THE HIGH COURT

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

AND IN THE MATTER OF AN APPEAL FROM A FINDING OF THE FINANCIAL SERVICES OMBUDSMAN

Record No. 2010/312 MCA

BETWEEN

F.B.D. INSURANCE PLC

APPELLANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

TERENCE MONGAN

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 29th day of July, 2011

1. This case concerns challenges to two decisions of the Financial Services Ombudsman dated 10th November, 2010, in which the complaint of the notice party were upheld. The appellant grounds this challenge on the claim that the respondent misdirected herself and erred in law and failed to understand the relevant law in relation to material facts.

2. *Factual Background*

The notice party took out insurance with the appellant in or around January 2007. A proposal form dated the 8th January, 2007 was completed by the notice party. At the foot

of this proposal form is a heading entitled "duty of disclosure", and under that heading the following was stated:-

> "We would draw your attention to the serious consequences of failure to disclose all material information. Such information is that which we would regard as to likely influence our assessment and acceptance of this insurance. If you are in doubt as to whether any information is material it should be disclosed. A copy of the completed proposal form is available on request."

3. A renewal notice subsequently issued to the notice party in October 2007. Under the heading "duty of disclosure" the following statement appears:-

> "Please inform the company of any material change in the risk such as:
>
> 1. Change of
>
> (a) Address.
> (b) Occupation.
> (c) Use of vehicle.
> (d) Drivers.
>
> 2. Details of:
>
> (a) Motoring convictions or pending prosecutions.
> (b) Any physical or mental disability, infirmity or disease of any driver.
> (c) Alteration to the structure or use of a building insured. The above is not an exhaustive list of examples – if in doubt please disclose."

The same statement was also printed on a renewal notice issued to the notice party in October 2008.

4. On 25th October, 2008, the notice party was involved in a single-car crash and his vehicle was extensively damaged. He made a claim on his motor insurance policy. The appellant refused to pay out on the claim and declared the policy to be null and void from the inception of the policy on the ground that the notice party had failed to declare previous criminal convictions on the proposal form submitted and at the renewal stage. The appellant confirmed this decision in a letter dated 25th November, 2009. In this letter the appellant stated it relied exclusively on the contents of the completed proposal forms in its decision whether to accept the notice party's proposal and that, as a result it is vital that all information with respect to the proposed insurance is declared to the appellant. The letter further stated that this had not been complied with in the notice party's case.

5. The underwriters wrote to the notice party on the 5th December and the 11th December, 2008, specifically requesting information on any criminal convictions he might hold and an explanation as to why this fact had not been disclosed. The notice party failed in his response to provide these details. A short time prior to the appellant's final decision on the matter, the notice party's legal advisors provided the information sought concerning previous convictions by letter dated the 16th November, 2009. In this letter, the notice party's legal advisors make reference to the following convictions:-

(i) A conviction dated the 29th April, 2002 of intoxication in a public place, for which the notice party received a fine of €50;

(ii) A conviction dated the 23rd April, 2007 of "burglary intent", for which the notice party was sentenced to a suspended sentence of 2 months imprisonment;

(iii) A conviction dated the 5th February, 2008 of theft, for which a suspended sentence of 1 year and 6 months imprisonment was imposed;

(iv) A conviction dated the 3rd October, 2008 for failure to appear on a remand date, for which the notice party was fined €100;

(v) A conviction dated the 11th May, 2009 of intoxication in a public place, for which the notice party was fined €75;

(vi) A conviction on the same date for failing to appear on the original date set, for which the notice party was fined €100;

(vii) A conviction dated the 13th July, 2009 of damaging property belonging to another, for which the notice party was sentenced to 200 hours community service;

(viii) A conviction on the same date for attempt to commit an indictable offence, for which the notice party received a suspended sentence of 6 months imprisonment and a 2 year probation order, and

(ix) A conviction of the 27th July, 2009 for theft, for which the notice party received a suspended sentence of 90 days.

