THE HIGH COURT

Record Number: 2011 No. 161 MCA.

IN THE MATTER OF AN APPEAL PURSUANT TO PART VIIB OF THE CENTRAL BANK ACT 1942, AND CHAPTER 6 AND SECTION 57CL THEREOF (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004)

Between:

Oliver Murphy

Applicant

And

Financial Services Ombudsman

Respondent

And

Allianz Plc.

Notice Party

Judgment of Mr Justice Michael Peart delivered on the 21st day of February 2012:

1. On the 1st August 2009 the applicant suffered a burglary and fire at his bed and breakfast premises in Dundalk, Co. Louth. A policy of insurance with the Notice Party ("Allianz") was in existence in respect of the premises, and the applicant sought to recover the amount of his losses under that policy which

run to a sum of approximately €200,000. It is clearly a very significant loss for the applicant. He made a claim but appears to have received little by way of response. His solicitors communicated with Allianz also but by 29th March 2010 were still calling for a progress to be made and complaining about the delay in having the claim dealt with.

2. The applicant completed a complaint form on the 7th April 2010 and submitted it to the Ombudsman. At that point his complaint was delay and he wanted the Ombudsman to assist in getting the claim settled. Having submitted it, the Respondent replied by letter dated 8th April 2010 stating that the applicant should firstly go through the internal complaints procedure at Allianz whereby a dispute is reviewed internally, and that the Ombudsman would consider the matter when the applicant received a Final Response letter.

3. Coincidentally perhaps, Allianz wrote a letter dated 7th April 2010 to the applicant's solicitors informing that the Notice Party was refusing an indemnity under the policy of insurance, had repudiated liability thereunder, and was treating the policy as discharged on the basis that the applicant had failed to disclose to it material facts, and the absence of a functioning alarm system.

4. Allianz issued a Final Response by letter dated 28th April 2010. The applicant states that while it bears that date, it was not in fact received by him until the 19th May 2010. The Final Response letter states that following receipt of the applicant's claim on the 4th August 2009, and in accordance with normal procedures, Allianz appointed a firm of Loss Adjusters, OSG, to inspect the damage to the premises, who in turn appointed Manus Coffey Associates, Consulting Engineers ("MCA") to carry out an inspection and prepare a report. Allianz go on to say that during the course of these investigations the applicant informed MCA's representative that he had set the intruder alarm as he had left the house on the night of the burglary and fire on the 1st August 2009, but that it had been noted that the alarm was not ringing when the Gardai arrived to the premises in response to the fire call. They said also that MCA had examined the alarm system, and reported that even though the

intruders had ripped out the wires the external alarm bell ought to have continued to ring until such time as the battery expired. It appears that MCA was unable to carry out a functional test of the alarm due to the damage to the wires, but he did examine the alarm panel and found that the back up battery positive terminal had been corroded away many years ago, and found also that the external bell box was heavily corroded and that the external siren was broken. His conclusion was that the alarm system was over 20 years old and that judging from its condition it had been inoperative for many years.

5. Allianz in their Final Response letter went on to refer to the manner in which the applicant had completed the proposal form for the policy of insurance in 2004, and noted that in that form the applicant had confirmed that he had an alarm fitted, and also that the front and back doors were fitted with mortice deadlocks, and also that the ground floor and other accessible windows were fitted with window locks. They also informed the applicant that his policy renewal schedule states that "endorsement EO2 was applicable". That endorsement states: "*Where a burglar alarm is installed as our requirement you hereby agree to maintain the installation in accordance with the supplier's recommendations and to have the alarm switched on and in service on all practical occasions*". They stated also that the applicant had received a premium reduction because he had an alarm fitted to the premises.

6. Allianz then went on to state that the information provided by the applicant on his proposal form and his ongoing obligations set forth in the renewal schedules form the basis of the insurance contract with Allianz; and having noted that OMG had reported that the alarm system had been inoperative for many years, and also that they had observed that the ground floor windows were not fitted with locks and that the front door was not fitted with a mortice lock, Allianz concluded that the inaccurate information provided by the applicant on his proposal form represented a material misdescription which had influenced their assessment of the risk and premium calculation, and that it was apparent to them that the terms and conditions of the policy were breached by not having maintained the alarm system in an operable condition, and, accordingly, that the decision communicated to the applicant's solicitors

on the 7th April 2010 to repudiate the claim should, following this review, stand and that the claim would not be covered.

