THE HIGH COURT

[2012 No. 253 MCA]

BETWEEN

IRENE SMARTT

APPELLANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

<u>JUDGMENT of Mr. Justice Hedigan delivered on the 20th day of November 2013</u>

1. The role of the Financial Services Ombudsman is now well established. It provides an informal, cost-free system of resolving disputes. See *Walsh v. The Financial Services Ombudsman* (the High Court, 27th June 2012).

2. The role of the court in an appeal such as this is also well established. In *Ulster Bank v. Financial Services Ombudsman and Others* [2006] IEHC 323 , Finnegan P. stated:

> "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*."

3. From this case, it is possible to extract the following principles that should guide the court in an appeal such as this:

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

(ii) the onus of proof is a 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 or a series of such errors;

(v) in applying this test, the court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman.

The court can only intervene if it concludes that the Financial Services Ombudsman could not reasonably have come to the decision impugned based on the facts he had before him. See *Governey v. Financial Services Ombudsman* [2013] IEHC 403.

4. The complaint made to the Financial Services Ombudsman (FSO) by the appellant was that the EBS, her insurers in the circumstances, incorrectly cancelled her Serious Illness Cover (SIC) without her consent and without notifying her. She stated that in November 2010, she was diagnosed with breast cancer and consequently tried to claim under her SIC policy held with the Society. She was informed by them that this cover had been cancelled in 2008. She denies this. In her complaint, she argues that she did not instruct the Society to terminate her SIC and was never informed by them that her policy had in fact been cancelled. She also alleged that the Society subsequently amended documentation without reference to her, giving the impression that she did not require SIC.

5. For their part, the provider stated that they acted in accordance with her instructions to replace a Mortgage Protection Policy (including SIC) with a decreased

level of cover in respect of her Mortgage Protection Policy (without SIC) in February 2008. The appellant in this hearing challenges the finding of the FSO on its merits. No request was made by her for an oral hearing at any time, nor was the absence of one pleaded in the notice of opposition herein. This is not surprising since it is clear all along that the complaint fell to be decided upon the documentation. That was clearly the understanding among the parties. I cannot allow that question to be raised now for the first time.

6. The following seem to me to be the relevant facts. In January 2000, the appellant applied for life assurance and SIC with Caledonian. She ticked a box that indicated that SIC was included. This policy commenced on 23rd March, 2000. On 4th December, 2007, the appellant reduced the balance of her mortgage by paying in approximately €49,000, thus leaving a balance of about €86,000. She was advised by the provider, EBS, that she might wish to reduce her life cover in the light of this partial redemption of the mortgage. On 24th January, 2008, she indicated that she wanted to reduce expenditure on life assurance. She was offered two new quotations. The first of these for life assurance and SIC came with a premium of €120.30. The second, which was for life assurance only, had a premium of €17.17. It was recorded that her choice of the latter policy was driven by cost as the reason. On a document dated 20th February, 2008, the appellant signed the Mortgage Protection Planner document (at p. 272 in the documents herein). The box ticked is one that says SIC is not included. Further, on 20th February, 2008, she signed the Business Replacement Form document (at p. 275). Her signature on the form confirms that the implications of the change in the policy had been explained to her. Also dated 20th February, 2008, the appellant signed the Customer Application Booklet document (p. 277). This document made it clear that where a policy was being replaced, special care should be

taken by the client to ensure that the new policy met her needs. Also, on 20th February, 2008, a Welcome Pack was sent to the appellant (p. 280). This pack also contained warnings about replacing a policy. Various documents such as Terms and Conditions were enclosed with this pack. On 27th February, 2008, the existing Mortgage Protection policy which had SIC included in it since 2000 was replaced. On 23rd March, 2009, the appellant visited the Dalkey branch of EBS and sought an additional Mortgage Protection Plan, again without SIC on the basis that it was "the cheapest cover required at this time" (p. 623). The box ticked was one which said that SIC is not included (p. 623). The appellant does not dispute that she did not seek SIC in her 2008 reorganisation of her cover. She says she did not do so because she thought she was already covered for it.

7. Clearly, the issue of the ticking or non-ticking of boxes on the various forms is irrelevant. The appellant herself has stated unequivocally that she did not seek SIC in the new plan. She says she thought she already had it and would continue to have it under the Caledonian policy. In essence, her complaint is that she was not told that her SIC would not continue.

8. The FSO states that he considered the complaint by reference to the written evidence. He notes her written acceptance in the MPP (p272) of and satisfaction with the level of cover. He notes she signed below the section that referred to SIC but stated she did not want it. She further ticked a box that acknowledged she had been advised as to the consequences of replacing an existing policy.

9. In the Business Replacement Form (BRF- p. 275), it was stated that the old policy was 'Mortgage Protection and Serious Illness'. The new, however, was 'Mortgage Protection' only. The appellant signed this form, confirming the financial

implications of replacing the original policy had been explained and that she understood.

10. In the Welcome Pack letter of 20th February, 2008, the appellant was asked to carefully consider the documentation to ensure the cover was in line with her expectations. This was noted to be especially important where she was replacing an existing cover. The Policy Schedule and Customer Information Notice clearly stated that life cover only had been taken out.

11. The FSO took into account also that the policy being replaced had been one single policy of life and SIC since 2000. He considered it should have been obvious that any replacement of it would be of all of it and not just a part. He did consider the fact that there are in existence two different versions of the same page in the Mortgage Protection Planner - one with the 'No' box ticked and one without a tick, where the importance of SIC to the appellant is referred. This, he noted, was not explained by the EBS. However, owing to the other evidence, he did not take this into account. It is hard to criticise this because the appellant herself makes clear she did not ask for SIC. She argues that she thought she had this continuing. The same thing applies to the apparently changed dates. Thus, whether the boxes were ticked or not or whether the dates were changed or not is not relevant to the appellant's actual complaint.

12. The FSO finds, on the basis of the documentation signed by her, that the appellant, in accepting a reduced premium, had foregone SIC. He finds she was put on notice of that in her policy documentation. He finds this was an important document and should have been carefully pursued by her. He finds the document is not confusing. Was this a reasonable finding based on the facts before him? Clearly, it was. He was entitled to rely upon the repeated signing of documents by the

appellant, acknowledging that the risks and consequences of replacing her existing policy cover needed to be carefully considered by her. Thus, in my view, the FSO had before him and relied upon relevant evidence upon which he could rely in coming to the decision he did. That is the test. It is not for this Court to either agree or disagree with his finding as long as it is one reasonably based upon the evidence before him.

13. I must therefore dismiss the appeal.