6. The appellant accepts that the five 2009 convictions should be disregarded, as they post-date the incident which is the subject-matter of the claim. However, the appellant submits that the notice party should have disclosed the four earlier offences.

7. The offences at (iii) and (iv) above (namely the conviction of the 5th of February, 2008 of theft and the conviction of the 3rd October, 2008 for failure to appear on a remand date respectively) are not referred to in the Ombudsman's ruling.

8. In that ruling, the respondent considered the information sought by the appellant in the proposal form and the renewal forms. The respondent noted that the proposal form completed in January 2007 limited the relevant convictions to a 5 year period and also specified convictions relating to motoring offences only. The respondent observed that the notice party's previous conviction of April 2002 for the public order offence, while falling within the relevant time period, was outside the category of offence referred to. On this basis, the respondent ruled that the declaration signed by the notice party on the proposal for was complete and accurate.

9. In relation to the failure to mention the April 2007 conviction for "burglary intent", the respondent emphasised that the renewal notices of 17th October, 2008 and 16th October, 2009 asked the notice party to disclose "any material change in risk", including

inter alia motoring convictions or pending prosecutions. The respondent further noted that the renewal notice stated that the notice party should disclose "if in doubt". The respondent stated that the convictions entered by the notice party had increased since the inception of the policy. The respondent stated that the April 2002 conviction was outside the 5 year period but in any event posed no increased risk than it had at the date of the original proposal form. The respondent then looked at the date of the October 2008 renewal, by which time the notice party had been convicted of "burglary intent", but the notice party failed to disclose this to the appellant. In determining whether the failure to disclose that offence constituted a breach of policy, the respondent held as follows:-

> "... if in the experience and expertise of the company, which was greater than that of the proposer, the company elected at the time to limit its reasonable enquiries to motoring offences only, I take the view that it was reasonable for the Complainant to accept this limitation on its face."

10. The respondent went on to state as follows:-

> "As to the convictions that the complainant has, I am satisfied that objectively, given the form which the proposal and renewal forms took, the correlation was insufficient between the convictions and his motor insurance policy, for the Complainant to have been obliged to disclose them. The company when referring to motor convictions states that on top of this duty of disclosure, there remains an overarching duty to disclose other convictions which are material. I cannot reasonably accept this argument."

11. *Appellant's Submissions*

The appellant submits that the failure by the ombudsman to consider and have regard to the full extent of the undisclosed convictions renders the entire decision flawed. The appellant argues that the respondent failed to have regard to the appellant's primary contention that the notice party's previous convictions were relevant to the issue of "moral hazard". It is claimed that the proposal form and the subsequent renewal forms

made it perfectly clear that there was a requirement to disclose any information that might materially alter the risk and that the phrase "motoring convictions" was clearly used as no more than an example of something that should be disclosed.

12. The appellant secondly submits that the kernel of the respondent's decision appears to be that there was insufficient correlation between the convictions and the motor insurance policy for the notice party to have been obliged to disclose them. The appellant states that no authority or rule of law was cited by the respondent in that contention. The appellant claims that it is difficult to see how any insurer's assessment of an insurance risk would not be affected by the knowledge that a proposer for motor insurance had been convicted of the offences in question. The appellant further submits that, by the time of the appellant's final signing off on the 27th November, 2009, all of the undisclosed offences had come to light and that the respondent made a significant error in principle in holding that there was insufficient correlation between the convictions and the assessment of the moral hazard that would have taken place.

13. Thirdly, the appellant claims that the respondent was unable to make an assessment of the moral hazard in the notice party's case because of the non-disclosure of the convictions. The appellant states that the purpose of requiring applicants for insurance to disclose all relevant details that might affect the assessment of risk is to enable an insurance company to assess with all relevant information whether, and at what premium, to insure the risk.

