THE HIGH COURT

[2009 No. 290 MCA]

[2010 No. 182 MCA]

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

BETWEEN

[2009 No. 290 MCA]

BRIAN MOLLOY

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

BETWEEN

[2010 No. 182 MCA]

BRIAN MOLLOY

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

BANK OF IRELAND INSURANCE SERVICES

NOTICE PARTY

JUDGMENT of Mr. Justice John MacMenamin delivered on the 15th day of April, 2011

1. In this appeal brought pursuant to s. 57CL of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, the appellant, Brian Molloy, sought to challenge two findings made by the

Financial Services Ombudsman, the first dated 29th October, 2009, being in respect of a complaint made against Royal Sun Alliance Insurance Company; the second dated 17th June, 2010, in respect of a complaint made against the Bank of Ireland. In both cases, the complaint made by the appellant was found not to be substantiated.

2. By way of background, the appellant owned a house at 37, Morely Terrace, Gracedieu, Waterford. He held a mortgage on the premises with the Bank of Ireland ("the Bank"). In July, 2005 he went to the Bank's branch at Custom House Quay, Waterford, for the purpose of effecting a policy of insurance with respect to buildings, contents and personal possessions. He says that he was requested by an employee of the Bank to sign a Royal Sun Alliance (R.S.A.) "home cover proposal form" which informed the consumer as to the basis of the policy of insurance in respect of the premises. It will be necessary to return to the contents of this form later.

3. On the basis of the information supplied, R.S.A., as insurers, issued the policy.

4. On 28th February, 2008, there was a fire at the house which caused damage. The appellant made a claim to R.S.A. in the sum of €129,976.

5. On 1st December, 2008, R.S.A. declared the policy to be void and of no effect *ab initio*. The grounds for repudiation were that declarations made by the appellant on the proposal form were false and contained misrepresentations of material facts.

6. The form is a simple one page document. It is divided into three sections: section A identifies the insured; section B identifies the nature of the buildings; and section C is headed 'DECLARATION'. The 'declarations' here include same as to the nature and construction of the house, its maintenance, its purpose and kindred issues. But the section also contains another important subsection: it questions whether the insured or any

member of his/her household has ever been convicted or had a prosecution pending for any criminal offence (other than minor driving offences).

7. The declaration also contains stipulations that (i) the contents of the form are true and complete; and (ii) the proposal form will be the basis of any contract between the insured and the insurer.

8. The insured had three criminal convictions for public order offences. He did not disclose any of these. This was the basis for repudiation. He said he was unaware of the contents of the declaration when he signed the form. He says he should have been told about these terms and was not. The appellant complained to the Financial Services Ombudsman as to the manner in which the Bank sold him home insurance. He sought compensation so that he would be able to restore the house to its pre-fire condition.

9. The matter was considered by the Deputy Ombudsman ("the deciding officer"). For convenience, I will refer to the respondent as simply "the F.S.O.". There was correspondence between the F.S.O., the Bank and the appellant's solicitor. The F.S.O. sought to mediate between the parties. Neither party took up the offer. By 8th September, 2009, the F.S.O. indicated that the matter would proceed to a full investigation. There was further correspondence. By letter dated 12th January, 2010, the Bank issued its response and enclosed a number of documents. These were furnished to the appellant on 15th January, 2010. He was informed that if he wished to make a submission he should do so within ten working days. The appellant says he never received the Bank's response which was said to be enclosed. There was much correspondence where each party was asked to respond to the other's case and did so. I am satisfied each party had ample opportunity to make any response they wished. The appellant did not raise any complaint

as to procedure. He was legally advised. Neither he, nor his solicitor, sought an oral hearing, even in light of what he now identifies as discrepancies in the Bank's account.

10. The F.S.O.'s finding was issued on 17th June, 2010. It found the appellant's complaint was not substantiated. The F.S.O. specifically stated:-

> "In the course of investigating the matters at issue between the parties, I considered whether an oral hearing would be necessary. I was satisfied, however, that the documentary evidence before me was sufficient to resolve the matters at issue and to adjudicate fairly upon the complaint, and therefore an oral hearing was not required."

