

THE HIGH COURT

[2010 No. 34 MCA]

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

BETWEEN

PATRICK MCCABE

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

ZURICH INSURANCE PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 21st December, 2011

1. Introduction

1.1 This matter comes before the Court as an application for relief pursuant to s. 57 CL of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004) on foot of a decision issued by the Financial Services Ombudsman (hereinafter referred to as “the respondent”) dated the 12th January

2010. In that decision, the respondent declined to uphold the appellant's complaint against his insurers, Zurich Insurance PLC, (hereinafter referred to as "the notice party") in this matter. The complaint was grounded on the notice party's refusal to indemnify the appellant in respect of a claim, relating to water damage caused to his boat on the 18th April, 2008, which he made under an insurance policy that he had with the notice party.

2. Factual background

2.1 The circumstances of the claim were outlined to the Court as follows. The appellant's boat was moored in Waterford marina on the 18th April 2008, when it was discovered that it was taking in water. The local fire brigade was called and succeeded in pumping the water from the boat so as to prevent it from sinking. This incident took place on a Friday evening and the appellant was not in a position to notify his insurance broker until Monday the 21st April 2008.

2.2 On the 24th April 2008, the appellant was requested by Techno-Marine Limited, on behalf of the notice party, to have an assessor appointed. The appellant queried the necessity for him to appoint an assessor to assess the boat as he felt that this obligation lay with the notice party. The appellant left this issue to be addressed between his insurance broker and the notice party and consequently nothing was in fact done to process the claim between April and October/November 2008 and the boat remained moored in Waterford marina.

2.3 In November 2008, the appellant had the boat inspected by a marine surveyor, Eugene Curry Marine Services Limited. Mr. Eugene Curry prepared a formal report which was submitted to the second named respondent on the 5th December 2008, which

concluded that “if a surveyor had been appointed within 24 hours much could have been done to ensure that the loss was mitigated”. Mr. Curry assessed the cost of repair to be €87,531.94. The notice party, through Techno-Marine Limited, contacted the appellant’s insurance broker by letter dated the 23rd February refusing the claim. On the 26th March 2009, the appellant submitted his complaint to the respondent. In January 2010, the respondent made his decision and refused to uphold the appellant’s complaint.

3. Submissions of the appellant

3.1 Counsel for the appellant, Mr. Eamon Marray B.L., outlined in detail the applicable legal principles in cases of this nature. In particular, counsel relied on the following cases: - *Gabriel & Anor. v. Financial Services Ombudsman and GE Capital Woodchester Finance Limited trading as GE Money* [2011] I.E.H.C. 318; *Irish Life and Permanent plc v. Financial Services Ombudsman and Feely and Gallagher* [2011] I.E.H.C. 422 and *Hyde v. Financial Services Ombudsman* (Unreported, High Court, Cross J., 16th November 2011). Counsel for the appellant outlined to this Court that to succeed in this appeal the appellant must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached by the respondent was vitiated by a serious and significant error or a series of such errors and relied upon *Gabriel v. The Financial Services Ombudsman and GE Capital Woodchester Finance Limited trading as GE Money* [2011] I.E.H.C. 318 in this regard.

3.2 It was submitted that the respondent had erred in not adequately considering certain matters put before him. Counsel contended that these errors amounted to a serious and significant error or series of errors and that the respondent had ignored the

“undisputed, unchallenged and expert evidence” provided by the report of the marine surveyor, Mr. Eugene Curry. The report, dated the 25th November 2008, stated that *“the failure to appoint a surveyor on the part of the insurer leaves one very puzzled. If a surveyor had been appointed within 24 hours much could have been done to ensure that the loss was mitigated.”*

3.3 Counsel argued that the appellant was in a position to confirm that the boat, which had remained moored in Waterford marina, did not take on any further water in the weeks subsequent to the 18th April, 2008. Counsel submitted that this was in contrast to the period of six days which elapsed after the 18th April 2008, before the notice party contacted the appellant’s insurance broker, on the 24th April 2008, to request an assessor to inspect the boat with a view to ascertaining the cause for the ingress of water into the boat in the first instance. Counsel submitted that the respondent committed a significant error in failing to hold that there was no delay on the part of the appellant and/or that any delay which occurred was not material or relevant in the circumstances in light of the very clear evidence from Mr. Curry as to the period within which the damage of the boat was caused. Counsel further relied upon the fact that the notice party did not put any evidence before the respondent to support its view that additional damage and loss was caused to the boat as a result of it not being taken out of the water.

