THE HIGH COURT

Record No. 2021 / 144 MCA

IN THE MATTER OF ORDER 84(C) OF THE RULES OF THE SUPERIOR COURTS AND IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

Between:-

HUGH FRIEL AND CHRISTINE FRIEL

APPELLANTS

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

NEW IRELAND ASSURANCE COMPANY PLC T/A BANK OF IRELAND LIFE

NOTICE PARTY

STENOGRAPHER'S NOTE OF THE *EX-TEMPORE* JUDGMENT OF OWENS J. DATED 2 MARCH 2023

Now I have had an opportunity to consider this. Firstly, I'd like to thank counsel for their very comprehensive submissions in relation to matters. The first thing I would say about administrative decision making, especially in relation to remedies, is that the remedies applied by administrative decision makers must be what I would describe as proportionate to what has gone wrong. That requires an analysis by administrative decision makers of what has gone wrong, obviously, and what remedy is proportionate to that.

It is an important consideration, proportionality is a vital tool of administrative decision makers. I can only interfere in relation to administrative decisions of the sort that have been made here if what is called a serious and significant error has been established. It seemed to me in relation to it that, having listened to matters for a while during the course of the argument, as you probably gather, that this really is a rather straightforward case.

It seems to me that, unfortunately for Mr. and Mrs. Friel, they haven't demonstrated that the Ombudsman has made a serious and significant error in her decision making. I noted in relation to those words of serious and significant error a gloss which is perhaps put on it by Mr. Justice MacMenamin in ***Molloy -v- Financial Service Ombudsman*** because he makes an important observation relating to the test:

The question really is, if the errors had not been made, would it reasonably have made a difference to the outcome. And, of course, that relates both to decision making as to what happened and also decision making in relation to the remedies that one grants as a decision maker. So it seemed to me, my view in relation to these matters was "no" in this particular case.

The fact of the matter is that the insurer here was never prepared to issue a policy to Mr. and Mrs. Friel which gave Mrs. Friel serious injury cover for MS. In the light of the family medical history it is most unlikely indeed that she could have got that type of cover from any insurer, as indeed was pointed out by the decision maker. Any other insurer was likely to have adopted the same view. And also, in relation to matters, as I pointed out to counsel, the Friels would have had to disclose, in the event that they had gone to another insurer, that the Bank of Ireland's captured insurance company New Ireland Assurance had denied that cover. That's unfortunately the reality of matters. These things, of course, should have been explained to the Friels in Letterkenny as there is an obligation on insurance agents to assist those in applications so that they have an understanding of what the process is.

Now, the effect of what happened in Letterkenny was undoubtedly that they were mis-sold the policy but not in a general sense of in effect any sort of misrepresentation or anything like that. They were mis-sold the policy in the sense that the letter that they signed wasn't explained to them and it was never made clear that they were not getting this particular type of cover. But it is impossible really, in my view, to say that there was any reality in their position being any different, I am afraid, if matters had fully been explained to them.

They would have been in substance in exactly the same position. I consider that there's nothing illogical on overall analysis by the lady Ombudsman of the position as not warranting forcing the insurer to provide cover which it was never willing to provide. I consider in relation to that the approach of the Ombudsman on that issue did not represent what I would describe as a serious and significant error in her approach.

Now "error" in that context - you mightn't like the result in relation to that - but error in that context really means error in legal terms in relation to it. What one is looking at is, is there, firstly, a serious error and, secondly, significant. Both of those words have meanings. "Serious" means what it says and "significant" means, obviously, that it has a significant effect, if you like, in terms of outcome, whether it be in terms of a finding of fact which hasn't been demonstrated in this matter, or indeed an outcome in relation to the approach that the decision maker takes relating to what the appropriate remedy is in the situation.

It seemed to me that the Respondent correctly points out in this particular matter that some of the claims, which in fact were all considered by the Ombudsman, were rejected, the claims based on active misrepresentation by bank officials. So this is not a case where they were, if you like, at cross purposes in that particular sense. That wasn't in point of fact what was happening. The policy holders were provided with a document explaining the special exclusion. Unfortunately they signed it without reading it. The Ombudsman also found as a fact that that document, of course, included the first page in relation to the matter.

Really the essence of their complaint, as I understood it, was that, as a result of what happened in Letterkenny - and as a result of what they were not told - they only found out about the lack of MS cover when they tried to make a claim on the policy. That really comes down to it, that the Ombudswoman appears to accept that that was in fact the position.

While I agree with Mr. Geoghegan that the statutory scheme allows the Ombudsman to give remedies which a court might not otherwise give, this is qualified. What has to be

granted, I would explain again, has to be an appropriate remedy to correct such failures in selling the product as have been identified. This has become clear indeed since the decision was given by the Ombudsman in this particular case and it becomes clear when one reads paragraphs 107, I think, and 108 of the judgment of the Court of Appeal in the ***Utmost Paneurope*** case which was decided, as we know, in 2022.

