THE HIGH COURT

[No. 2019/289 MCA]

IN THE MATTER OF SECTION 64 OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN ACT 2017

AND

IN THE MATTER OF A DETERMINATION OF THE FINANCIAL SERVICES AND PENSION OMBUDSMAN MADE ON 14TH AUGUST 2019 BEARING REFERENCE NO. 16/91486

BETWEEN

JOHN O'CONNELL

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT NO. 2 of Mr. Justice Tony O'Connor delivered on the 5th day of November, 2020

Introduction

1. The appellant appeals the decision of the respondent Ombudsman ('the Ombudsman') which determined his complaint about a provider of life assurance having allegedly cancelled wrongfully or unfairly two life policies in February 2016. The decision stated: -

(i) "pursuant to s.60(1) of the Financial Services and Pension Ombudsman Act 2017 ('the 2017 Act') this complaint 'is partially upheld on the grounds prescribed in s.60(2)(g)'";

(ii) Pursuant to s.60(4) and s.60(6) of the 2017 Act, the respondent provider "was directed to make available to the complainants" the five options already offered by the provider without returning the encashment amount for specific life cover at prescribed monthly premia along with a sixth option of returning "the full encashed value of €7,284.26 to the provider in return for the reinstatement of policy…from the 24th of February, 2016, on a dual life, whole of life basis, with a life cover benefit on each life of €134,000 for a monthly premium of €101.84. In that event, the provider should deduct the premium due from the 24th February, 2016 to the date of reinstatement, from the policy unit value and the policy can then continue, with the complainants making monthly premium payments and the provider administering the policy in accordance with its terms and conditions''.

(iii) "pay the complainants a compensatory payment in the amount of €300 to an account of their choosing within a period of 35 days of the nomination of account details by the complaints to the provider. I also direct that interest is to be paid by the provider on the said compensatory payment at the rate referred to in s.22 of the Courts Act 1981 if the amount is not paid to the said account within that period."

(iv) "the provider is also required to comply with s.60(8)(b) of the" 2017 Act and "the above decision is legally binding on the parties, subject

only to an appeal to the High Court not later than 35 days of the date of notification of this decision."

Summary of complained process.

2. The appellant wrote in February 2016 to his life insurance provider (**'the provider'**) "…in relation to cashing in the value of our policies, they are dropping in value every year…". On the 3rd of March, 2016, two cheques sent by his provider were encashed and the appellant waited for six months to make a complaint to the provider initially and then to the Ombudsman.

3. After an unsuccessful confidential mediation process, the complaint was sent for formal investigation in July 2018. The Ombudsman prepared a summary of the complaint which was sent to the provider and the appellant, with which the appellant took no issue at that stage. The decision of the Ombudsman was dated the 14th of August, 2019.

Appeal under the 2017 Act.

4. Order 84(c) of the Rules of the Superior Courts provides that an appeal shall be commenced by notice of motion which, "…shall specify the reliefs sought, and the particular provision or provisions of the relevant enactment authorising the granting of such relief". Order 84(c)(3) describes the detail to be included in an affidavit grounding the notice of motion.

5. The statement of opposition in these proceedings filed on 29th November, 2019, identified a number of preliminary objections including the failure to specify any infirmity with the decision "…other than an allegation seemingly in respect of delay at the final page of the affidavit [which is not accepted]…". In addition, counsel for the Ombudsman submitted that the appellant raised a host of issues which formed no part of his original complaint to the Ombudsman. The appellant expressly

declined on the 3 February 2020, before Meenan J. to submit any further affidavit to mend his hand in order to comply with the Rules of the Superior Courts.

Grounds of appeal document.

6. A document headed "Grounds of Appeal*"* dated the 28 October 2019, was signed by the appellant "appearing in person as a 'litigant in person'*".* There is no provision for filing this document in the rules and there is no order on the court file directing or giving liberty to the appellant to file and serve such a document. The document adopts a scattergun approach by alleging that the procedures and investigations of the Ombudsman were flawed and by alleging that the Ombudsman erred:

(i) "…Not holding an oral hearing to consider the conflict of facts";

(ii) "… not considering all aspects of the complaint";

(iii) "…in fact and law in not finding for the appellant in s.57C 1(2) Central Bank Act 1942…";

(iv) "… in law – s.51(2)(iii) of the FSPO Act 2017, resulting in the decision that the appellant complaint relating to the sale of policy DF…to the appellant in 2000 does not form part of the investigation".

