THE HIGH COURT

[2010 No. 267 MCA]

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

BETWEEN

MARK LITTLE

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

AXA IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice McMahon delivered on the 11th day of March, 2011

Introduction

1. This is primarily an application to extend time for appeal against the decision of the Financial Services Ombudsman ("the Ombudsman") handed down on 20th April, 2010. In the event, the notice of appeal was ultimately issued on 19th October, 2010. The time limit for bringing such an appeal is set out in the Central Bank Act 1942, as amended ("the Act of 1942"). Section 57CL(3) of the Act of 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, states:-

"An appeal under this section must be made –

(a) within such period and in such manner as is prescribed by rules of court of the High Court, or

(b) within such further period as that Court may allow."

2. The relevant rule of the Rules of the Superior Court ("the Rules") is O. 84C, r. 1(5) which reads:-

"Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued –

(a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or

(b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

3. Summarising the position, therefore, an appellant must bring his/her appeal:

(a) within 21 days of being notified of the decision; or

(b) such further period as the court may allow where the court is satisfied that there is good and sufficient reason for extending that period, provided that any such extension of time will not result in an injustice to any other person concerned in the matter; or

(c) "within such further period as [the] Court may allow" as permitted under s. 57CL(3)(b) of the Act of 1942.

4. With regard to (c), I am of the view that the discretion given there to the court is not an arbitrary one and will in the vast majority of cases be accommodated within (b) – *i.e.* the discretion under the Rules where the court requires "a good and sufficient reason" to be offered by the appellant. However, I am not satisfied that the provisions in the Rules inevitably exhaust all the circumstances where the court may extend time under this statutory provision if it is moved to do so. This is clearly evident from the wording of O. 84C, r. 1(5) of the Rules as well as the terms of s. 57CL(3)(b) of the Act of 1942.

5. Since this jurisdiction is relatively new and relates to the office of the Ombudsman, which was established primarily to keep matters out of the courts, and where a relatively informal procedure prevails, the court, when dealing with matters of delay and extensions of time relating to appeals from the findings of the Ombudsman, should bear in mind that a more tolerant approach may be warranted in such cases.

The Appellant's Case

6. The appellant's case is set out clearly in the Ombudsman's finding:-

"The Complainant proposed for car insurance with the Company on 4 May 2004. On 8 March 2008, the Complainant parked his trailer at the Midland Machinery yard in Portlaoise. When the Complainant returned to the yard on 12 March, he realised his trailer had been stolen. It was never found and the Complainant made a claim on his insurance policy on 15 April 2008. However, the Company refused the Complainant's claim on the grounds that the trailer was not within the "care, custody and control" of the Complainant when the trailer was stolen. This is the

essence of this complaint; the Complainant asserts that the trailer was within his "care, custody and control" but the Company disagrees."

7. The relevant section in the policy stipulates in fact that cover shall be given:-

"Provided that:...such trailer at all times remains in your care, custody **or** control." *(Emphasis added)*

8. In her finding, however, the Ombudsman analysed the legal issue on the basis that the policy obliged the insured to keep, at all times, the trailer in his "care, custody and control". This, of course, was an error and it was a significant one in her reasoning, since she repeated the phrase "care, custody and control" no less than eight times during the course of her analysis. Although she did not expressly address whether the "or" used in the policy phrase was used disjunctively, it is clear from the final paragraph of her finding, where having determined on the facts that the insured did not have "control", that little or no attention was then paid to the other elements of the clause *i.e.* "care" and "custody".

9. When this became obvious, I am surprised that the Ombudsman, given the nature of her office, should have opposed the present application on the basis that the appellant was out of time. Before examining more closely the nature of the office in more detail, I set out the relevant time line involved in this case to assess the reasonableness of the appellant's delay.

The Time Line

10. I set out here the relevant chronology of events necessary for these deliberations.

(i) 20th April, 2010: The decision of Financial Services Ombudsman was issued. The decision noted in bold print that an appeal to the High Court had to be made within 21 days.

(ii) 22nd April, 2010: The appellant at para. 20 of his affidavit dated 15th October, 2010, averred "that at all times from 22nd April 2010 [he had] instructed [his] solicitors to appeal".

(iii) 5th May, 2010: The appellant's solicitor in correspondence to Mr. Mealiff (who was to furnish additional evidence on behalf of the appellant) emphasised the importance of a prompt response because of the limit of 21 days from 20th April, 2010, to make the appeal.