In my view it wasn't necessary for the decision maker to articulate specifically in her decision whether or not she was considering whether to award the amount of the sum insured on the footing that MS was a covered illness or to compel payout for that amount on the policy as part of any analysis which excluded that as a basis of compensation or excluded that as an approach to dealing with the consequences of failures in the Letterkenny branch to explain the letter which was signed by Mr. and Mrs. Friel.

In fact when one reads the decision, one finds that she specifically accepted in relation to this; in other words, in relation to this matter, she did consider it and she has actually specifically accepted that the insurer was entitled to apply the special term, excluding MS, to Mrs. Friel's serious injury cover and that the term continued to apply to the Friel's policy. This was an express finding in relation to a matter which was canvassed. So she has actually come to that conclusion. That is a specific finding which she arrived at which indicated that her approach to remedies was not to pay out the 157,000 and, in my view, she was entitled to come to that conclusion. If she had specifically articulated that she was, if you like, in a special sentence 'that I am considering whether to require the insurer to pay out the 157,000 on the policy,' when you read the decision it's quite clear that the decision would have been the same decision for the same reasons.

So the fact that something may not have been particularly expressed or that the preliminary remark in relation to the consideration was not there doesn't mean that something has not been considered. It is evident from a whole fair reading of the decision, that the matter that Mr. Geoghegan complained of as not having been thought of, in my view, was indeed considered.

The decision maker looked at what she identified that the insurer's agents did wrong or did not do and the effect of those actions and inactions. She looked at the conduct of the insurance provider and the provider's agent. She looked at the reality in relation to cover for MS for Mrs. Friel and some unlikely availability.

She didn't consider it appropriate to engage in speculative theorising on whether, if the information was available, the Applicants would have sought an alternative policy. As the decision maker pointed out, and indeed I pointed out, I think, during the course of the matter, it is highly unlikely that Mrs. Friel would have been able to secure cover with this provider or with any other insurer for that particular risk. That finding, in my view, by the insurance Ombudswoman was within the expert purview of the decision maker. In fact anybody with a knowledge of insurance would know that. It is my view, for what it is worth, that those who were dealing with the matter in Letterkenny, if they had complied with their obligations and advisory duties, would have drawn home this particular home truth to the attention of Mr. and Mrs. Friel and not given them, if you like, any room for false hope in relation to that. That really represents, I am afraid, the reality of the position.

So, with regard to the decision maker, I can't identify any significant error here. It seemed to me - in coming back to the point that I made originally about proportionality - that the factors influencing the decision correctly analysed proportionality. All of the circumstances of what happened were fully explored and considered. The case made by Mr. and Mrs. Friel that they were deliberately misled was rejected. That might have resulted in a different result. It would have been incorrect, in my view, for her to have proceeded otherwise than she did, in the absence of something very special which made payment of the claim proportionate to what she found as being the mischief about what happened in the Letterkenny branch of the Bank of Ireland on 5th February, I think it is 2013, whatever date it was, when the letter was signed by Mr. and Mrs. Friel.

Now with reference to the award of €15,000, the power is:

"To award compensation for any loss, expense or inconvenience sustained by the

complainant as a result of the conduct complained of."

This relates to cases where the remedy of requiring payment under the policy or some other remedy is not given. Provisions relating to compensation are not designed, if I might put it like this, to permit an end run around other relief. If it is not appropriate to give some other relief, such as a remedy requiring provision of cover or providing a payout on foot of the policy for reasons identified by the decision maker, the award of compensation is not, if you like, a substitute for that. The power to award compensation is also not a power to levy an administrative fine or to punish anybody. As set out, it must relate to what's called loss, expense or inconvenience.

Again in relation to that this court is not a court of appeal in relation to these matters. I've a very, very limited remit in relation to adjusting these matters and I cannot interfere with the award unless it can be demonstrated that a serious and significant error has been made in decision making. It seems to me in relation to this again that no such error has been identified.

In essence, the Friels in this case have been compensated by the Ombudsman for inconvenience. They still have the other benefits of their policy, and I don't accept that the sum awarded was plucked out of the air. The decision maker has set out the basis on which she awarded the sum at page 29 of her reasoning. The amount of the award is within her competence. I might have awarded more in relation to it, but it's not for me to step in and insert my oar in relation to thing.

In my view she was entitled not to have regard to the fact that the €157,000 was being paid out in assessing compensation, so I'm rejecting, in other words, that particular argument, which was very ably made by Mr. Geoghegan but I don't agree with it. The argument may be ably made, as were all of your arguments, Mr. Geoghegan, but unfortunately, if I disagree with them, they can be put forward by the ablest counsel in Ireland and that's the end of it.

In my view she didn't have a role either in engaging in speculative scenarios, about theorising loss arising from theoretical opportunities of the policy holder to get MS cover. And, as I mentioned it, I think, during the course of the argument, that heaven knows what premium that one might get cover for that.

It seems to me also, I have to say, in relation to the argument about the maximum jurisdiction in relation to terms of award, that has no relevance in relation to the exercise either.

So I'm rejecting the application, that's the end of it.