THE HIGH COURT

[2017 No. 392 MCA]

IN THE MATTER OF SECTION 57 CL OF THE CENTRAL BANK ACT, 1942 (AS INSERTED BY SECTION 16 OF CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004) AND AS AMENDED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORTY OF IRELAND (AMENDMENT) ACT, 2017

BETWEEN

CONOR O'DONOGHUE

APPELLANT

AND

OFFICE OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENTS

AND

BANK OF IRELAND INSURANCE SERVICES

AND

RSA INSURANCE

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 16th day of October, 2018

1. This is an appeal from two findings of the Financial Services and Pensions Ombudsman ("the FSPO") of 8 December 2017 given under Part VII B of the Central Bank Act 1942 ("the Central Bank Act"), as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 and amended by s. 7 of the Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017. The Central Bank Act, in its part dealing with the FSPO, has been since repealed by an *ad hoc* act,

the Financial Services and Pensions Ombudsman Act 2017, which is in force since 1 January 2018.

2. In 2011, the appellant made a complaint to the FSPO under the then operative s. 57BX of the Central Bank Act against two financial services providers, the first and second respondent, Bank of Ireland Insurance Services Ltd. ("BIIS"), an insurance intermediary, and Royal and Sun Alliance Insurance Plc. ("RSA"), an insurance company. The FSPO assessed the complaints separately and issued its findings on 16 March 2012.

3. Those findings were the subject of an appeal to the High Court and O'Malley J. delivered judgment on 19 November 2014, *O'Donoghue v. The Financial Services Ombudsman* [2014] IEHC 620 allowing the appeal and remitting the complaint to the Office of the FSPO for further review.

4. The complaints were then re-adjudicated by the then director of adjudication and legal services of the FSPO, Ms. Mary Rose McGovern, who had not previously contributed to the findings.

5. An oral hearing was conducted on 4 April 2017 in relation to the complaint against BIIS only. The FSPO wrote to the appellant enclosing a copy of the transcript of the oral hearing in relation to the complaint and requesting that he submit a number of additional items of evidence. Correspondence between the office of the FSPO and Mr. O'Donoghue personally continued for a period thereafter.

6. On 8 December 2017, the FSPO issued its findings on both the RSA and BIIS complaints and Mr. O'Donoghue has appealed those findings by notice of motion dated 19 December 2017. The argument that the policy had been unlawfully avoided was rejected, but Mr. O'Donoghue did receive an award on account of other failures. Details of the findings are set out below.

7. When the matter first came on for hearing before me, and in the light of submissions by counsel for the FSPO, I directed Mr. O'Donoghue to take certain steps to comply with the procedural requirements of O. 84C of the Rules of the Superior Courts ("RSC"), in essence, directions that he should identify with precision the matters in respect of which he sought to appeal, which were stated in overly broad and vague terms in his original motion paper.

8. Mr. O'Donoghue then submitted a further document, in the form of an affidavit of 14 June 2018, in which he set out the basis of his complaints the details of which I set out below.

Factual background

9. The appellant purchased a residential dwelling as an investment ("the investment property") in or around the year 2005. As his principle private residence was insured through BIIS, he sought its assistance in the purchase of an insurance policy. The underwriter was RSA, with BIIS acting as intermediary.

10. On 2 November 2005, the investment property was broken into and damaged. The appellant made a claim under the policy, and in May 2006, RSA informed him that they were voiding the policy on the grounds of misrepresentation, and refunded the premium paid by him.

11. The Home Cover Proposal Form completed for the purpose of the purchase of the policy is dated 8 April 2005 ("the Proposal Form"). It contained the following warning:

> "The question on this form relate to the facts considered material to underwriting the insurance. [...] If you are in any doubt as to whether a fact is material, you should disclose it", and defined "material fact" as "one which

might affect the company's decision to give you insurance and the premium we might charge."