(iv) 8th May, 2010: Mr. Mealiff responded to the appellant's solicitor so that the appellant's solicitor had all additional evidence he wished to submit at that time and further the appellant was still in the country on that date.

(v) 15th June, 2010: The appellant's solicitor requested the Ombudsman to review her decision. This is the same date on which the appellant left the country (see para. 8 of the appellant's affidavit dated 6th January, 2011).

(vi) 17th June, 2010: The Ombudsman wrote to the appellant's solicitor saying her decision was only reviewable on an appeal to the High Court.

(vii) 14th October, 2010: The appellant said he returned to Ireland on this date, finalised his affidavit for the appeal and issued a notice of motion on 19th October, 2010.

11. It is quite clear from the above that the appellant was fully aware through his solicitor that a 21 day time limit applied, that it was his intention at all times to appeal

and that he instructed his solicitor to do so immediately after he had considered the decision of the Ombudsman.

12. The explanations that the appellant gave for the delay were:

(a) That he was out of the country from 15th June, 2010 until 14th October, 2010 due to work commitments;

(b) That he is not familiar with email *etc.* and had difficulty communicating with his solicitor from France;

(c) That he had financial problems and had to emigrate to France to work to generate an income; and

(d) That he had no funds to pay his legal team, who were not willing to work on a "no foal no fee basis" and free legal aid was not available.

13. It should be noted, however, that the first time the appellant advanced the explanation of being out of the country or being in financial difficulty was on 6th January, 2011, in his second affidavit. There is no mention of this in his first affidavit sworn on 15th October, 2010. Further, it is difficult in these modern days of rapid communication to believe that the appellant should have had any difficulty in contacting and instructing his solicitor while he was in France. The appellant's solicitor indicated that in April, 2010 he was assembling additional evidence from Mr. Mealiff before deciding whether to appeal or not. Mr. Mealiff, however, responded by letter dated 5th May, 2010, to the request for information, so that after this date the appellant was in a position to decide whether he would lodge an appeal. Moreover, any decision to delay filing his appeal while he waited for additional evidence was a risky decision, since normally the admissibility of new evidence in a statutory appeal is unusual to say the least. It should not be a reason for

delay in prosecuting the appeal. This is particularly so in this case as the appellant intended relying on the fact that the Ombudsman made an error on the face of her decision, in that she misconstrued the insurance policy in question in believing that it exempted the insurance company where the property was not in "the care, custody and control" of the appellant, rather than where the property was not in "the care, custody or control" of the appellant. The appellant points out that this was a serious flaw in that determination. If that was true, did it not provide the appellant with a reason to prosecute his appeal immediately? There was no need to wait for further evidence which might not be admissible in any event at the end of the day.

14. The relevant case law on enlarging the time for appeal in ordinary civil and commercial matters establishes that the appellant must show that (i) a *bona fide* intention to appeal was formed within the relevant time period; (ii) there was an element of "mistake"; and (iii) there is an arguable ground for appeal. Even if I were to accept that the appellant here has satisfied (i) and (iii), I see no evidence of "mistake" in the classical sense as the word has come to be used in this context. I am thinking especially of cases such as *Eire Continental Trading Co., Ltd. v. Clonmel Foods, Ltd.* [1955] I.R. 170. Although these requirements are frequently insisted on by the courts, one should not conclude, however, that they are mandatory and must be met in all cases before allowing an extension of time. In *Eire Continental Trading Co., Ltd.* itself, Lavery J. said (at 173):-

> "In my opinion these three conditions are proper matters for the consideration of the Court in determining whether time should be extended but they must be considered in relation to all the circumstances of the particular case."

15. Referring to these words in *Brewer v. Commissioner of Public Works* [2003] 3 I.R. 539, Geoghegan J. (with whom Hardiman J. and McCracken J. agreed) had this to say (at 548):-

> "I would interpret those words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion."

16. The main reasons advanced by the appellant, belatedly, for the delay was that he was in financial difficulties, he had to seek work in France and he had difficulty in communicating with his solicitor during his absence. He alleged that he could not fund the litigation at the time and that no free legal aid was available. I am not prepared to admit financial difficulties as an acceptable excuse in the present case. There may be circumstances when it would be a relevant consideration, but I am not prepared to factor it into my decision here. In any event it was clear that the appellant was represented at the hearing and that the solicitor was still acting during the 21 day period allowed for the appeal.

