BANKING OMBUDSMAN

GREGORY K BURTON

Barrister-at-Law, Sydney

Graham has made wrong one of my predictions today, in that I said to him I thought, when we were competing with stamp duties, we would have about three people and a dog here. And I nearly had a wager with him. I am very pleased to see we have many more than that. His appointment in itself made wrong one of the predictions in an article I wrote on the Banking Ombudsman, just when the scheme was coming into existence, that it would be a place which would provide a secure home for experienced banking and finance lawyers about to retire. And Graham has brought a perspective from administrative law which has some impact on one of the matters I am going to talk about.

What I am going to talk about could be summarised under several headings of comment.

First, there are two areas of disagreement which I have with Graham over the way he reads his Terms of Reference. And while these may be lawyers' points, it may be one day they become real points. One would hope, given the nature of the scheme, that they will not, but nevertheless there is always that possibility. One is over the ability of a bank to challenge his decisions on jurisdiction, and indeed perhaps to challenge his award.

The other, and I think this is one which may become contentious and make the lawyers' points real points, is the way that Graham reads the fairness test: that it is co-ordinate with applying the rules of law and banking practice. Essentially, in my view the rules of law are the ultimate applicable test under the Terms of Reference.

Secondly, there are two areas of concern which I have in relation to the Ombudsman scheme. One is related to use of evidence in any subsequent court proceedings, and this is a concern which is common to many alternative dispute resolution schemes. The other is the possible conflict of roles within the Ombudsman's function between mediation and arbitration.

Finally, I have some general comments and some queries, some of which Graham may wish to answer, which are really points of information.

Some of these matters I have actually dealt with elsewhere, and I can do the advertisement for the *Journal of Banking and Finance Law and Practice* at the same time which is something I am always asked to do while I am here! I put on the table out at the front in amongst all the IBC publications some brochures for the Journal and some copies of Volume 1 No 1, which also happens to contain the article I wrote on the Banking Ombudsman. It may be that Law Book Company gave me that issue because

there are more of them to remainder than any of the others, but some of what I am saying is developed in more detail in that article.

If I could turn to the first area of disagreement which Graham has raised in his paper: as I understand it, Graham has been saying that there is a co-ordinate test: one looks at banking practice, one looks at the applicable rules of law, and one looks at what is fair - whatever that means - and it seems to be what is fair in the Ombudsman's opinion. I disagree with that as a test and if I could just mention the reason that I do, very briefly, which I have developed more elsewhere. If one looks at paragraph 15 in the Terms of Reference, one sees that there is a provision there which says: "In making any recommendation or award under these Terms of Reference, the Ombudsman shall do so by reference to what is in his opinion fair in all the circumstances, and" - then there are two sub-paragraphs - "shall observe any applicable rule of law or relevant judicial authority, and shall have regard to general principles of good banking practice".

If push ever came to shove on this issue it would be my view that a court would say that "shall" could be seen as mandatory in that situation and that, while applicable rule of law and banking practice are given a co-ordinate status between each other, in fact the way the courts have used banking practice is within, and to develop, applicable rules of law and that both of those terms would be seen as governing the use of the term "what is fair". If one has to construe the Terms of Reference one day as a contractual document, one would presumably apply ordinary principles of interpretation - it is a contract between the banks.

Terms of Reference paragraph 18 says: "The Ombudsman shall have no power to make a recommendation or award in respect of a dispute to the extent that it relates to a practice or policy of a bank which does not itself give rise to a breach of any obligation or duty owed by the bank to the applicant". So again we have an emphasis on not making awards unless there is a breach of any obligation or duty. It tends to give supremacy again to the applicable rule of law.

When we look at what is excluded from the Ombudsman's jurisdiction, he cannot look at commercially based decisions unless they involve "maladministration". When one looks at the definition of "maladministration" in paragraph 31(a), one sees that it says: "'maladministration' means an act or omission contrary to or not in accordance with a duty of care owed at law or pursuant to the terms express or implied of the contract between the bank and the disputant" - so again there is an emphasis on the applicable rule of law. Now again, push may never come to shove, but if the shove for "fairness" is strong enough then the push in the opposite direction one day may come. And the use of those terms, I would suggest, tends to give supremacy to applying the law.