7. The Ombudsman in due course suggested mediation, but as Allianz was not agreeable to that process it could not proceed, and accordingly, the Ombudsman proceeded by way of investigation and adjudication. I note that in a letter dated 9th June 2010 to the applicant, the Ombudsman noted that the applicant had spoken to a lady in the Ombudsman's office and had mentioned that he might refer the claim to the High Court, and stated in that regard:

> *"Please be aware that the Financial Services Ombudsman has sole responsibility for deciding whether or not a complaint is within the Ombudsman's jurisdiction. Section BX (3)(a) of the Central Bank and Financial Services Authority of Ireland Act, 2004 provides 'a consumer is not entitled to make a complaint if the conduct complained of is or has been the subject of legal proceedings before a court or tribunal.*
>
> *Therefore if you decide to have your complaint examined by the High Court, your case in this office will accordingly be closed off. Please advise the Bureau on your decision in that respect."*

8. The applicant responded by letter dated 16th June 2010 confirming that he wished the Ombudsman to investigate the claim against Allianz. The Ombudsman wrote to each party inviting submissions, and those were provided in due course, each party being furnished with the submission of the other. The applicant was also provided with a copy of the MCA report provided to the Ombudsman. He himself engaged an electrician, Kieran Nevin, to express an opinion on the state of the alarm system and to comment on the MCA report, and he had provided that report to the Ombudsman. Mr Nevin takes a very different view to MCA, and in so far as there is a significant dispute between these experts and the Ombudsman reached his decision against the applicant by favouring the opinions expressed in the MCA report, the applicant is submitting that the Ombudsman should have

exercised his power to direct an oral hearing in order to assist the Ombudsman in resolving that conflict which, it is submitted, was crucial and central to any findings that Ombudsman would make. It is in these circumstances that the applicant seeks an order setting aside the decision of the Ombudsman and an order directing the dispute be determined by the High Court by a plenary hearing.

9. Section 57CM of the Central Bank and Financial Services Authority of Ireland Act, 2004 ("the Act of 2004") provides for what orders the High Court may make on an appeal brought by a complainant against a decision of the Ombudsman. In that regard, Section 57CM(2) provides:

> *"(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."*

Kieran Nevin's reports:

10. The first report from Mr Nevin appears to be an undated short report which states that he is a qualified electrician with over 40 years experience of installing alarm systems. He states that he tested the applicant's alarm bell box which the applicant had removed from his chimney and gave him on the 21st May 2010, and that he applied electric power to the box and that both the siren and flashing light worked perfectly. The applicant also informed him that Allianz had stated that it was badly corroded but he found no corrosion on it, commenting also that it is made of "*pvc type material and therefore not liable to corrosion*", and noted that there were some bird droppings on it.

11. A second report is dated 16th April 2010 in which he states that in August 2009 the applicant had asked him to install a new alarm system which he did. He took down the old system at that time but did not check the old system prior to installing the new system as he felt it was as easy to install a new system rather than try to repair the wires connecting the old one. He goes on to state that the applicant brought the old alarm to him in April 2010 as Allianz were stating that it was not functioning properly when the fire happened on the 1st August 2009, and that he tested it and that even after the nine months interval since the fire it was working perfectly, both in terms of electric power and battery power.

12. In a report dated 28th January 2011 he comments upon the statement in Allianz reports that a functional test could not be carried out on the alarm since the wiring had been ripped out by the intruders. In that regard he states that he had been able to do such a test and had found it to be working perfectly, and goes on to state that when he installed the new alarm in August 2009 he had used all the old components and that the only new parts were the panels and the wiring. He left the old sensors since they were working properly, and he considers the statement that it was not possible for him to have checked the alarm to be simply wrong.

13. In his report dated 18th February 2011 he states that he was asked to comment upon the statement in the Allianz reports that the external bell box should have continued to ring until the internal battery expired. In that regard he states:

> *"That is of course correct but it is irrelevant because it has already been explained that in this instance the internal battery had been destroyed by the intruders and thus would have no power to service the external box. Furthermore even if it had power it couldn't transmit it outside to the bell box on chimney because the cables running to the outside box had been burned".*

The MCA report – author: Greg Duggan:

14. MCA inspected the premises on the 4th August 2009 which was three days after the date of the burglary and fire at the premises. Mr Duggan of MCA was present on the date of inspection and gave an account of events to Mr Greg Duggan, Consulting Engineer of that firm. He informed Mr Duggan that he had taken no bookings for the 1st August 2009 as he was due to attend a 40th birthday that night. His wife and children also were absent from the premises that night. Mr Duggan was told that on that night he watched football on television and that he had left the premises at about 9.15pm., and that before leaving the house he had checked that all the doors and windows were secure, and further that he had set the intruder alarm. The applicant explained also that he had returned to the house at about 11.45pm and found the fire brigade and the Gardai there. Apparently he initially thought that there had been a road accident, but the Gardai informed him that there had been a fire and a suspected break-in, and that as the scene had to be preserved he would have to find somewhere else to spend the night. On the following day he was allowed back into the house when he saw that most rooms had been rifled with drawers and contents strewn about. A brief description of certain missing items was given such as a passport, his bookings diary which contained some cash deposits for B&B rooms, and a jar of loose change. Mr Duggan asked him about a plastic petrol drum which he had seen at the side of the house, and the applicant stated that he had purchased the petrol a few days previously for his lawnmower. He also asked him about a travel bag he had seen in the conservatory and was told that it had been there for a couple of weeks since he returned from what is described in the report as "an overnight". The applicant had also informed Mr Duggan that there had been no break-ins before that night.