12. It also identified the fact that failure to disclose a material fact could invalidate the insurance.

13. The house is described in section A of the Proposal Form as a "tenanted property" and section B gives the number of bedrooms as three and the number of tenants as one. Section C states that the property is "not left unoccupied for more than 2 months a year" and is regularly occupied at night. The form contained a declaration that the matters therein set out were true and complete, and was signed by Mr. O'Donoghue.

14. RSA informed the appellant that it was not prepared to indemnify him as the house was unoccupied, was not regularly occupied at night, and indeed the evidence of these facts is not contested.

15. Whilst Mr. O'Donoghue accepts that the house was vacant, he argues that he contracted to buy a policy for an unoccupied house. He says that the insurance premium was calculated on the basis that the house was vacant, that he informed BIIS that the house would be unoccupied, that he had never said that he would let it, and that the Proposal Form was fabricated to add details of the tenancy, the narrative that the house would generally not be unoccupied at night and would not be vacant. He says that the form he signed did contain the declaration setting out that the matters stated therein were true and accurate, but contend none of the factual declarations on which RSA relied to avoid the policy. He said, in essence, that the form was filled in with inaccurate details after he signed it and handed it over to BIIS.

16. In his amended affidavit of 14 June 2018, Mr. O'Donoghue describes the alleged actions of BIIS as follows:

"[...] Bank of Ireland Insurance Services (not Bank of Ireland) added incorrectly to a declaration of honesty signed by myself and a Bank of Ireland official on 14-04-05 and sent this document to RSA Insurance in 2006 in response to a request from RSA Insurance in 2006 for a "proposal form" that could "void" TN-202546 [...]".

17. He avers that he informed the BIIS official that the house was vacant and that an agent or employee took the unauthorised step of "adding incorrectly" to the signed declaration of honesty on the Proposal Form the false assertion that the vacant house had a tenant, instead of reflecting the information he says he had given.

18. In his grounding affidavit, he swears that:

"[...] there was no insurance policy issued to me on 07-04-05 or on 08-04-05 for a house with a tenant for a premium cost of e297-22 [...] the insurance policy TN-202546 was issued to me on 14-04-05 for a vacant house for a premium of [the relevant premium for an unoccupied house]."

19. Mr. O'Donoghue furnished a bank statement which shows a payment out of an amount which reflects on his estimate the premium for an unoccupied house.

20. In broad terms, Mr. O'Donoghue says that RSA relied on falsified documentation and that the cost breakdown bears out his argument.

21. The primary ground of appeal is that the FSPO was wrong in making a finding of fact that the policy was correctly voided.

The finding in regard to RSA

22. The FSPO upheld the complaint against the RSA in part and made the following findings:

(a) that RSA had wrongfully delayed in making a decision on Mr. Donoghue's claim and failed to keep him informed of developments throughout the investigative process;

(b) that there were a number of factual errors in the report of the loss adjuster, including two conflicting dates of inspection which, "while had not necessarily undermining the content of the report, would indicate a regrettable lack of care in its composition";

(c) that the roles of the loss adjuster and of the underwriter of the policy were not appropriately explained to Mr. O'Donoghue;

(d) that there was a "significant failure in customer service" and a failure to adequately communicate the claims process to Mr. O'Donoghue, to respond adequately to his complaint regarding the absence of a claim form and the processing of his claim;

(e) that the offer of RSA of €750 was inadequate and compensation of €2,000 was directed to be paid in respect of these findings.

23. However, the FSPO did not uphold the primary claim of Mr. O'Donoghue, namely that RSA had wrongfully voided the policy, and she rejected his argument that he had purchased insurance for an unoccupied property having regard to her view that the nature of the occupancy was a material fact which might have affected the decision by RSA to insure the property.

The finding in regard to BIIS

24. With regard to BIIS, the FSPO upheld the complaint of Mr. O'Donoghue in part and directed a compensatory payment in the sum of €15,000 on account of her finding that the policy sold was not suitable, and that Mr. O'Donoghue had not been given correct information as regards the claims process.

25. However, the FSPO rejected the evidence and argument of Mr. O'Donoghue that he had filled in a blank proposal form and that the details in the Proposal Form regarding the tenancy were added later and did not reflect the instructions he had given.