11. The F.S.O. found the insurance underwriter had declined the appellant's claim on the basis of non-disclosure of the three previous convictions. These were material facts. The appellant had by that time confirmed that he had a number of convictions for public order offences. Consequently the content of the declaration which he signed in July, 2005 was incorrect.

12. The deciding officer pointed out that (i) the principle characteristic of an insurance contract is that it is *uberrima fidei*, made in the utmost good faith; (ii) the duty to disclose all material facts is inherent in the doctrine of good faith; (iii) the insurer, in assessing the application form, was entitled to receive complete answers to all questions; (iv) this imposed a duty on the appellant to disclose *all* material facts which would influence the insurer in its decision regarding the underwriting of the risk; (v) the duty to disclose material facts ultimately fell on the proposer; and (vi) any breach of this duty entitled the insurer to void the contract *ab initio*.

13. The appellant's point of attack is upon the finding made by the F.S.O. dated 17th June, 2010, regarding the complaint against the Bank.

14. A separate finding was made on the R.S.A. complaint. The appellant makes no further point in relation to that finding, however, focusing now on the decision made by the F.S.O. on 17th June, 2010.

15. It is not in dispute that the appellant did not disclose his previous convictions to the Bank. Rather, the appellant's argument is that the Bank, acting in its capacity as an insurance intermediary, was guilty of negligence and breach of duty in failing specifically to bring the contents of section C to his attention.

16. The deciding officer pointed out that (i) the dispute centred on what was, or was not, said during the execution of the proposal form in July, 2005; and (ii) the evidence submitted was based on the recollection of each party of the circumstances surrounding the completion of the proposal form, five years earlier in July, 2005. The two Bank officials who dealt with the appellant had no specific recollection of having dealt with him or what transpired at any meeting, but relied on the contents of the form, their diaries, and their normal procedure to bring a customer through the proposal form.

17. The deciding officer drew attention to the provisions of Part IIIA of the Insurance Act 1989, as amended. It was not in dispute that the information concerning previous convictions was information "peculiar to the [appellant]". The appellant had signed the form; but his complaint is that the proposal form was one of many which he signed when taking out the mortgage.

18. However, the F.S.O. found that the forms themselves showed that they were not all signed on the same day. The appellant signed a mortgage application form on 15th

July, 2005; the mortgage offer letter was signed by the appellant on 25th July, 2005; and the home proposal form itself was not dated, although there was a stamp confirming that it was received in the Bank's Insurance Department on 27th July, 2005.

19. The deciding officer pointed out that there was a difference of view between the parties as to which Bank official had arranged the home insurance policy. The Bank identified the adviser as having been a Ms. Finn, while the appellant stated that it was a Mr. Cantwell. But there was evidence that Mr. Cantwell had been on vacation during the relevant time. The deciding officer concluded that the appellant's recollection of events was not borne out by evidence; in particular, she took into account confirmation from the Bank that Mr. Cantwell was in fact on vacation. She also took into account a signed statement of Ms. Finn who said she had definitely met the appellant on 26th July, 2005, although she had no specific recollection of the meeting. Ms. Finn said that she would have conducted the interview in accordance with bank procedure as she always did. She would always recommend that customers should read forms before they signed them. She had ten years experience working as a mortgage adviser.

20. Through his solicitor, the appellant complained that the Bank had not encouraged him to take the proposal form home for consideration. He said that when it was completed he was given a copy of it. The appellant's solicitor claimed that *Mr. Cantwell* only asked the questions contained in sections A and B of the proposal form and not section C. The letter then states, significantly:-

> "These questions related to whether the house was timber or block build, the condition and age of the building."

The letter claimed section C was not brought to the appellant's attention:-.

"Mr. Cantwell did not advise our client as to the contents of Section C prior to requesting our client to sign same."

21. This information furnished by the appellant's solicitor is of some significance. As noted earlier, section C contained the declaration. This section, in turn, was broken down into subsections which dealt with (a) the nature and construction of the house and (b) the query as to prior criminal offences. But it should be emphasised that *each* of those questions actually formed part of section C of this one page document. Thus, even on the appellant's own case, it was conceded that one part of section C had actually been brought to his attention. I do not find it unreasonable then for the deciding officer to conclude that section C *had* in fact been brought to the appellant's attention because of what was actually contained and accepted in his solicitor's letter.

