APPROVED **[2021] IEHC 23**

THE HIGH COURT

2019 No. 286 MCA

IN THE MATTER OF AN APPEAL UNDER SECTION 64 OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

BETWEEN

UTMOST PANEUROPE DAC

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

W.

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 February 2021

INTRODUCTION

1. This judgment addresses a number of consequential matters arising out of the principal judgment delivered in these proceedings, *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2020] IEHC 538. Specifically, it addresses whether the matter should be remitted to the Office of the Ombudsman for reconsideration, and whether leave to apply to the Court of Appeal for a review should be granted.

NO REDACTION REQUIRED

2. The shorthand "***the Ombudsman***" and "***insurance provider***" will be used to refer to the parties to the proceedings.

3. The insured party, W, did not participate. An order has been made pursuant to section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 restricting the publication or broadcasting of the name and address of the insured party (the notice party to these proceedings). This order is appropriate in circumstances where it had been necessary for the purposes of the principal judgment to set out the notice party's sensitive medical history in detail.

APPLICATION TO REMIT MATTER TO OFFICE OF THE OMBUDSMAN

4. Section 64 of the Financial Services and Pensions Ombudsman Act 2017 addresses the form of orders which the High Court may make in respect of an appeal against a decision of the Ombudsman as follows.

> (3) The orders that may be made by the High Court on the hearing of an appeal under this section include (but are not limited to) one or more of the following:
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> (a) an order affirming the decision or direction of the Ombudsman, subject to such modifications as it considers appropriate;
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> (b) an order setting aside that decision or any direction included in it;
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> (c) an order remitting that decision or any such direction to the Ombudsman for review with its opinion on the matter;
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> (d) such other order in relation to the matter as it considers just in all the circumstances;
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> (e) such order as to costs as it thinks fit;
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> (f) an order amending the decision or direction of the Ombudsman, as the case may be.
>
> […]

> (5) Where the High Court makes an order remitting to the Ombudsman a decision or direction of the Ombudsman for review, the Ombudsman shall review the decision or direction in accordance with any directions of the court.

5. As appears from the principal judgment, this court held that the Ombudsman had erred in upholding a complaint made by the notice party in respect of the processing of her claim for payment pursuant to an income protection policy. The principal judgment went on to indicate that an order would be made, pursuant to section 64(3)(b), setting aside the Ombudsman's decision and direction in their entirety.

6. The Ombudsman now seeks an additional order remitting the matter to his Office for review in accordance with the findings of the court. The insurance provider opposes remittal on the grounds that there is, in effect, nothing remaining for the Ombudsman to decide, given the findings made by this court in its principal judgment. Emphasis is placed on the fact that this court held (at paragraphs 71 to 80 of the judgment) that the criticisms made of the insurance provider by the Ombudsman were unjustified.

7. I am satisfied that this is an appropriate case in which to make an order for remittal. Whereas it is correct to say that this court made certain findings in respect of the correspondence between the insurance provider and the independent medical consultant, the more significant finding had been that the Ombudsman had erred in failing to have regard to the Central Bank's Consumer Protection Code. The notice party's complaint should now be reviewed in light of this latter finding. As counsel for the Ombudsman put it in submission, there is still a "job" to be done. Accordingly, I direct that the matter be remitted to the Office of the Ombudsman to be reviewed (by a different decision-maker within the Office) having regard to the Consumer Protection Code.

8. Finally, for the sake of completeness, it is necessary to address a separate, procedural objection raised by the insurance provider. In essence, it is suggested that the possibility of a remittal is foreclosed by the fact that this court, in its principal judgment, indicated

that an order would be made setting aside the Ombudsman's decision and direction in their entirety. It is further suggested that the Ombudsman is inviting this court to make an entirely different order (as opposed to an additional order) than that proposed in the judgment.

9. This suggestion was, very sensibly, not pressed at the hearing on 3 February 2021. The setting aside of a decision and the making of an order for remittal are not mutually exclusive. Indeed, it would seem to follow, by analogy with the approach taken to judicial review proceedings, that an order setting aside a decision is a necessary first step to the making of an order for remittal. The initial decision would have to be set aside to allow the Ombudsman to embark upon a reconsideration.

LEAVE TO APPLY FOR REVIEW TO COURT OF APPEAL

10. The principal judgment had been delivered in the context of a statutory appeal pursuant to section 64 of the Financial Services and Pensions Ombudsman Act 2017. Sub-section 64(6) provides as follows.

> (6) The decision of the High Court on the hearing of such an appeal is final, other than that a party to the appeal may apply to the Court of Appeal to review the decision on a question of law (but only with the leave of either of those courts, as appropriate).

11. As appears, a party who is dissatisfied with a decision of the High Court is entitled to apply to the Court of Appeal "to review" the decision on a "question of law". (This is subject to either the High Court or the Court of Appeal granting "leave"). The statutory language is precise, and appears to envisage something less than a full blooded appeal. Of course, it is ultimately a matter for the Court of Appeal to define the scope of its appellate role, and I propose to say no more in relation to same.