26. She found that:

> "[…] it would appear a technical impossibility for the system employed by the provider at the branch in April 2005 to print a completely unpopulated proposal form. While it may have been possible to bypass a number of fields, such as the telephone number, the mortgage reference number and the third party interests, the evidence is convincing that the form would have contained a certain amount of pre-populated information, including the information set out in s. C, which contained the declarations relating to the occupancy of the property by the insured or their family member. This included the declaration that the property was regularly occupied at night, and that the property would not be left unoccupied for than two months at a time."

27. That finding was linked to the evidence of the general practice regarding the filling in of these forms, the fact that the Proposal Form was a "standard form" and the system process did not have the capacity to alter the declarations contained in section C or to alter them in the manner for which Mr. O'Donoghue contended.

28. Mr. O'Donoghue appeals against the finding of the FSPO that the policy was not wrongly voided.

The arguments on appeal

29. Mr. O'Donoghue presents what he says is "a simple proposition", that the FSPO errored in her approach to the "false documentation". He relies primarily on the calculation of the premium and that he paid the relevant premium calculated for the insurance of a vacant house. He also relies on the fact that the Proposal Form was

"poisoned" and that the FSPO errored in rejecting his argument on the facts that the document was false.

30. To an extent, the appeal is centred on the assertion of Mr. O'Donoghue that the FSPO's finding of fact was wrong, and that the documentation was false, "poisoned" or had been wrongly altered. The appeal must therefore be characterised as an appeal on the merits of the finding, or to put it another way, it is an appeal on the facts.

Statutory Scheme

31. Section 57CI of the Central Bank Act provides for the bringing of complaints before the FSPO. The jurisdiction of the Ombudsman permits him to go outside what might be described as the ordinary common law principles of contract law or the law of negligence, and he is entitled to find a claim substantiated or partly substantiated, *inter alia*, if he finds that the conduct complained of was unreasonable, unjust, oppressive, or improperly discriminatory. In addition, he has a power to find a complaint to be substantiated or partly substantiated, if the application of a practice, law, or regulatory standard was unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant, or if the conduct complained was based wholly or partly on an improper motive, an irrelevant ground, or an irrelevant consideration. He also has a power to look to the conduct complained of and to consider if it was "otherwise improper".

32. The Ombudsman is required, under the statutory regime, to give reasons for his finding and any directions given following from and as a result of the finding.

33. The range of remedies available to the Ombudsman includes the power to direct a financial service provider to review, rectify, mitigate, or change the conduct, to direct it provide reasons, change a practice, or pay an amount of compensation to a complainant.

34. The purpose of the statutory complaints procedure is to afford complainants an informal, expeditious, and independent mechanism for the resolution of complaints against a financial service or product provider, and a complaint does not have to be confined to matters which would fall within the realm of contract law, the law of negligence, or other defined legal rights or principles.

35. Section 57CL(1) of the Central Bank Act provides that any person dissatisfied with the findings of the Ombudsman may appeal to the High Court against the finding. The High Court is given wide powers to make such order as it thinks appropriate in the light of its determination on appeal.

The test on appeal

36. The applicable test for an appeal to the High Court was set out by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323:

> "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."

37. This statement identifies a number of matters familiar in the realm of judicial review, namely that the court will give due deference to the specialist expertise of the Ombudsman, that the adjudicative process as a whole must be considered, and that a decision will be vitiated where there was a serious and significant error or a series of errors.

38. It has been accepted and identified in subsequent case law that the appeal to the High Court, not being a *de novo* hearing, falls somewhere between a judicial review and full appeal, the test being one which bears many of the features of a judicial review, but not all of them. An error, even one within jurisdiction, provided it is a significant and serious error, can vitiate a decision.

39. The test in *Ulster Bank v. Financial Services Ombudsman*, is well recognised as authoritative and was considered *inter alia* by MacMenamin J. in *Hayes v. Financial Services Ombudsman* (High Court, 3 November 2008), by Barrett J. in *Quinn v. Financial Services Ombudsman* [2016] IEHC 453, and in *Stowe v. Financial Services Ombudsman* [2016] IEHC 199, where Twomey J. described the test as establishing a "high threshold".