(v) "… in her decision relating to s.51 is unconstitutional…";

(vi) "… in law in not finding that fair procedures were not followed allowing the appellant's complaint for mis-selling…";

(vii) "erred on page 2…in refusing/interpreting the complainant on a time restriction section of the FSPO s.51(3)(a) then dismissing these complaints at first instance";

(viii) "in not properly holding the provider accountable to the Consumer Protection Acts…";

(ix) "… showing a deference of evidence towards the provider over the appellant";

(x) "… in not finding the policy DF…was opportunistic…";

(xi) "… in fact not finding the appellant was induced into entering the policy to secure the mortgage";

(xii) "…in not finding the product policy DF… was unsuitable, unnecessary and neither explained to the appellant";

(xiii) "…in fact wrongly considering the background of the evidence enough…";

(xiv) "… failed to consider the product…"

Status of appellant in person.

7. In *Burke v. O'Halloran* [2009] 3 IR 809 Clarke J. (as he then was) noted at p.819: -

> "A party who chooses to represent him or herself is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party."

8. In *ACC Bank v. Kelly* [2011] IEHC 7, Clarke J. quoting commentary stated at para. 2.1:

> "…the court should not confer upon a personal litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity to each party to present its case."

He continued at para. 2.6 that the plaintiff before him: -

> "…cannot expect to gain an advantage because he is a litigant in person. To have allowed him to do what he wanted would have been to give him an advantage which no represented litigant could even remotely hope to obtain".

9. The fact that the appellant chose to pursue this appeal without legal representation does not confer any different duty on the court to him than it owes to a litigant who is represented by qualified lawyers.

10. Moreover, the remark of McGovern J. in *Doherty v. Minister for Justice, Equality and Law Reform* [2009] IEHC 246 (para. 14) resonates as submitted by counsel: -

> "…it seems to me that it is not the function of the court to sift through the material in the statement of claim to see if, perhaps, somewhere within it, a claim can be found in the proper form."

11. The Rules of the Superior Courts were designed to assist in the administering of justice and litigants whether represented or not ignore them at their peril. The appellant did not make any submission to the court to counter the statement that this statutory appeal cannot be a new hearing of his complaint to the Ombudsman. The appellant wittingly or unwittingly overlooks his obligation to comply with O.84(C) of the Rules of the Superior Courts. He cites no authority for this Court to have regard to his grounds of appeal document.

12. Further I accept the submission of counsel that the appellant has had "every opportunity to formulate a proper appeal. He has declined to do so…for this reason alone…the reliefs should be refused".

<u>Alternative approach to determining the appeal.</u>

13. Even if the appellant is considered to have properly formulated an appeal in some way and without detracting from my earlier statement that it is not for the court

to define something from the broad and scattergun approach adopted by the appellant in his notice of motion and so called grounds of appeal, this Court finds that there is an underlying misunderstanding shown by the appellant about the reliefs and the grounds therefor which the court can consider.

14. Having sought and received the full encashment value of two life insurance policies, the appellant contends that he only wanted partial encashment. Even on the day of the hearing of this appeal, the appellant was unable to articulate what he ultimately wanted which was not granted by one of the six options made available to him by the Ombudsman. In other words, the reference in his oral address to this court to statements by public representatives about such policies and other mentions of what he perceived to be wrong, lacked a focus on what can be achieved in an appeal like this.

15. Delay in the determination of his complaint to the Ombudsman and the constitutionality of the legislation which he mentions cannot be part of this type of appeal.

16. The decision by the Ombudsman not to hold an oral hearing is challenged by the appellant without outlining what evidence he would have given had an oral hearing occurred. In *Ryan v. Financial Services Ombudsman* (unreported, High Court, 23 September 2011), MacMenamin J. stated (p.34): -

> "The courts have constantly deprecated any tendency to seek to make a case that was not made before the Ombudsman".