12. The High Court's function at this stage is confined to determining whether or not to grant "leave" to apply to the Court of Appeal for a review. The Financial Services and Pensions

Ombudsman Act 2017 is silent as to the criteria to be considered by the High Court in this regard. Notably, there is no requirement that the "question of law" meet a threshold of "exceptional public importance" or "public interest". This is in marked contrast to other legislative provisions which limit access to the Court of Appeal, such as, for example, under the planning legislation or the immigration legislation.

13. The threshold to be applied under the equivalent provision of the precursor to the Financial Services and Pensions Ombudsman Act 2017 has been authoritatively defined as follows by the Supreme Court in *Governey v. Financial Services Ombudsman (No. 1)* [2015] IESC 38; [2015] 2 I.R. 616. Having noted that no criteria of any sort had been specified under the provision, Clarke C.J. then stated as follows (at paragraphs 18 to 20).

> "[…] That section simply speaks of the requirement for leave of either the High Court or this court without specifying any particular criteria by reference to which that leave is to be granted or refused.
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> In the light of the general principles applicable to the construction of legislative provisions which restrict or exclude a right of appeal otherwise constitutionally provided, I am satisfied that a statutory provision which provides for appeal only on leave, but which is silent as to the leave criteria, must be interpreted as meaning that leave should be granted provided that a stateable basis for appeal has been established. No higher criteria should be implied in the absence of express provision.
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> In addition, in the context of this case, it must also be noted that the stateable basis for the appeal sought to be brought must, of course, be a stateable basis within the scope of the type of appeal allowed. As this case can only involve an appeal on a point of law, it follows that it is necessary for [the putative appellant] to establish that he has a stateable appeal on a point of law. If the scope of appeal permitted under the Act of 1942 were wider, then, of course, the type of appeal which might meet a stateability test might itself be wider."

14. The Court of Appeal has emphasised that where leave is granted, the question of law for determination should be clearly identified in the order of the High Court. (See *Millar v. Financial Services Ombudsman* [2015] IECA 126 and 127; [2015] 2 I.R. 456; [2015] 2 I.L.R.M. 337).

15. I turn now to apply these principles to the circumstances of the present case.

16. The written legal submissions filed on behalf of the Ombudsman identify, in broad terms, the grounds of appeal/review which he seeks to advance. These were refined somewhat by leading counsel at the hearing before me on 3 February 2021, with a view to identifying the *questions of law* said to underlie the grounds of appeal/review.

17. In response, leading counsel for the insurance provider, while acknowledging that the threshold for the grant of leave is low, submitted that certain of the grounds of appeal/review simply sought to challenge findings of fact and did not disclose any question of law.

18. Having carefully considered the submissions of both parties, I am satisfied that leave to apply to the Court of Appeal for a review of the principal judgment should be granted on the following questions of law.

19. The first question of law is whether the Ombudsman, when determining the reasonableness of the conduct of a financial services provider, is required to have regard to any applicable code of conduct published by the Central Bank. The principal judgment had found that the Ombudsman had erred in failing to have regard to the Central Bank's Consumer Protection Code. The rationale being that the code of conduct represents a relevant consideration in assessing reasonableness. (For the avoidance of doubt, it had not been intended to suggest that the code of conduct is necessarily conclusive, rather that it is a *relevant consideration* to which the Ombudsman should have regard in assessing reasonableness).

20. The Ombudsman submits that this finding is in error in circumstances where the legislation itself does not prescribe that reasonableness is to be reckoned by reference to a particular standard or code of conduct. I am satisfied that this represents an arguable ground for review. The criteria, if any, which the Ombudsman is required to have regard

to in determining the reasonableness of the conduct of a financial services provider have not yet been considered in detail by the Court of Appeal. The question of law is, therefore, open to this extent.

21. The second question of law is whether the Ombudsman has jurisdiction, in the absence of any finding on his part that there has been a breach of contract, to direct a financial services provider to admit a claim under a policy of insurance and to pay the benefit to the insured. As discussed in detail in the principal judgment, the Ombudsman exercises a hybrid jurisdiction, which encompasses both contractual and non-contractual complaints. The extent to which the Ombudsman can direct a remedy, which is similar in effect to that which would be granted in the case of an established breach of contract, in consequence of a finding of unreasonable conduct is a difficult issue. The Ombudsman has established arguable grounds for review of the principal judgment on this question.

22. The third question of law concerns the High Court's appellate jurisdiction, and, in particular, the extent to which the High Court is entitled to draw its own inferences from documentary evidence. This question arises out of the finding in the principal judgment that the criticisms made by the Ombudsman of certain correspondence between the insurance provider and the independent medical consultant were unjustified.

23. The classic statement of the High Court's appellate jurisdiction is that of Finnegan P. in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323. Having carefully considered a number of judgments addressing the nature of statutory appeals, the former President of the High Court observed that it was desirable that there should be consistency in the standard of review on statutory appeals. The threshold for a successful appeal was then stated as follows.