22. The deciding officer pointed out that there was no legislative requirement that a policy holder should automatically be given a copy of a completed proposal form. She indicated that she was satisfied that there was a primary responsibility on a policy holder to read documentation carefully before signing his/her name to it. She concluded that (i) there was no evidence that there had been a breach of any of the relevant legislation, including the Sale of Goods and Supply of Services Act 1980; (ii) the appellant had signed the document; (iii) there were clear indications that some parts of section C at least had been specifically brought to his attention; and (iv) any omission in relation to the critical area of previous convictions was the appellant's own fault.

23. It is clear that during the currency of the procedure adopted by the deciding officer, the appellant had access to legal advice. At no stage did he make any request for an oral hearing. It is evident from the correspondence that the appellant's solicitor was

involved in the procedure from at least 12th August, 2009. The decision made by the F.S.O. was dated 17th June, 2010. The appellant thus had access to legal advice for a period of ten months.

24. While the deciding officer made reference in her finding to certain items of correspondence which were not before her, I do not consider that any of them are significant for the decision which was made and which is now impugned.

25. In the course of submissions, counsel for the appellant makes a number of criticisms of the finding, namely that:

(a) there was a conflict of evidence and thus the F.S.O. should have conducted an oral hearing;

(b) the appellant said that he was required to sign the proposal form by Mr. Cantwell; whether he had been so requested by Ms. Finn or Mr. Cantwell was fundamentally a credibility issue;

(c) Ms. Finn had no recollection of the transaction and was confined merely to saying what her normal procedure would have been;

(d) the statement before the deciding officer which indicated that Mr. Cantwell was on annual leave for the last two weeks of July, 2005 was inconsistent with the fact that when the appellant first had a grievance he first went back to Mr. Cantwell: this was an inconsistency which might have been tested by oral hearing; there was a conflict of evidence as to whether the matter generally had been dealt with by Mr. Cantwell or Ms. Finn; and a question arose as to whether Mr. Cantwell had been on holiday or not;

(e) there was an absence of evidence that the contents of the declaration had been brought specifically to the appellant's attention;

(f) the deciding officer at one stage in her decision incorrectly referred to the date on the proposal form as being 18th July, 2005;

(g) a question arose as to why the proposal form had been undated; and

(h) there was vagueness in the deciding officer's identification of a "relevant time" during which Mr. Cantwell might have been on vacation.

I am not persuaded that any of the grounds can succeed for reasons I will now explain.

26. The starting point for the consideration of the legal principles in cases of this kind was identified by Finnegan P., as he then was, in the case of *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman & Ors.* [2006] IEHC 323, (Unreported, High Court, Finnegan P., 1st November, 2006). There, the then President laid down the threshold test for these appeals in the following terms (at p. 9):-

> "To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process *as a whole,* the decision reached was vitiated by a *serious* and *significant* error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in **Orange v. The Director of Telecommunications Regulation and Anor** and not that in ***The State (Keegan) v. Stardust Compensation Tribunal*** [[1986] I.R. 642]." *[Emphasis added]*

27. This widely accepted principle contains the following elements:

(i) the burden of proof is on the appellant;

(ii) the standard of proof is the civil standard;

(iii) the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;

(iv) the onus is on the appellant to show the decision reached was vitiated by a serious and significant error or a series or such of errors – put in simple terms, the question is if the errors had not been made, would it reasonably have made a difference to the outcome; and

(v) in applying this test, the court may adopt what is known as a deferential stance and may have had regard to the degree of expertise and specialist knowledge of the F.S.O.

28. It has been repeatedly pointed out that hearings of this type are not *de novo* appeals, where the court is to look to all the material *ab initio* and make its own determination (see *Orange*, cited above). Instead, this Appeal Court must apply the deference which arises from a reluctance to interfere with decisions of specialist bodies. This is well established in the jurisprudence: *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 at pp. 37 to 38, Hamilton C.J.; and *ACT Shipping (PTE) Ltd. v. Minister for the Marine* [1995] 3 I.R. 406 at p. 431, Barr J.