At p.35 MacMenamin J. continued: -

> "The Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing."

He added that: -

> "It is important to recognise that, if the Ombudsman's Office is to be permitted to carry out its statutory function, effectively it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law."

17. In *Cagney v. Financial Services Ombudsman* (unreported 25th February, 2011), Hedigan J. stated at p.6: -

> "In the circumstances of this case the decision made by the Ombudsman not to hold an oral hearing was a decision that was well within his jurisdiction and therefore not something with which this court can interfere".

It is worth emphasising that the appellant has not set out on affidavit what would have emerged at an oral hearing which had not already been considered by the Ombudsman in his summary of complaint with which the appellant did not take any issue at that time.

Issues advanced unrelated to the original complaint.

18. The complaint form, or the documentation accompanying it, made no reference to the following which are belatedly mentioned by the appellant: -

(a) That the provider did not act in accordance with fair procedures;

(b) that the provider breached provisions like the Consumer Protection Act;

(c) that the policy DF…was "opportunistic on the part of the provider for the purpose of unjust enrichment";

(d) that the "appellant was induced into entering the policy to secure the mortgage";

(e) that the policy was "unsuitable" or "unnecessary";

(f) that the policy somehow breached the Family Home Protection Act, 1976.

19. I accept the submission of counsel that if the appellant was to be indulged in the manner in which he proposes, "decision making would become impossible, because it would be necessary to restart the process, and to engage in a fresh set of submissions from the provider responding submissions to that and so on". Here, the decision expressly noted (p.504) that, "the complaint for adjudication" was that "…the provider wrongfully or unfairly cancelled the complaint's two life insurance policies in February 2016".

Burden of proof.

20. It has been established for a long time, particularly since the judgment of Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323, that: -

(1) The burden of proof is on the appellant.

(2) The onus of proof is the civil standard.

(3) The court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole.

(4) 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.

(5) The court will adopt a deferential stance having regard to the degree of expertise and specialist knowledge of the Ombudsman.

21. Cherry picking or isolating an apparent error is not sufficient. As Keane C.J. stated in *Orange v. Director of Telecommunications Regulation* [2000] 4 IR 159 at 184-185: -

> "In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be in the substitution by the High Court of its adjudication for that of the first defendant".

Serious and significant error?

22. The appellant in these proceedings fails to acknowledge that he has a high threshold to overcome in order to set aside the decision of the Ombudsman. Baker J. in *O'Donoghue v. Office of Financial Services and Pensions Ombudsman* [2018] IEHC 581 at para. 7 succinctly states: -

> "The High Court is bound by the findings of fact, unless these are clearly wrong or the determinations of fact are considered to have been made on evidence which is not credible or which does not bear out the conclusions reached."

Despite the time and opportunities given to the appellant since his complaint to the Ombudsman and throughout the prosecution of this appeal, he has singularly failed to persuade this Court of any serious and significant error made by the Ombudsman. I have regard to the dictum of O'Malley J. in *Carr v. Financial Services Ombudsman* [2013] IEHC 182 where she stated: -

> "I consider that the obligation of the respondent to give the 'broad gist' of his reasons in a written finding means that he is not obliged to deal on a point-by-point basis with every argument made by a complainant. This was a case with extensive written submissions. The respondent is, within his discretion and relying on his own expertise in the area, entitled to select and determine those issues that appear to him to be relevant."

Conclusion

23. For all of the above reasons I shall make an order refusing each of the reliefs sought in the notice of motion issued on the 10th of September, 2019. In the interests of minimising personal appearances in Court during these current restrictions, I direct the appellant to deliver submissions as to why the costs of these proceedings should not follow the event of not succeeding in the appeal. Within seven days of receipt of those submissions by email, the respondent is directed to furnish and file a written reply if it is intended to pursue the appellant for the costs. The parties are also invited to include submissions on whether an oral hearing is required to determine any application on behalf of the respondent for costs, bearing in mind the COVID-19 restrictions.