3.4 It was submitted that the respondent’s decision to treat the six month delay, from April 2008 until October/November 2008, advanced by the notice party as being material and supportive of their contention that the appellant had failed to mitigate his loss under the *“Duty of Assured Clause”* in the insurance policy amounted to a significant error such as to warrant the Court in intervening and setting aside the decision. The *“Duty of*

Assured Clause” states as follows: - “*In the event of any loss or misfortune it is the duty of the assured to take such measures as may be reasonable for the purpose of averting or minimising the loss which would be recoverable under this insurance*” Indeed, counsel argued that there was a clear contradiction in the respondent’s decision in that the respondent held that the “*Duty of Assured Clause*” in the insurance policy did not impose on the appellant any duty to engage a surveyor but rather required the appellant to mitigate his loss and then proceeded to hold that the appellant’s delay in having the boat inspected for the purpose of ascertaining the cause of the water ingress in the boat amounted to a failure by the appellant to mitigate his loss.

3.5 On this point it was submitted that the respondent failed to understand the meaning of Mr. Curry’s report and in that regard it was open to the respondent to seek clarification from the appellant and indeed where such a conflict arises it is similarly open to the respondent to request an oral hearing of the matter. Counsel for the appellant relied upon *Hyde v. Financial Services Ombudsman* [2011] I.E.H.C. 422 in this regard.

3.6 It was also submitted to this Court that s. 57BK(4) of the Act requires the respondent “*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.*”

4. Submissions of the respondent

4.1 Counsel for the respondent, Mr. Paul Anthony McDermott, submitted that the appellant has failed to establish that taking the adjudicative process as a whole, the finding made was vitiated by a serious and significant error or a series of such errors and thus his appeal should be dismissed. In setting out the applicable test for this appeal, counsel relied upon *Ulster Bank v. Financial Services Ombudsman & Others* [2006]

I.E.H.C. 323 as subsequently followed in *Molloy v. Financial Services Ombudsman* (Unreported, High Court, McMenamin J. 15th April, 2011) and *Ryan v. Financial Services Ombudsman* (Unreported, High Court, 23rd September, 2011). In particular, counsel noted the deferential stance which must be adopted by this Court in considering this statutory appeal and relied upon the cases of *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, *ACT Shipping v. Minister for the Marine* [1995] 3 I.R. 406, *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3 November, 2008) and upheld in *Square Capital Limited v. Financial Services Ombudsman* [2010] 2 I.R. 514 in this regard.

4.2 Counsel for the respondent made submissions concerning the Office of the Ombudsman noting that it was established to deal with complaints in an informal and expeditious manner and that s. 57BK(4) of the Act provides that the respondent is “required to act in an informal manner” and relied upon *Murray v. The Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] I.E.H.C. 27 in this regard. Similarly, the unique statutory function of the respondent was highlighted and it was submitted that this Court should not review any decision of the respondent as though it were reviewing the procedures adopted by an inferior Court and should not apply the same standards of procedure as it would to a Court.

4.3 Counsel for the respondent placed reliance upon Eugene Curry’s concluding remarks that had a “surveyor had been appointed within 24 hours much could have been done to ensure that the loss was mitigated” as a clear evidential basis for the decision which the respondent reached.

5. Submissions of the notice party

5.1 Counsel for the notice party, Mr. Paul Fogarty, opened up both his oral and written submissions with the assertion that there is no major dispute as to the facts of this case in that the appellant's boat was discovered to be taking on water on the 18th April 2008 which resulted in the fire brigade being called to pump out water from the vessel so as to prevent it from sinking. Counsel also submitted that it is beyond dispute that the appellant was advised to retain a surveyor as it was uncertain whether the ingress of water was covered as an insured peril.

5.2 It was submitted that apart from some initial activity by the insurance broker to notify the notice party of the claim, the appellant did not make any further efforts from April 2008 until December 2008 to advise the notice party of the nature or extent of any damage. Counsel described the level of inactivity displayed on the part of the appellant as "*extraordinary*".

5.3 It was noted that Mr. Curry's report dated the 5th December 2008 was significant in two respects: - (i) that it dealt with the issue of causation for the first time, and (ii) that it estimated the cost of the damage which had occurred. Counsel submitted that, up to this point, the appellant had failed to provide any information to the notice party as to the nature of the loss or the potential cost of the damage caused to his boat. Prior to Mr. Curry's report there was no suggestion that any damage had actually occurred and the preoccupation of the appellant was to enquire whether the fire brigade charges were recoverable under the policy.

5.4 Counsel relied upon the decision in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323 as setting out the relevant test to be applied in matters such as those currently being canvassed before this Court. In this regard, counsel submitted that the reading of Mr. Curry's report by the respondent did not differ materially from that given by the notice party and that the report should not be allowed to "undergo a process of reinterpretation". The fact that Mr. Curry's report did not state that all the damage occurred within the first 24 to 48 hours was relied upon and it was submitted by counsel that that argument was only made for the first time in the subsequent affidavits. It was counsel's contention that as a consequence, Mr. Curry "has had to turn his report on its head and to argue that when he referred to the Surveyor being appointed within 24 hours, he really meant that there was no point in doing anything outside the first 24 to 48 hours".