17. On the other hand, I am not moved by the Ombudsman's argument that there would be prejudice to her if the appeal were allowed. I do not consider it a serious prejudice that her decision would have to be revisited in the circumstances where a patent error was made. Neither am I impressed by the "flood gates" argument in these circumstances. Counsel for the notice party (AXA Ireland Ltd.) did point out that under

the Rules, the Court should refuse the extension, emphasising that there is no "good and sufficient reason" for granting the extension "and that the extension of the period [should only be granted if it] would not result in an injustice being done to any other person concerned in the matter". Counsel for the notice party said that in the circumstances it would suffer an injustice if the matter goes forward now to an appeal. The injustice the notice party invokes, however, is no more than the suggestion that if further consideration is given to the matter, where the true terms of the policy are properly addressed, it might result in the notice party now being held liable. But if that transpired, would there be an injustice? It seems to me that such an outcome might more properly be construed as doing justice to the insured/appellant, rather than prejudicing the notice party. In any event, there is no certainty that this will be the outcome. It may be that even if the exercise is allowed, the decision maker will confirm the original conclusion, in which event there will be no serious prejudice to the notice party at the end of the day. To refuse the extension of time for the appeal, however, when an obvious error appears on the face of the decision, would invite more serious criticism in my view.

The Financial Services Ombudsman: Her Functions and Powers

18. In examining the role of the Ombudsman in *Square Capital Limited v. Financial Services Ombudsman* [2009] IEHC 407, (Unreported, High Court, McMahon J., 27th August, 2009), I stated at pp. 3 to 4 of the unreported judgment:-

> "Section 57BB of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 sets up the Financial Services Ombudsman as an independent officer:-

> 'to investigate, mediate and adjudicate complaints made in accordance with this Part [of the Act] about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service...and to enable such complaints to be dealt with in an informal and expeditious manner...'

Section 57BK, states that the principal function of the Financial Services Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication. Subsection 4 of the same section states that the Ombudsman "when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.""

19. I continued at pp. 7 to 8 of the judgment with the following comments:-

"From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions. In this connection, I agree with the views advanced by MacMenamin J. in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008) where he described the Ombudsman's office in the following language:-

> "What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving

a contract law dispute in the manner in which a court would engage with the issue.

The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable *simpliciter*; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57CI(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction." (p. 14)

The informal procedures of the Ombudsman were also noted by Kelly J. in *Murray v. Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, where he observed that:-

"...the procedures of the Ombudsman are undoubtedly less formal than those of a court' (p. 21)""

20. When one bears in mind that the Ombudsman is, under this legislation, cast as the "consumer's champion", it seems somewhat strange that in a case like the present, where the Ombudsman made an obvious error in her decision, she should invoke the time limit

to prevent the appellant filing an appeal. After all, all that is involved is that the merits of the appellant's claim should be revisited in view of the error made.

21. Having considered the matter at length, I am of the view that in these exceptional circumstances I should allow the extension of time to bring the appeal, not because the appellant complies with the three conditions set out in *Eire Continental Trading Co., Ltd.*, but because the peculiar surrounding circumstances in this case suggest that I should exercise my discretion in his favour. I rely on the *dicta* of Geoghegan J. and Lavery J. (quoted above) to justify my decision in this matter. I also consider that the authority given to the Court under s. 57CL(3)(b) of the Act of 1942 is additional to the period set out at O. 84C, r. 1(5) of the Rules and provides me with statutory comfort in reaching this conclusion.

22. Bearing in mind the nature of the Ombudsman's office, the patent error (not denied) on the face of the Ombudsman's decision, the importance of the misconstrued phrase in her reasoning and the absence of obvious prejudice to the Ombudsman or the notice party, I am of the view that I should extend the time for bringing the appeal to three weeks from today's date.

23. Were I convinced that I had the jurisdiction to do so, I would yield to the appellant's request that instead of extending the period to bring an appeal to the High Court, I should remit the matter back to the Ombudsman for reconsideration in view of the error made in the earlier finding already adverted to. I think that would readily meet the requirement of justice in the matter as I see it. The jurisdictional matter was not discussed before me. Were I sure, however, that the Ombudsman would consent to such an order I would make it.