14. Fourthly, the appellant submits that the finding is inconsistent with the respondent's earlier rulings on the same issue. The appellant refers to a ruling of the respondent of the 5th October, 2010 in which an insurance company refused to honour a claim made in relation to a farmhouse that burnt to the ground and declared the policy void *ab initio* as a result of non-disclosure of material facts. The Complainant in that case had been convicted of 15 counts of indecent/sexual assaults which had not been disclosed to the insurance company. The Complainant in that case similarly argued that the express terms of the proposal form referred to motoring convictions only and that there was

consequently no requirement to disclose sexual convictions. The Ombudsman in that case held that the Complainant should have disclosed any convictions to the insurance provider. Mr. Buckley, an independent insurance litigation consultant, avers in his affidavit that a prudent insurer would have been influenced in his decision to accept the risk and/or the terms on which they might do so by the disclosure of the convictions in the case at hand.

15. Fifthly, it is submitted that the respondent failed to have proper regard to the issue of moral hazard. An underwriter of insurance is concerned with two broad aspects of risk: the physical risk and the moral hazard. The physical risk is a hazard attached to the physical characteristics of the subject matter of the proposed insurance, for example in the context of motor insurance the use to which the vehicle will be put and the previous accident record of the proposer. Moral hazard is more difficult to define, but is described as the risk or danger deriving from human nature and is concerned with the character, honesty or circumstances of the proposer. The appellant claims that the respondent in the instant case failed to have regard to the fact that the duty of disclosure requires that, not only must every conviction relevant to the physical risk be disclosed, but also those material to the moral hazard.

16. *Respondent's Submissions*

Counsel for the respondent submits that the following points summarise the applicable test:-

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

(ii) The onus 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) In light of the above principles, the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors;

(v) In applying the test, the Court should adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman.

Counsel for the respondent further submits that the Act requires the respondent to act informally and without regard to technicality or legal form. It is submitted that, by establishing the office of the respondent, the Oireachtas has provided for an informal, expeditious and independent mechanism for the resolution of complaints.

17. It is also argued on behalf of the respondent that, on the basis of the lower standard of reasons required from administrative tribunals, the respondent's reasoning met the test. Counsel for the respondent further argues that it is an overriding principle of Insurance Law that the duty of disclosure on a proposer can be cut down expressly or impliedly by the wording of the questions asked by an insurance company and that the appellant in the instant case chose to seek less information than it might otherwise have been entitled to.

18. It is also submitted on behalf of the respondent that the Court should take the adjudicative process as a whole in determining whether the decision was vitiated by a serious and significant error, and that there is no sufficient basis in the case at hand for the Court to intervene in respect of the impugned decision.

19. *The Court's Decision*

The applicable test for an appeal pursuant to s. 57CL of the Central Bank Act 1942, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004 (hereafter "the 2004 Act") has been very well stated by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman and Ors.* [2006] IEHC 323, where he stated as follows at p. 9 of the judgment:-

"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 & Anor and not that in The State (Keegan) v Stardust Compensation Tribunal"

20. To summarise the criteria that he set out, one may say that; firstly, the burden of proof is on the appellant; secondly, the onus of proof is the civil standard; thirdly, the court should not consider complaints about process or merits in isolation but rather should consider the adjudicative process as a whole; fourthly, in light of those principles the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors ; fifthly, in applying this test the Court is to adopt what is known as a deferential stance and should have regard to the degree of expertise and specialist knowledge of the Ombudsman.

21. The passage from *Orange v the Director of Telecommunications Regulation & Anor* [2000] 4 IR 159, to which Finnegan P. referred was from the judgment of Keane C.J., where he stated as follows at p. 184 of the judgment:-

"In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first Defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first Defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court 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

arriving at a conclusion on that issue the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first Defendant."

22. The decision of McMenamin J. in *Hayes v. Financial Services Ombudsman and Others* (unreported, High Court, 3rd November 2008) is instructive in relation to the nature of the position of the Financial Ombudsman. At page 13 of the judgment, he stated as follows:-

> "...while a statutory appeal (such as this) is not a judicial review, and where the decision maker is acting within his own area of professional expertise, the test set out by Finnegan P 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 that error falls short of being one that is serious and significant."