One also sees that in the way that "fair" has been interpreted in some of the consumer claims legislation to relate to the remedy rather than to the application of the principles. And there is also a philosophical problem of how a privately organised body such as the Ombudsman can make decisions other than on what is according to the law because, presumably, if one is applying these rulings in a society where we operate on the rule of law, unless there is some mandate from the law makers to allow you to make a decision that is fair (that is, discretionary), one must work within the ambit of the system and one must therefore, under the rule of law, equate what is fair to what is the law no matter what one may think on an idiosyncratic basis. I do not need to quote you the authority for that - probably Mr Justice Deane in **Muschinski v Dodds** is a good example.

Now that impacts on the other area of disagreement that I have which is whether the Ombudsman's decisions on jurisdiction can be challenged or not, and whether in fact the Ombudsman's decisions in general can be challenged - whether they are open to

review. I agree with Graham that what is essentially involved here is a contract between banks. But what we also have is a curious hybrid. In one sense the Ombudsman is a mediator, a negotiator. In another sense he is an inquisitor. In another sense he is like a commercial arbitrator. In another sense he is like a domestic arbitral tribunal in a club. The question then arises, what is he doing? Is he acting as an expert or a referee? Is he acting as an arbitrator? Or is he acting as a domestic tribunal? Again, I have developed this elsewhere, but if one looks at the nature of what he does overall, at the end of the day there is an arbitral function and that arbitral function involves use of powers to investigate and obtain information, and make a decision on pre-existing rights.

It seems to me that, in that situation, particularly where those rights can impact on what the courts have chosen to call "legitimate expectations", the duty of procedural fairness and the other duties that lead to judicial review and the rights of judicial review would apply. So not only could there be standing for a bank who wishes ultimately to be sticky about a decision and feels sufficiently aggrieved about the process to sue for breach of contract; there may be some sort of judicial review right as well. This may apply to the substantive decisions. I suspect that if this ever becomes a real problem - and in many ways I hope it never does because of the nature of the scheme and the good work that the scheme has done - but if it ever does become a problem, it is more likely to be on the question of jurisdiction. And on that Graham has a very firm view, it seems to me, that the scheme gives him the final power on determining whether the dispute falls within the Terms of Reference or not. And I have an equally firm view that it does not.

If one reads paragraph 3 of the Terms of Reference one sees that it says: "The Ombudsman shall decide the procedure to consider disputes; he shall also decide whether or not a dispute falls within the Terms of Reference and in reaching this decision shall consider representations from the disputant and from the bank concerned. When requested he shall give the reasons for his decision of whether or not a dispute falls within the Terms of Reference, in writing, within a reasonable time". There is not even an attempt expressly in that term of reference to make the decision final, there is not the normal blurb that one gets in legislation about the decision being final and binding and no appeals shall be entered into. There is just the bald statement that he makes the decision and he has to give reasons. Why would one need to give reasons if it is not reviewable? That is the usual reason for giving reasons, and one sees that as well in the laws governing review of administrative decisions.

So again, it seems to me that if push ever came to shove, the Ombudsman's decisions on jurisdiction and other matters would be reviewable. Now as I have said, they are lawyers' points, and hopefully given the spirit of the scheme and the way that it seems to have worked to date, they will not ever come to a point of resolution or need for resolution.

If I could just deal with another couple of matters which come up in Graham's paper which are areas of concern. One area is what happens if the process falls apart and the complainant decides to march off to court? Can the complainant subpoena the files that the Ombudsman has created? Can the materials that form the basis of the Ombudsman's decision be used in proceedings? Now the Ombudsman is not bound by the rules of evidence, and under the Terms of Reference he can obtain material which the banks may object to on the grounds of confidentiality being released elsewhere. He can use his own knowledge of the security procedures of the bank, which he may have obtained in previous investigations. It is not clear whether he is able to obtain material subject to legal professional privilege or privilege against self-incrimination. One would think probably not, because there is no mention of that ability under the Terms of Reference and it would be very difficult for a privately ordered scheme to waive that sort of privilege unless the parties expressly agreed. However, some of that material may be

given to the Ombudsman and there is a curious case called **Calcraft v Guest**, the status of which in Australian law is still very problematical, which tends to suggest that if you get hold of privileged material or a copy of it, it then ceases to be privileged. Could that material be subpoenaed and produced in the subsequent proceedings?

Again, this hopefully will not become a real concern, but it is something that I think probably should be addressed. There would be ways to do it - one of them would be by some sort of statutory immunity for the Ombudsman, another means would be simply to clarify in a greater degree than there is at the moment the confidentiality of the material and give some directions about its confidentiality in court proceedings. If that was done by way of the Terms of Reference, and there is something about that in the Terms of Reference at the moment, it would still not be binding on the complainant, but it may leave the court to say that this is a good scheme in terms of public policy, part of it relies on full and frank disclosure to the Ombudsman, and therefore in the interests of public interest immunity we will not have his file subpoenaed and produced and able to be used in evidence.