> "[…] 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*."

24. The Ombudsman places emphasis in his written legal submissions on the subsequent judgment in *Stowe v. Financial Services Ombudsman* [2016] IEHC 199 which emphasised that the Ombudsman has "the right to get the decision wrong". See, in particular, paragraph 42 of the judgment as follows.

> "[…] there is high threshold for the High Court to set aside decisions of the FSO.* The FSO has the right to get the decision wrong, by which this Court means that even if the judge in the High Court hearing the appeal of the FSO's decision would have reached a different decision to the FSO on hearing the details of the consumer's complaint, this is not grounds for the decision of the FSO to be set aside, provided that the FSO did not make a serious and significant error in reaching his decision. In many other appeal situations, such as in an appeal from the Circuit Court to the High Court, the decision-maker being appealed is not in the slightly exalted position of the FSO, of having the right to get the decision wrong."
>
> *Financial Services Ombudsman.

25. The specific complaint made by the Ombudsman in the present case appears to be that whereas the approach taken to the correspondence in the principal judgment certainly indicated this court's disagreement with the Ombudsman's analysis, it did not meet the "serious and significant error" test.

26. The question of the precise parameters of the High Court's appellate jurisdiction is one which would benefit from review by the Court of Appeal. In particular, as flagged by the Supreme Court in its judgment in *Governey v. Financial Services Ombudsman* (cited earlier), the same standard of deference may not be appropriate to *all* decisions of the Ombudsman. See paragraph 44 of the reported judgment as follows.

> "There may well be a case for affording deference to the view which the F.S.O. [Financial Services Ombudsman] takes as to, for example, the unreasonableness of lawful conduct on the part of a financial institution. But it does not necessarily follow that a court is bound to afford similar deference to the F.S.O. on its view of the law or the

> application of the law to facts which task is, after all, one of the core functions to be found in the administration of justice."

27. More generally, the judgment of the Supreme Court in *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment) emphasises that, even in the context of an appeal on a point of law only, the High Court has jurisdiction *inter alia* to reverse inferences drawn by a decision-maker, if the same were based on the interpretation of documents.

28. I will grant leave therefore on the following question: is the High Court, in the exercise of its appellate jurisdiction in a statutory appeal under section 64 of the Financial Services and Pensions Ombudsman Act 2017, entitled to draw different inferences from documentation (in this case, correspondence) than those of the Ombudsman. Put otherwise, to what extent do the principles in *Fitzgibbon v. Law Society* apply to a statutory appeal under section 64.

CONCLUSION AND FORM OF ORDER

29. For the reasons set out herein, the notice party's complaint is to be remitted to the Office of the Ombudsman pursuant to section 64(3)(c) of the Financial Services and Pensions Ombudsman Act 2017, with a direction, pursuant to section 64(5), that the matter is to be reviewed, by a different decision-maker within the Office, having regard to the principal judgment delivered in these proceedings.

30. This court grants leave, pursuant to section 64(6), to the Ombudsman to apply to the Court of Appeal for a review of the principal judgment on the following three questions of law.

    (i). Is the Ombudsman, when determining the reasonableness of the conduct of a financial services provider, required to have regard to any applicable code of conduct published by the Central Bank?

(ii). Does the Ombudsman have jurisdiction, in the absence of any finding on his part that there has been a breach of contract, to direct a financial services provider to admit a claim under a policy of insurance and to pay the benefit to the insured?

(iii). Is the High Court, in the exercise of its appellate jurisdiction in a statutory appeal under section 64 of the Financial Services and Pensions Ombudsman Act 2017, entitled to draw different inferences from documentation (in this case, correspondence) than those of the Ombudsman? Put otherwise, to what extent do the principles in *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment) apply to a statutory appeal under section 64?

31. Finally, an order will be made pursuant to Part 11 of the Legal Services Regulation Act 2015 directing that the Ombudsman is to pay to the insurance provider, as the successful party, its costs of and incidental to these proceedings. Such costs to be adjudicated upon by the Office of the Chief Legal Costs Adjudicator in default of agreement between the parties. The costs order includes all reserved costs; the costs of two sets of written legal submissions; and the costs of an overnight transcript.

32. The costs are to include the costs of the application for leave to apply to the Court of Appeal and the application for remittal, i.e. the costs of the hearing on 3 February 2021. A hearing would have been necessary even had the insurance provider not opposed the application. This is because it is, ultimately, a matter for the court and not the parties to decide whether leave should be granted and whether the matter should be remitted. It would be artificial therefore to treat the hearing on 3 February 2021 as a separate "event" for costs purposes.

33. The usual stay is placed on the costs order pending an appeal to the Court of Appeal and/or an application for leave to appeal to the Supreme Court.

Appearances
Kelley Smith, SC for the insurance provider instructed by Matheson
Eoin McCullough, SC and Francis Kieran for the Ombudsman instructed by Eversheds Sutherland

Approved
Garrett Simons