15. Mr Duggan also spoke to the investigating Garda for the purpose of his report, and a detective from the Garda Technical Bureau. The Garda investigations were ongoing at that stage but they informed Mr Duggan nevertheless that they were treating it as a criminal break-in with the fire set by persons unknown, though no likely suspects had yet been identified. He was informed

that the fire had been reported by a passer-by at 11. 35pm. A Garda informed him that having been concerned that there may be persons inside he had forced open a 'French door' at the front right of the house. That door had been closed but it opened easily – needing a shoulder rather than a kick. The Gardai found no obvious forced entry, and they felt that either the French door had been opened by the perpetrators and closed again once inside, or else that entry had been gained by breaking the rere bedroom window. There were two seats of fire discovered – one in the applicant's own bedroom and another in the downstairs hallway.

16. As for the intruder alarm, Mr Duggan was informed that it was not ringing when the Garda arrived at the house, but that the applicant had told the Garda that he had set the alarm when he was leaving the house that evening at 9.15pm. The Garda also stated that on four or five occasions over the previous three to four years the Gardai had responded to reports of break-ins and theft. The report states in that regard that *"the common thread between those incidents was that [the applicant] took in "health board type" residents – generally youths in need of immediate short-term accommodation"* and that many of these residents were of a disruptive nature. Mr Duggan was informed that the Gardai had had a fairly good success rate in apprehending the perpetrators of those previous incidents. He was also told that Gardai in this area have little or no record of fires being set gratuitously during a break-in and that the usual modus operandi of burglars was to simply enter and leave, and that the present incident was the exception.

17. Mr Duggan carried out an examination of the house which is a detached dormer bungalow fully set up as a bed and breakfast. He noticed that the bedrooms were ready for guests and that the breakfast tables were set.

18. He reported that the front door was fitted with a Yale lock only and no mortice lock, and there was no sign of forced entry there. As for the rear door he stated that it was fitted with a 2 lever mortice lock only and that the door had not been forced and was in working order. He noticed also that the key for that door was in place on the inside of the door, and that there were no kick

marks or similar on the outside of the door. He saw also the conservatory fitted externally to the rear door and that this door could be opened from either inside or outside. He reported that the French door at the front right of the house was fitted with two locks – a Yale lock the bolt of which was consistent with forced entry, and a two-lever mortice lock which was not engaged and had no key available. He saw also that there was a small night bolt fitted to this door which was not engaged when the door was forced open. He had been able to force this door open as had the Gardai on the night of the incident.

19. Mr Duggan examined the windows and stated that apart from the main bedroom window all were of traditional timber construction and without locking mechanisms, and he did not note any marks on these windows which might have indicated a forced entry. There was some broken glass from the bedroom window which he examined and he was satisfied that the window had been broken by fire fighters.

20. As for the Intruder Alarm, Mr Duggan noted that the components of the printed circuit board seemed to indicate that it had been manufactured in 1987, but that the applicant was unable to tell him anything about the history of the alarm, when it was installed or by whom; but he was informed that it was operational and that he (the applicant) would set it on leaving the house unless guests were staying over. He noted also that only one zone was configured and that there was one P.I.R. sensor in the entrance hall. He stated that the telephone wiring and alarm wiring had been ripped out by the intruders and that it was not possible to perform a functional test of the alarm. He examined the alarm panel and observed that the backup battery positive terminal had been corroded for many years. He noted also that the external box located at the top of the chimney was heavily corroded and that the external siren was broken.

21. Mr Duggan examined the house generally as reported by him, including a smoke detector from which a battery was removed though it worked when Mr Duggan connected a battery. He reported on the seats of fire which he observed, and he estimated that the duration of the fire was between 20-25

minutes. He reported on a number of other matters which are not of particular relevance to the issues to be decided on this application. He concluded that this was not a straightforward burglary given the targeting of the applicant's bedroom, his personal possessions, the gratuitous level of vandalism within the house and the multiple seats of fire found, and he concluded that on balance those factors indicated that the applicant was targeted probably by somebody he knew or used to know or acquaintances of such persons, though the applicant informed him that he was not aware of anyone who might hold a grudge against him. Mr Duggan could not be certain as to the means of entry by the intruders.