29. Thus a statutory appeal such as this is not a judicial review and the decision maker is to be seen as acting within his own area of professional expertise; the test set out by Finnegan P. in *Orange* suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as the error falls short of being one which is serious and significant. There, the court may intervene.

30. The decided cases emphasise the disparity in function between the F.S.O. and a court: the former is enjoined not to have regard to technicality or legal form. The F.S.O. resolves disputes using criteria which would not usually be used by the courts such as whether the conduct complained of was "unreasonable" simpliciter; whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with law, it was unreasonable or otherwise improper. It is well established that it should not be expected that a decision of the F.S.O. should be as detailed or formal as a court judgment. Decisions of this type should be not subject to a minute analysis or a "cherry picking" exercise in order to identify some error, howsoever insignificant: see the observations of O'Flaherty J. in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 at p. 111; and the judgment of McMahon J. in *Square Capital Ltd. v. Financial Services Ombudsman & Ors.* [2009] IEHC 407, (Unreported, High Court, McMahon, 27th August, 2009).

31. I would re-emphasise the simple fact that it is not the function of the Court to "place itself in the shoes" of the F.S.O. The jurisprudence militates against such a course of action. The test, therefore, is whether the decision was vitiated by a *serious* error of a series of such errors.

32. In *Square Capital*, McMahon J. stated at pp. 8 to 9 :-

> "Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the Court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the

Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

33. As a preface to what follows, it is apposite to quote the observations made in *Flynn v. Financial Services Ombudsman*, a decision of Hanna J. on 28th July, 2010. There, that judge pointed out:-

> "It is well-established that an individual with a criminal offence, or who has a criminal record, or who fails to disclose same to an insurance company, is putting himself or herself under a general moral hazard and this may entitle the insurer to void an insurance policy. This might occur even where a conviction bears no resemblance whatsoever to the hazard insured against (See *Latham v. Hibernian Insurance Company Ltd. And Others*, (Unreported, High Court, Blayney J., 4th December, 1991).

34. I now apply those legal principles. I have already indicated that the proposal form was not a complex document, it was one single sheet of paper. It was not unreasonable to conclude that it would be difficult to sign the document without seeing what was written on it. The format of the document is simple. I have already referred to the apparent inconsistency as to whether the appellant was in fact referred to section C.

35. A primary point made by the appellant is that there should have been an oral hearing. I have not been persuaded that this is a valid point. The finding actually demonstrates that consideration was given to whether or not an oral hearing would be necessary. The F.S.O. indicated reasons why this course of action was not adopted: the documentary evidence was sufficient to resolve the matters at issue. One question is relevant here: what difference would an oral hearing have made other than to show a

discrepancy in the evidence as to who dealt with the appellant. The question of disclosure and engagement with the part of section C would have remained.

36. It is necessary to bear in mind that what was before the F.S.O. were matters which had taken place five years previously in 2005. Thus, other than looking at the documents, it is now unclear what effect an oral hearing would have had other than to demonstrate that Ms. Finn had no recollection of what happened and/or that the documents at least indicated that Mr. Cantwell had drawn the appellant's attention to some part of section C. An inference from all this that an oral hearing would not have progressed matters further was not unreasonable and was within the F.S.O.'s statutory remit. It is not reasonably established, even taking the case at its height, and accepting that the appellant could have shown that the Bank officials had imperfect recollections, even different recollections, that an oral hearing would have affected the outcome.

37. I am not persuaded there was a "serious and significant error or a series of errors". An incorrect reference to the date of the proposal form in the finding of the deciding officer was a "one off"; it is correct elsewhere in the finding.

38. Furthermore, I consider the appellant should not be heard to make this procedural complaint to an oral hearing when he was legally advised throughout the process and the point was not raised until the finding was completed. Save for some very fundamental issue emerging, a court will be slow to grant relief when the decider is not given the opportunity to consider the point at first instance.

39. Applying the *Ulster Bank* criteria, therefore, I am not persuaded that the Court should intervene. I have considerable sympathy for the appellant, but I should add that even at a very late stage, after the submissions were completed, he was given the

opportunity to withdraw his case without any consequence on costs. He did not avail of this offer. I find this appeal must fail.