Another way that one could get to the same result would be to say that this whole process is without prejudice and the equivalent of family law conciliation. There is authority to suggest that, unless both parties waive privilege, that sort of mediation or conciliation effort in family law proceedings is not usable in later court battles. However, there is the problem with that approach that in some cases you may not have had actual proceedings on foot. In fact, under the Ombudsman scheme, one of the reasons Graham cannot take a case is if proceedings have started and the parties do not consent to its reference to the Ombudsman. There may not even be anticipated proceedings at that point and so the without prejudice ground may not be available - so again that is an area which needs to be clarified.

An area which I thought might need to be clarified, and may cause concern, arises from the possibly more combative approach to our legal culture I would think than the English have, and it is quite interesting from what Graham has told me in discussion that we have already had several awards made, formal awards binding on banks under our scheme in the first two years of operation. The UK Ombudsman has been going since 1986-87 and has never had to make a formal award or has never been asked by a bank to make a formal award. There has been one test case here; to my knowledge there have been no test cases in the UK.

On the other hand, it is interesting to see that there seems to be a higher settlement rate here. If one compares the latest United Kingdom Ombudsman Report for 1991 with Graham's report one sees, I think, a larger settlement rate. So the combativeness may in fact not in the long term be significant. That is a matter which other people in the audience may wish to comment on, who have had direct hands on experience dealing with the Ombudsman and his staff.

A couple of matters of information query which I am just interested about and Graham may wish to comment on. I think there is a power to extend this scheme, not only to the banks, but also to designated associated companies such as finance companies which a bank may be the parent of, or a credit card company if it is a separate entity. This is a similar power to, but less extensive than, the power in the UK Ombudsman scheme. The need to do that may have diminished, given that several finance companies have been spectacularly re-swallowed by their parent banks in recent times. I would just be interested to know if there is any move to extend the scheme by this means to beyond just banks or whether there had been any talks with the Australian Finance Conference in that regard. I understand they had some proposals for a mediation or arbitration scheme on foot.

I would also be interested to know if there was any proposal to extend the process of exchanging information between Ombudsmen on a regular basis internationally to see if there are improvements in efficiency and in cost and the different experiences. For instance, I note, again comparing the UK report and the Australian report, that we are now heading, after only two years of operation, towards nearly the same number of complaints with a population of nearly 18 million that the UK had after six years with a population of 55 million, and the Ombudsman staff in the UK is about 27, the Ombudsman staff here is about 30. On the other hand, the average time taken to complete dealing with a complaint is dramatically less in Australia to date.

As to the other matter of concern, I would also be interested to know if there is any perceived conflict between the negotiation and the arbitral roles. This is something which has come to some extent forward in the alternative dispute resolution literature. Is it appropriate that the same person has the role of negotiation and mediation and then has to make a decision if the negotiation or mediation fails. Is the same material going to be used in both cases?

In the light of the foregoing, what extra powers does the Ombudsman need? Has there been, for instance, any wilful non-disclosure by a complainant which would require a power akin to discovery? I use that term advisedly, given the problems that discovery can cause in litigation and the cost, but while a complainant through human self-interest would throw forward every document he or she has to show what a good case he or she has, and the bank is required, unless there is a conflict with a duty to a third party - a duty of confidence - to bring forward its documents, what about the other documents the complainant might have which do not help their case? Now that may not be a real problem because I must say my experience, acting on occasion for borrowers and acting for banks, has been that often the bank keeps the documents, either on the benign view that the customer will lose them or on the view that they are the bank's documents anyway. So it may not in reality be a problem, but again I would be interested in some views on that.

There are other matters that I could raise from a very wide-ranging written paper by Graham McDonald which he has spoken well to, but I think it would be better to open it for discussion at this point other than to say the scheme has clearly had an energetic start and has had a degree of acceptance. I still have some reservations about the relative cost of the scheme comparative to the number of complaints, particularly given the size of this country and the way that one has to spread resources and that means more cost too, and given the small number of complaints relative to the number of banking transactions involved. On the other hand, one must balance against that the very real sense of grievance and the relative loss which many people experience and suffer in complaints which just would be ridiculous - and any lawyer would tell them would be ridiculous - to take to court. After all we have the learned Chief Judge of the Commercial Division in New South Wales saying it is not worth coming to court these days for less than $100,000. Thank you.