22. Mr Duggan also opined that he does not believe that the applicant set the alarm when he left the house at 9.15pm "because the alarm was inoperative". He noted that the Gardai had told him that on arrival at the house the alarm was not ringing and, again, that he was unable to test the alarm as the wiring had been pulled out during the burglary. He reached the conclusion finally that the applicant had given misleading information when he stated that he had set the intruder alarm as he left the house, noting that it did not trigger during the break-in or during the fire and was probably inoperative, and also when he stated that there was no history of break-ins at his house or in the locality whereas the Gardai had stated that they had previously attended following several break-ins/robberies at his house in recent years.

23. It is worth noting that by letter dated 19th March 2010, OSG, the Loss Adjusters, wrote to MCA for answers to certain questions which they asked in order to respond to queries raised by the applicant in relation to his claim. One of these questions was whether MCA could give a view as to whether the applicant was telling the truth about having set the alarm on the date of the incident. When answering that question Mr Duggan stated that his impression of the applicant was that he was an honest and straightforward man, but he had told certainly one untruth by stating that the house had not been previously broken into, and that "*there may well be others*", and he opined that "*on balance it is, I feel, extremely unlikely that the intruder alarm was*

operational at the time of the accident" but then states "Note, I have not put the inconsistencies in his story to Mr Murphy" (emphasis added)

24. He was asked also whether, if the alarm had been set, it could have functioned properly given that the external box was heavily corroded and the back up battery positive terminal was corroded, to which he responded by stating that the combination of the state of the external bell and the lack of a functional back up battery in the alarm indicated that the alarm had been installed 22 years ago and that no maintenance or upgrade work had been undertaken since its installation, and that the probability that the alarm was functioning at the time of the fire was remote, and he again stated that a functional test had not been possible at the house due to wiring damage.

25. This response to questions also states: "*in my experience it is very rare for a bed and breakfast establishment to make use of an intruder alarm due to the random nature of paying guests entering and leaving*". In that regard, of course, the applicant states that on this night there were no guests staying in the house.

26. Mr Duggan also stated in these responses that "*possibly a synopsis of the Alarm situation is: we cannot prove that it was not working (though we can provide a good on–balance case); he cannot prove that it was working*". In that regard the applicant has submitted that the report of Mr Nevin (the applicant's electrician) is to the effect that he found that it was working when he tested it.

27. The Final Response by Allianz to the applicant's claim was as set forth already in paragraphs 5 and 6 above, and it is clear from it that the views of Mr Duggan prevailed, following which the applicant pursued his complaint with the Ombudsman. He had not at that point received a copy of the MCA report.

28. On the 22nd December 2010 the Ombudsman sent the applicant a copy of the Allianz response to his complaint and invited him to make a submission in

response thereto. The applicant availed of that opportunity and prepared a detailed submission which was received by the Ombudsman's office on the 7th January 2011. In that lengthy document he refers to the delay on the part of Allianz in reaching a decision on his claim, but also takes issue with many of the matters which appeared to him to influence the decision to repudiate liability. He notes that Mr Duggan of MCA accepts that the inconsistencies which Mr Duggan felt existed in the applicant's account were not put to him. There is much in this submission which it is not necessary to refer to, but it is relevant to see what he stated in relation to, in particular, the alarm system, and to a lesser extent what he states about the locks on the doors and windows, as the position of Allianz is that the applicant breached the terms of his policy in relation to the latter too.

29. The submission stated inter alia that he was not obliged under the policy which he took out to have mortice locks on all exterior doors, because the relevant endorsement in that regard (T01) was not operative, although he states also that in fact two of the doors were fitted with mortice locks, and he furnished photographs showing this to be the case. He also submitted that he was not required under the policy to have window locks fitted and suggests that this is because people in the house have to be able to escape from any fire by means of windows.

30. He stated also that the policy did not require an alarm to meet any particular specification, and that while endorsement EO2 (alarm) is referred to in the renewal forms, the first occasion that a note was attached to the schedule requiring the applicant "*to maintain the installation in accordance with the supplier's recommendation and to have the alarm switched on and in service on all practical occasions*" was in the 2010 renewal schedule which was one year after the fire. But in any event, he states that the alarm was working and he enclosed Mr Nevin's report dated 16th April 2010 to that effect. He makes the point also that Mr Duggan never made him aware that of any problems he encountered in relation to the alarm, and wonders why he did not so that they could have checked the matter out. In fact he states that Mr Duggan gave him to understand that there was no problem with the alarm. He takes issue with

the findings of Mr Duggan in relation to the alarm and in great detail. In relation to corrosion, he made the point that because it is made of pvc type material it does not corrode and he submitted photographs in that regard. He refers to the second report from Mr Nevin which stated that when he tested the alarm both the siren and the flashing light were in working order. He disputes that Mr Duggan could conclude that the alarm had not been working for many years and wonders how he could find that the intruders hadn't damaged it when pulling out the wires. He takes issue with much of Mr Duggan's report and referred in detail to the reports of his own electrician which contradict his findings. He refers to the comment by Mr Duggan which I have set forth when he stated: "*possibly a synopsis of the Alarm situation is: we cannot prove that it was not working (though we can provide a good on – balance case); he cannot prove that it was working*".