5.5 Counsel submitted that the crux of this appeal is that the appellant is challenging the decision of the respondent for not agreeing with certain elements of Mr. Curry's report which were not actually in the report at all and that in effect Mr. Curry is putting forward an entirely different and inconsistent case.

5.6 In respect of the "Duty of Assured Clause", counsel for the notice party submitted that steps taken by the assured with the purpose of saving, protecting or recovering the subject matter are expressly protected and thus any works undertaken by the assured would not have amounted to the appellant waiving or abandoning the policy.

5.7 In conclusion, counsel submitted that the respondent cannot be faulted for not addressing a case which was not put before him in the first instance.

6. Relevant law

6.1 Section 57 CL of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004) provides the following:-

“(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.

(2) The Financial Services Ombudsman can be made a party to an appeal under this section.

(3) 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.”

6.2 Section 57CM provides for the following:-

“(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.

(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:

(a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;

(b) an order setting aside that finding or any direction included in it;

(c) an order remitting that finding or any such direction to that Ombudsman for review.

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.

(4) The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts)."

6.3 There has been much case law emanating from the High Court in relation to appeals pursuant to s. 57CL of the Central Bank Act 1942 as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004. The test which is to be applied by this Court in considering such statutory appeals was established by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323. and followed by Hedigan J. in *Cagney v. Financial Services Ombudsman* (Unreported, High Court, 25th February, 2011). Hedigan J. set out a synopsis of the law as follows:-

"The law in relation to that has been very well summed up by Ulster Bank v. Financial Services Ombudsman & Ors. [2006] I.E.H.C. 323, judgment of Finnegan P. to summarise the criteria that he set out in that judgment, 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 the 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. Finally, in applying this test the Court is to adopt what is known as deferential stance and should have regard to the degree of expertise and specialist knowledge of the Ombudsman.”

7. **Decision**

7.1 This Court adopts the well established test enunciated by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman & Ors.* [2006] I.E.H.C. 323 as subsequently endorsed by Hedigan J. in *Cagney v. Financial Services Ombudsman* (Unreported, High Court, 25th February, 2011). It must also be noted that this Court is cognisant of the fact that in applying this test it must adopt a deferential stance and must have regard to the degree of expertise and specialist knowledge of the respondent as consistently reiterated by this Court in the jurisprudence on this matter; *Orange v. The Director of Telecommunications Regulation & Anor.* [1999] I.E.H.C. 254, *Henry Denny & Sons (Ireland)Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, and more recently restated in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November, 2008) and *Square Capital Limited v. Financial Services Ombudsman* [2010] 2 I.R. 514.

7.2 In determining the matter before this Court, it is abundantly clear that the function of this Court is to decide whether the decision of the respondent was vitiated by a serious error or a series of such errors. In carrying out this duty, this Court can only review the decision of the respondent on the basis of the evidence that was submitted to him by the appellant and the notice party. It is the view of this Court that, on the basis of the written and oral submissions put before the Court, the appellant has established 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. It is this Court's view that the respondent erred in failing to adequately consider the mitigating steps which the appellant undertook in alerting his insurance brokers upon the reopening of its office on Monday, the 21st April 2008. Furthermore the steps taken included the inspections organised by the appellant following the incident that occurred on the 18th April 2008 to ensure that no further water ingress occurred. The respondent did consider the "*Duty of Assured Clause*" within the insurance policy and whilst expressly acknowledging that the appellant was not required under that clause to appoint a surveyor the respondent nonetheless concluded that the appellant had failed to take reasonable steps to mitigate his loss by not acting on the advice to engage a surveyor to produce a report until October 2008 which was six months after the claim and in this regard the appellant must take responsibility for his failure to act expeditiously. This Court is of the view that the respondent erred in failing to adequately consider the mitigating steps that the appellant undertook and the fact that the "Duty of Assured Clause" did not require the appellant to appoint an assessor but rather to "*take such measures as may be reasonable for the purpose of averting or minimising the loss which would be recoverable*" under his insurance.

7.3 In light of the Court's finding in respect of this ground, it is unnecessary for this Court to consider whether the respondent erred in failing to conduct an oral hearing on foot of the conflict of evidence which arose from the documents before him in reaching his decision.

7.4 This Court is required to consider the adjudicative process adopted by the respondent as a whole to see if the decision made was vitiated by a serious and significant

error. This Court concludes that there is a sufficient basis made out by the appellant which would merit intervention by this Court in respect of the decision made and in this regard the Court will make an Order pursuant to s. 57CL (1) and s. 57 CM(1) and (2) of the Central Bank Act 1942 (as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004) remitting the decision of the respondent to the respondent for further review.