sought to make legal representations on the basis of factual claims that had not been substantiated in witness statements, which the Tribunal was not prepared to accept, the applicant withdrew from the proceedings which were then struck out for want of prosecution, and costs of €20,000 were awarded against the applicant.

In *Maynooth Credit Union –v- Central Bank*¹³ the appellant lodged an appeal against an unspecified decision of the Central Bank, and its solicitors lodged the requisite Appeal Fee of €5,000; various extensions of time were granted because of the voluminous documentation involved. The Appeal was listed for hearing in September 2014, but the day before the scheduled date the parties informed the Tribunal that the appeal was withdrawn and on consent the appeal was dismissed and no order was made for costs. The appellant’s solicitor then applied for the repayment of the Appeal Fee of €5,000. The Tribunal examined the Rules of the Tribunal, and Rule 5 in particular, and noted that the Tribunal could waive the payment of all or part of the Fee if an appellant argued that it would cause serious financial hardship, and that it could also direct the refund, in whole or in part, of the Appeal Fee “...where the proceedings terminate in a manner favourable to the appellant”. Clearly, the proceedings had not terminated in appellant’s favour, but the question was whether the proceedings had been terminated by the Tribunal? The Tribunal gave a purposive reading of the Rules. It concluded that “...the Authorities were anxious to ensure that in certain circumstances that IFSAT could recover the costs of proceedings brought before it....but to forfeit a fee when no such costs had been incurred it would appear to be a manifest injustice”. The Tribunal directed the repayment of the entire Fee.

Among its options as to how an appeal should proceed Rule 4(12) enables the Tribunal to direct that a directions hearing be held before the presiding member. Rule 6 describes the purpose of the directions hearing as to ensure that appeals are progressed in a manner that is just, expeditious and likely to minimize costs; this can be achieved by narrowing the issues to be decided as concisely and clearly as possible, by ensuring that all materials be exchanged between the parties and all enquires be made, and by establishing a full or partial timetable for the hearing of the appeal. The Tribunal can schedule a further hearing at anytime after the directions hearing, and Rule 7(2) enables it to do so where it becomes evident that an issue or issues in the appeal have been determined or

¹² 28 April 2009.

¹³ 13 November 2014.

decided in a previous decision of the Tribunal or of a court. If the directions hearing requires any discovery of documents to be made, Rule 8 states this will take place according to the manner prescribed in the Rules of the Superior Courts. Part VIIA of the Act makes provision for a variety of applications to the Tribunal, for example under Section 57M(1) to establish that the interests of an applicant are, or are likely to be, affected by a decision of the Central Bank, or under Section 57W (3) and (4), to determine whether a hearing should be in private. Rule 12 identifies 12 such applications and specifies how such applications should be made, using a form of application annexed to the Rules.

Rule 13 requires documents to be delivered by post to the Registrar at the Tribunal's offices at: First Floor, Frederick House, 19 South Frederick Street, Dublin 2; sittings of the Tribunal are also conducted at this address (Rule 14). Delivery by hand can be arranged with the Registrar, and Rule 13 also allows for delivery by fax or by electronic mail.

Rule 22 enables the Tribunal to forgive or disregard non-compliance with any requirement of the Rules, if it considers it reasonable and just to do so, and the Tribunal may enlarge or abridge the time appointed by the Rules any particular step in the proceedings (Rule 23). Finally, Rule 25 provides for contemporaneous electronic communication to enable all parties to be present at a hearing or sitting and such linking together of the parties is deemed to constitute a hearing or sitting of the Tribunal.

References and Appeals to the High Court

Chapter 4 of Part VIIIA allows the Tribunal, either of its own volition or on the application of either party, to refer a question of law for the opinion of the High Court, and Section 57AJ precludes the Tribunal from making a decision in the matter that is inconsistent with the decision of the High Court. Section 57AK allows a party to appeal to the High Court against a decision of the Tribunal, but the members of the Tribunal cannot be made a party to this further appeal. The High Court may make such orders as it sees fit including an order affirming or setting aside the decision of the Tribunal, or an order remitting the case to be heard and decided again by the Tribunal. An appeal to the Supreme Court is envisaged by Section 57AL, but only in respect of a determination by the High Court of a question of law. Finally, the Tribunal is empowered to report to the High Court a range of behaviors listed in Section 57AN. These include failure to obey a witness summons, refusing to be sworn, threatening or abusing personnel of the tribunal or barristers, solicitors or witnesses, and interruption or obstruction of the Tribunal. The High Court can order compliance with the Act and if the person concerned fails to comply the matter can be dealt with as if it were a contempt of court.

There is no record to date of any applications to the High Court under Chapter 4 of Part VIIA.