31. Following receipt of the applicant's submission, a copy was sent by the Ombudsman to Allianz asking for any further observations they might wish to make. Allianz made some observations by letter dated 20th January 2011. That letter acknowledged that there were a number of areas of difference between them and the applicant, but they did not believe that much of use could be added in that regard. However, they mentioned the fact that the applicant had stated in his submission that the front and back doors were fitted with mortice locks whereas the third exterior door was not, and they referred to Mr Duggan's direct contradiction of that statement since he had noted that the two doors at the front were secured only with Yale locks and that the back door was secured with a 2 lever mortice lock. They noted also that the first time that Allianz became aware that the applicant had engaged an electrician to provide a report was from this submission, and that they therefore asked Mr Duggan to comment on the fact that Mr Nevin was stating that the alarm functioned properly when tested by him. The comments received are set forth by Allianz. They do not alter the facts for the purpose of this Court's decision. Mr Coffey maintains his conclusions and stands over them in his responses.

32. This response letter from Allianz concluded:

> *"Clearly there are differences of opinions and even some difference in the version of events but we must rely on the advices [of] our independent experts and the information contained in the proposal form and therefore our position in this case remains unchanged."*

33. The applicant was invited by the Ombudsman to make any comments he wished in relation to the Allianz response, and he did so, again at length, by letter dated 27th January 2011. He joins issue with much of what was said and makes no concessions from his previous position as outlined in his earlier submission. This response in turn was sent to Allianz by the Ombudsman. They responded briefly to the effect that clearly there were differences of opinion and that the further submissions by the applicant demonstrate this. They made three comments which do not add anything for the purpose of the issue arising for decision in these proceedings. The applicant was asked for his further responses to these comments and he provided them. This exchange of correspondence ended in February 2011 and the Ombudsman issued his Findings by letter dated 21st April 2011

The Ombudsman's decision:

34. The Ombudsman first dealt with the complaint made by the applicant in relation to delay by Allianz in dealing with his claim, and having noted that Allianz accepted that there had been delay, he directed that Allianz pay the applicant a sum of €250 in relation to that issue.

35. He goes on to summarise the position of Allianz in this dispute from the materials provided to him, and in relation to the applicability of endorsement E02 which required the applicant, as shown above "*to maintain the installation in accordance with the supplier's recommendation and to have the alarm switched on and in service on all practical occasions*". He does not refer to the applicant's contention that this wording appeared for the first time

on the renewal schedule for 2010 even though previous renewals had referred to endorsement EO2 but without the additional note explaining what it was. He refers to the Allianz position that the alarm was inoperable for many years and that the ground floor windows were not fitted with window locks and that the front door was not fitted with mortice locks, and that the applicant's failure to disclose all material and accurate information in these respects constituted a material misdescription, and further that the failure to maintain an operable alarm system breached the terms of the policy, and that accordingly it was entitled to repudiate the policy. The Ombudsman's finding does not set forth in any way or discuss the applicant's arguments against the Allianz position, and does not refer to the reports provided by Mr Nevin, though he states that he has considered carefully the evidence and submissions put forward by both parties.

36. In his conclusions the Ombudsman notes that the applicant had answered "yes" to four questions on the policy proposal form as to mortice locks on front and back doors, window locks on ground floor windows, locks on patio doors and a fitted burglar alarm. He noted the existence of endorsement EO2, and referred also to the wording on the policy which pointed out the serious consequences of a failure to disclose all material facts, as well as any changes to any data provided which occur following the inception of the policy.

37. The Ombudsman then proceeded to refer to the reports from MCA which were provided to Allianz, and he sets out a summary of what is contained in the report of Mr Duggan about him being unable to test the alarm due to wiring damage and the other defects identified by Mr Duggan. He noted also that the alarm had not been ringing when the Gardai arrived at the house on the night of the fire, and that the alarm should continue to ring even where the intruder rips out the wires. He noted that this could not happen because the internal battery had corroded many years before, and Mr Duggan's conclusion that the alarm had been inoperable for many years. He noted the various bases on which Allianz had refused to indemnify the applicant.