He continued as follows at page 14 of the judgment:-

> "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 issues.
>
> 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 that 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 where it should have been; or whether, although the conduct was in accordance with 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 into the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in a court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

It is apparent from this passage that the form of the Ombudsman's position and role is very far removed from that of a court determining issues between parties such as breach of contract.

23. Section 57BB of the 2004 Act provides that the objects of Part VIIB of the Act, which establishes the respondent, include "to enable ... complaints to be dealt with in an informal and expeditious manner". Section 57BK(4) of the 1942 Act provides as follows:-

> "The Financial Services Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, 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."

It is clear that the respondent in this case is under a duty to provide an informal, expeditious and independent mechanism for the resolution of complaints. The function of the respondent is fundamentally different to that traditionally performed by the courts. He is enjoined not to have regard to technicality or legal form, notwithstanding that he should be conscious of due process and fairness in his approach.

24. In relation to the appellant's challenge to the respondent's reasoning, he says the reasoning is adequate for purpose. In *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107, O'Flaherty J. stated as follows:-

> "[W]hen reasons are required from administrative tribunals they should be required to give only the broad gist of their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis."

Thus it is well established that decisions of administrative bodies are not required to include the same depth of reasons for their decisions as would be expected from a court. It seems to me that the reasons given are sufficient and left the applicant in no doubt as to what the decision was and why he had made it.

25. As regards the claim of the respondent that the appellant effectively limited the duty of disclosure by seeking less information than it might otherwise be entitled to through the wording of the Proposal Form, the decision of Finlay C.J. in *Kelleher v. Irish Life Assurance Company* is instructive. Finlay CJ quoted the following extract from MacGillivray and Parkington on Insurance Law (8th ed.,1998):-

> "It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if the questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the questions. Thus, if an insurer asks, 'How many accidents have you had in the last three years?', it may well be implied that he does not want to know of accidents before that time, though these would still be material. If it were asked whether any of the proposer's parents, brothers or sisters had died of consumption or been afflicted with insanity, it might well be inferred that the insurer had waived similar information concerning more remote relatives, so that he could not avoid the policy for non-disclosure of an aunt's death of consumption or an uncle's insanity. Whether or not such waiver exists depends on a true construction of the proposal from, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his rights to receive all

material information, and consented to the omission of the particular information in issue?"

26. In *Coleman v. New Ireland* [2009] IEHC 273, Clarke J summarised the relevant law on disclosure in the following terms:-

> "The requirement that a proposer for a policy of insurance must make full disclosure is more than well settled. Thus, an insurer can avoid a policy of insurance where either:-
>
> A. The insured fails to disclose a material fact; or
>
> B. The proposer makes a positive misrepresentation in the course of the negotiations.
>
> Furthermore, an insurer may be entitled to avoid a contract of insurance where there has been a breach by the proposer of a term of the contract of insurance warranting that a certain set of facts is the case. Whether, and to what extent, there has been any such warranty is a matter of construction of both the insurance policy itself together with connected documents such as any proposal form."

Clarke J. went on to state as follows:-

> "It is clear, therefore, that any material non-disclosure or any materially inaccurate answer to a question on the proposal form are to be judged by reference to the knowledge of the proposer, and whether answers given were to the best of the proposer's ability and truthful."

27. Has there been such a nondisclosure herein? What was within the knowledge of the proposer and were his answers truthful in the light of the questions he was asked? In this regard the Ombudsman was obliged to take into account the limited duty of

disclosure that the respondent had created by the form of his questions. This consideration is classically something that is within the jurisdiction of the tribunal in question. His finding thereon is therefore something which must attract a high degree of deference by the court. No serious error is apparent to me. In fact it appears to me that the Ombudsman's view of the law in regard to limiting the duty to disclose is the better view of the law and in accordance with *Kelleher* and *Coleman* as cited above.

28. For the above reasons, I dismiss the appeal.