40. 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.

41. In regard to findings of fact, the test on appeals from the High Court to the Supreme Court or Court of Appeal established in *Hay v. O'Grady* [1992] 1 IR 210, is whether there was material on which an adjudicator could have reasonably come to a decision. The passage from the judgment of McCarthy J. at p. 217 is often quoted:

> "1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
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> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and,

apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

42. In *O'Regan v. Financial Services Ombudsman* [2016] IECA 165, at para. 65, giving his judgment for the Court of Appeal, Hogan J. held that the same test is the appropriate test on appeal from a decision of the FSPO:

"In my judgment, the same principles apply, *mutatis mutandis*, to the scope of an appeal from the FSO to the High Court in a case of this kind following an oral hearing. In other words, provided that there is credible testimony to support the FSO's findings of primary fact and such are clearly stated, the scope of review by the High Court of such findings is distinctly limited and is generally governed by the principles articulated by the Supreme Court in *Hay v. O'Grady* and *Doyle v. Banville*."

43. Counsel for the respondent also relies on the *dictum* of my judgment in *Law v. Financial Services Ombudsman* [2015] IEHC 29, at para. 17:

> "[...] I accept that the Ombudsman is entitled to control and manage his own process, and that to require him to hear repetition of matters of which he has already had adequate and fulsome argument and evidence, or to require him to hear detailed submissions on the tools of his trade, the Codes and their implementation, would unduly burden him with procedures more akin to those in a High Court case. It is appropriate to look to the process as a whole, and the process differs from that before a court hearing a case in an adversarial context, in that the Ombudsman is entitled to and does regard the oral hearing a being only part of his investigation, and one which is sometimes necessary for him to determine matters of fact. It has not been shown to my satisfaction that the Ombudsman failed to accord due process and give the appellants a fair opportunity to make their case in the complaints process taken as a whole and I reject this ground of appeal."

Analysis and conclusion

44. Having regard to the fact that the present appeal may be characterised as an appeal of the findings of fact on which the determination of the FSPO were made, that Mr. O'Donoghue argues that the declaration he signed was altered or added to, and that the FSPO failed to properly have regard to the calculations of the premium, my view is that he has to meet the "high threshold" described by Twomey J. in *Stowe v. Financial Services Ombudsman* and that Mr. O'Donoghue must show a "serious and significant" error in the findings in accordance with the test in *Ulster Bank v. Financial Services Ombudsman*.

45. I consider that Mr. O'Donoghue has not met this threshold and that FSPO had credible and sufficient evidence to come to her decision. I am also satisfied she identified the factual basis of her decision and the reasons and evidence which led her to draw the inference that it was not possible or credible that the two respondents had somehow collectively produced a false document. The FSPO heard evidence of how the Proposal Form was created, and from a witness who gave evidence that there was no way of bypassing the input of data, and that it was not possible to print a blank form prior to its population having regard to the computer system then employed by the BIIS at the time.

46. I am not satisfied that the FSPO came to an unsustainable conclusion that the document could not have been populated in the material way for which Mr. O'Donoghue contends after it had been signed by him.

47. Further, Mr. O'Donoghue accepted that, at the relevant time, there was not available on the market an insurance product that would cover the losses he suffered. Evidence of this fact was given by the relevant witness from BIIS and under oath on 4 April 2017, and accepted by Mr. O'Donoghue. It is difficult in those circumstances to understand how he could succeed in the appeal.

48. Mr. O'Donoghue relies to a large significant extent on the fact that he paid a premium amount calculated as the relevant premium for an unoccupied property. Even were that evidence capable of being accepted on appeal, it is difficult to see how it might assist him having a regard to his concession that a suitable insurance product was not available on the market.

49. I consider that Mr. O'Donoghue has not met the threshold for an appeal for the reasons set out and I therefore propose making an order dismissing the appeal against the two decisions of the FSPO.