38. There is no analysis of the competing arguments and submissions made by the parties, or discussion about the conflict of opinion between the applicant's electrician and Mr Duggan. What he states in that regard is contained in a single paragraph on page 4 as follows:

> *"I note that the Complainant takes issue with the Engineering Consultant's conclusions regarding the alarm, accepts that there were no locks on the windows but states that building regulations state that there should be no locks on the windows, and submits that the front and back doors had mortice locks. I note that he submits two colour photographs of one of the two French doors. I also note that the Complainant states that he did not read the Proposal form."*

39. His final conclusions are set forth as follows thereafter:

> *"I am satisfied that the Alarm was not operable at the time of the incident and that consequently as policy Endorsement EO2 applied, the Company was entitled to decline to indemnify the Complainant. I am also satisfied that the detail provided by the Complainant in the Proposal Form regarding the locks on windows was incorrect. Unfortunately, it is not sufficient to sign a document and subsequently seek to resile from its contents on the grounds that one did not read it. I am satisfied that this constituted a material misdescription. I am satisfied that the situation as regards mortice locks as outlined by the Engineering Consultant was correct."*

40. The Ombudsman has filed two affidavits in support of the Statement of Opposition filed. In his first affidavit he sets out in some detail the nature of the complaints procedure, including that, as provided by Section 57BK(4) of the Act of 2004, he 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*", and as provided by Section 57BB(c) thereof in "*an informal and expeditious manner*". Having outlined the procedures by which each side is requested for submissions and responses to

submissions, he states that both sides of the complaint are then reviewed and examined by the Ombudsman, the Deputy Ombudsman, the Head of Investigation, the Head of Legal Services or the designated investigating officer. He states that further information or supporting documentation may be requested form either or both parties, as required, and that *"where it is considered necessary, an oral hearing may be held"*. Following all of this a Finding is prepared and issued to both parties, which is binding on both parties subject to the right of appeal to the High Court. He then confirms that the above procedure was followed in the present case.

41. In relation to the applicant's present proceedings he notes that his appeal appears to challenge the Finding on the merits, and that no complaint is levelled at the procedures adopted. In the applicant's second affidavit filed on the 2nd December 2011 in response to the Ombudsman's first affidavit, the applicant picks up on the latter's averment that where considered necessary an oral hearing will be held, and submits that in the face of such a direct conflict of evidence between the two experts, MCA and Mr Nevin, as to the operability of the alarm, and where there was dispute also as to the applicability of Endorsement EO2 to the insurance policy, the Ombudsman ought to have exercised his power to convene an oral hearing to assist him in resolving these conflicts of evidence. It is submitted that the Ombudsman has simply accepted the arguments of Allianz without having given consideration to the competing arguments put forward by the applicant, as in his Finding, while noting that the applicant takes issue with the Allianz position, there is no analysis of the competing arguments, and simply a statement that he is satisfied as to the matters which I have already set forth.

42. The Ombudsman filed a further affidavit in response to that of the applicant sworn on the 2nd December 2011 and complains that it is for the first time in that affidavit that the applicant raises a procedural argument about the failure to hold an oral hearing, and states that neither the applicant nor Allianz sought an oral hearing while the Ombudsman was investigating the applicant's complaint, and submits that it is now too late for that issue to be canvassed on this appeal, especially where the applicant does not explain why he never

raised the issue previously. The Ombudsman states that in relation to holding an oral hearing he has a broad discretion, and that having considered the submissions made by the parties, he did not believe that such a hearing would have assisted.

43. In his said affidavit the Ombudsman addresses again the issue raised by the applicant in relation to the applicability of Endorsement EO2, and in addition, an affidavit was sworn on the 13th December 2011 by a Claims Manager in Allianz in which she deals with that issue also.

44. The applicant's complaint about the Finding of the Ombudsman can be summarised by saying that it is vitiated by serious and significant error, firstly by the manner in which in his Finding he determined against the applicant the controversy between the applicant's expert and that of Alliance in relation to the alarm, and in particular the absence of any analysis of the competing expert opinions; secondly by not having exercised his power to direct an oral hearing to assist him in resolving that conflict of professional opinion; and thirdly by finding as he did that the information provided by the applicant in relation to the locks on the windows was inaccurate and constituted a material misdescription sufficient to entitle Allianz to repudiate the policy. It is submitted that the applicant was denied his constitutional right to fair procedures.

45. In my view, the locks issue is of lesser importance, though it has to be said that if that was the sole issue on which the Ombudsman's decision was based, it would have been relevant for the Ombudsman to have considered also the significance of that issue since it is clear that entry was not gained by that means. He may not have considered in all the circumstances that any perceived misdescription by the applicant at the time he took out the policy would have justified a repudiation of the contract, given the wider basis on which he can make his findings, as opposed to a court of law which would reach a decision on the basis of contract law. That feature of the Ombudsman's jurisdiction is touched upon by Hogan J. in his judgment delivered just two days after I heard the within application in *Lyons and*

another v. Bank of Scotland Plc., High Court, unreported, 14th December 2012, and in which he referred to another judgment delivered by him in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407. In this regard he stated:

"13. This entire debate nonetheless raises what counsel for the Bank, Mr. Fanning, correctly described as an existential question. What, after all, is the purpose of the FSO and, perhaps, more specifically, how does its function differ from those of the courts? In Koczan v. Financial Services Ombudsman [2010] IEHC 407, having referred to the powers given to the FSO by s. 57BK(4), I observed:-

"The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the courts. It is clear from the terms of s. 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of ex aequo et bono which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s. 57CI(2) which provide that:-
'(2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:

(a) the conduct complained of was contrary to law;
(b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

(g) the conduct complained of was otherwise improper.'"

14. So far as the ex aequo et bono jurisdiction is concerned, this is illustrated by a number of statutory appeals that have come before this Court. In Koczan, for example, the issue was whether an income protection policy gave sufficient warning to the insured that the policy might lapse if he became incapacitated through workplace injury and was unable to pay the insurance premia. This is a classic instance of where wider considerations of fairness and reasonableness should be brought to bear to mitigate a possible injustice caused by the bare language of a consumer contract."

46. In relation to the manner in which the Ombudsman expressed his conclusions and did not demonstrate therein any analysis of the competing expert views, and simply stated that he was satisfied that the alarm was inoperable and that accordingly endorsement EO2 applied, it is certainly arguable that if this Court was deciding an application for judicial review, the Finding might be vulnerable to arguments of unreasonableness, and that it failed to give any or any adequate reasons for the decision, thereby making it almost impossible to challenge by way of judicial review. Nevertheless, even though the Ombudsman is performing a different function than a judge, he is as a matter of general fairness required to enable a party to the dispute, particularly the party who is unsuccessful perhaps, to understand the reasons why one party succeeded and the other lost. It seems to me that where there are conflicts of evidence which require to be resolved before a decision can be reached by the Ombudsman, he ought to set forth and analyse the evidence which was provided to him, and then express his conclusions in a way that makes the

basis of the decision clear to the parties. It seems to me that if the unsuccessful party is to be able to make a decision whether or not to exercise his right to appeal the Ombudsman's decision to the High Court, that party must be able to understand clearly the basis on which the decision has been arrived at. I appreciate that the process by which the Ombudsman deals with complaints is intended to be informal and expeditious, but that relates to the assembly of material and submissions relevant to the complaint, and the manner in which it is considered and examined, but it does not in my view justify informality or undue brevity in the manner in which the ultimate decision of the Ombudsman is expressed.

46. The question of whether fair procedures require that the Ombudsman should direct an oral hearing where there is disputed evidence to be resolved before the complaint can be decided, was addressed by Cross J. in his judgment in *Hyde v. Financial Services Ombudsman*, unreported, High Court, 16th November 2011. In that regard he stated as follows:

> *"7.1 In para. 4 of the appellant's affidavit, she complained that the respondent did not require the Bank to "given information under oaths to finely establish the validity of their claims". Clearly the respondent enjoys a broad discretion as to whether or not to hold an oral hearing. In Davy v. Financial Services Ombudsman [2010] 3 I.R. 324 at p. 364, it was held in the Supreme Court that:-*
>
> > *"Assuming, as conceded by the respondent, that there is power to direct an oral hearing then it will be appropriate to consider directing an oral hearing in the interests of fairness where there is a conflict of material fact. There is here such conflict in relation to the oral advice given by the applicant to the notice party and also in relation to the expert evidence as to the nature of the bonds. In Galvin v. Chief Appeals Officer [1997] 3 I.R. 240, Costello P. held it was not possible on the records available to determine that the applicant's wages for the relevant period*

exceeded the insurable limit. In the course of his judgment Costello P. said at p. 251:-

> *'There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing... What I have to decide is (as Keane, J. had to decide, in The State (Boyle) v. General Medical Services (Payments) Board [1981] I.L.R.M. 14) is whether the dispute between the parties as to (a) the reliability of the evidence before the appeals officer, of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other, made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the appeals officer.*
> *I have come to the conclusion that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose in this case.'*

7.2 It is submitted by Mr. McDermott that the appellant did not suggest an oral hearing was necessary at any stage during the investigation nor did the Bank ever suggest that an oral hearing was necessary and submitted that it was difficult to see how the decision of the respondent could now be attacked on the basis of the issues that were not properly raised or ventilated before him.

7.3 I hold that the question of whether or not an oral hearing should take place is indeed a matter of broad discretion for the respondent but the issue before me is whether the failure to do so in the circumstances was a serious and significant error. This is an issue of fair procedures and can be decided by me in this appeal."

47. It will not always be the case that an oral hearing is justified or necessary even where a complainant requests one. It is not in every case that material

essential facts are seriously in dispute, or if they are, that the facts in question are central to any decision which the Ombudsman will make. Sometimes a party will have simply asserted facts which contradict assertions of another, and in such cases it may be unnecessary to hold an oral hearing. But where evidence such as reports are seriously and materially in dispute particularly between experts, the need for an oral hearing increases.

48. Examples of cases where the decision by the Ombudsman not to hold an oral hearing was upheld by the High Court on appeal are those of Hedigan J. in *Cagney v. Financial Services Ombudsman*, High Court, 25th February 2011, and *Caffrey v. Financial Services Ombudsman*, High Court, 12th July 2011.

49. As I have mentioned already, Hogan J. delivered judgment in *Lyons v. Financial Services Ombudsman* a few days after argument before me, and addressed the question of an oral hearing in the context of the right to fair procedures where there is a serious and material conflict of material fact. His conclusions are in line with the authorities to which I was referred. In his conclusions he stated:

> *"36. In these circumstances, it is impossible to avoid the conclusion that the Ombudsman's decision was vitiated by a serious error, negating as it did in the circumstances of this case the very substance of the appellants' constitutional right to fair procedures. In reaching this conclusion I am very mindful of the fact that this decision will have many inconvenient consequences (including, perhaps, considerable resource implications at a time of austerity) for the Ombudsman's office. The Ombudsman cannot, of course, as Mr. McDermott pithily put it, replicate the structure and procedures of the Commercial Court. Perhaps cases such as the present one will prompt a review of the proper scope and role of the Ombudsman vis-à-vis the court system.*
>
> *37. Yet the fact remains that, as matters stand, the essence of the appellants' case has not been properly evaluated in the absence of an*

oral hearing. Perhaps such an omission might not be fatal if the Ombudsman's role was purely facilitative and offered something in the nature of a mediated agreement. Naturally, mediation is a thousand times preferable than litigation, not least in this area.

38. Once, however, the Ombudsman proceeds to adjudication, a legal Rubicon is thereby crossed, not least having regard to the potential legal consequences of such an adjudicatory decision identified by Charleton J. in O'Hara. As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures: see generally, Dellway Investments Ltd. v. National Asset Management Agency [2011] IESC 14. This has further consequences, for, as Cross J. noted in Hyde, the resolution of the question of whether there should be an oral hearing is not a matter which goes directly to the specialist expertise of the Ombudsman, so that the deference to that expertise as enunciated by Finnegan P. in Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman [2006] IEHC 323 is simply not applicable in this particular case.

39. In any event, none of this could take from this Court's bounden duty to uphold the constitutional rights of the appellants and to provide them with an effective remedy where (as here) such a right has been infringed: see, e.g., my own judgment in Efe v. Minister for Justice, Equality and Law Reform [2011] IEHC 214,

40. For all of these reasons, therefore, I propose to allow the appellant's appeal pursuant to s. 57CM(2)(b) of the 1942 Act. I will further remit the appellants' complaint to the Ombudsman for re-hearing in accordance with s. 57CM(2)(c) and I will discuss with the parties' legal representatives the precise form of the order."

50. I am left in no doubt that in order to properly determine the controversy between the competing opinions expressed by Mr Duggan of MCA in his report and the opinions of Mr Nevin in his reports, the Ombudsman ought to

have directed an oral hearing even though one had not been requested by either party. The power vested in the Ombudsman to direct such an oral hearing is not dependent upon him being requested so to do by either party. It is a matter which he must consider and decide upon. While he stated in his final affidavit that having considered the parties' submissions he did not believe that an oral hearing would have advanced matters further, he has not disclosed the basis on which that belief was reached. It clearly was the case that not only did the applicant take issue with material facts and opinions stated by Mr Duggan in his report, but that the applicant's expert did also. In my view fair procedures required that the applicant be afforded an opportunity to hear Mr Duggan speak to his report and to have an opportunity to cross-examine him in relation to it, and to have his own expert heard. It is hard to see how these controversies could be fairly resolved merely by expressing satisfaction with the views expressed by Mr Duggan, especially where the Ombudsman's decision does not analyse the competing views and opinions, and explain how the decision was arrived at.

51. I appreciate that the question of an oral hearing was raised late in this case, but in my view the applicant should not be deprived of arguing that issue, given its significance for the applicant.

52. In so far as curial deference has been referred to on this application, it is of course the case that a Court should not easily interfere with a decision of the Ombudsman where he arrives at such decision in reliance upon his own particular expertise. However, in the present case, it cannot be said that his expertise lies in the area of alarm installation. That is outside his expertise as Financial Services Ombudsman, and it is obvious therefore that where two electrical/alarm experts disagree he cannot call upon any expertise of his own in order to resolve the disagreement without hearing each, including any cross-examination which may occur.

53. I am most appreciative of the assistance given by Micheál Ó Scanaill SC for the applicant, and by Paul Anthony McDermott BL for the respondent and for their helpful submissions and reference to the relevant authorities.

54. I will make an order pursuant to Section 57CM(2)(b) of the Act of 2004 setting aside the Finding of the Ombudsman dated 21st April 2011, and an order pursuant to Section 57CM(2)(c) thereof remitting same to the Ombudsman, and I will hear the parties submissions' as to any further directions which this Court should give for the purposes of Section 57CM(3) thereof.