THE HIGH COURT

[2016/149MCA]

BETWEEN

KANAGARATNAM BASKARAN

APPELLANT

AND

FINANCIAL SERVICES and PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 24th day of January, 2019

1. This judgment concerns an appeal of the appellant from a decision of the respondent in relation to a complaint made to the respondent arising out of a decision made by Friends First Life Assurance Limited ("Friends First") to cease making payments to the appellant under an income protection policy he had taken out with Friends First (the "Policy"). This appeal is brought pursuant to s. 57CL of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) (the "Act").

Background

2. The appellant worked as a manager of a hostel for homeless in Dublin city centre up until March, 2011 , when it appears he sustained an injury to his back that left him unfit for work. The Policy provided for payments to be made to the appellant by Friends First, subject to the terms and conditions of the Policy, in the event of his being unable to work owing to disability. The appellant made a claim under the terms of the Policy which was admitted by Friends First. In the ordinary course, the appellant submitted medical reports to support his claim and also attended, at the behest of Friends First, for medical examinations with various consultants nominated by Friends First. The appellant was kept under review and eventually Friends First

concluded that in its opinion the appellant was fit for work and notified him of this decision on 8th August, 2014. The appellant appealed that decision in accordance with the provisions for appeal in the Policy, but Friends First rejected this appeal by letter dated 4th August, 2015. In this letter to the appellant Friends First stated, *inter alia*:-

> "Our Claims Committee in conjunction with our Chief Medical Officer have now carried out a full review of your claim.
>
> They have considered all the medical evidence we previously had on file together with a report from the Functional Capacity Evaluation…along with up-to-date reports from your consultations with Professor McCormack and Mr. O'Brien.
>
> The … FCE confirms that you are fit for the physical demands of your occupation. We provided copies of the FCE to Professor McCormack and Mr. O'Brien and they have both confirmed that you could return to work from a physical perspective…
>
> Following this review our Claims Committee have confirmed, based on the medical evidence available, that they are unable to consider that you are totally unable to follow your normal occupation of hostel manager."

3. The appellant had previously made a complaint about Friends First to the respondent in connection with the amount of the disability benefit paid to him by Friends First. While this complaint had resolved, the appellant now wrote to the respondent in relation to the decision of the respondent terminating payments of the benefit altogether, and it appears the respondent treated this as a complaint for the purposes of the Act. The respondent suggested to the parties that the dispute be referred to mediation, and while the appellant was willing to refer the dispute to

mediation, Friends First was not willing to do so. Accordingly, the respondent proceeded to investigate the complaint in accordance with the Act.

4. There then followed correspondence between the respondent and the appellant, and the respondent and Friends First. This correspondence continued between 10th August, 2015 and 4th April, 2016, when the respondent issued his decision on the complaint, concluding that: " I accept that the Company's decision to refuse the Complainant's appeal was reasonable and was adequately supported by the evidence that was available to it in August, 2015". It is against that decision which the appellant has appealed. He did so by notice of motion dated 19th April, 2016, in accordance with O. 84C of the Rules of the Superior Courts. The appellant issued this motion and accompanying grounding affidavit as a lay litigant, although he subsequently engaged the solicitors now representing him in this appeal. The grounds of appeal relied upon by the appellant in his affidavit of 19th April, 2016, are as follows:-

(1) The respondent excluded from his consideration of the complaint four medical reports provided by the appellant that post-dated the decision of Friends First of 4th August 2015;

(2) The respondent unfairly relied upon the refusal by the appellant to attend for further orthopaedic and psychiatric reviews as suggested by Friends First, prior to the determination of the complaint. This was unfair because, the appellant avers, he had been discharged from orthopaedic services at the time, and had been referred to rheumatology and pain specialists. He further avers that he had already been psychologically assessed and was awaiting an appointment in April and May 2016 with a psychiatrist.

5. Following upon the issue of the appellant's motion, the respondent, Mr. Ger Deering delivered a replying affidavit dated 7th July, 2016. In this affidavit Mr. Deering sets out in general terms his functions as Financial Services Ombudsman and summarises the complaints procedure under the Act and as operated by the respondent. He sets out a chronology of events, starting with the first complaint received from the appellant in relation to the quantum of the payment then being paid to him by Friends First, through to the termination of the benefit by Friends First, the complaint of the appellant arising out of that termination, and the decision of the respondent dated 4th April, 2016. As to the merits of the appeal, and the grounds of appeal relied upon by the appellant, the respondent says simply that he rejects any assertion that the decision was arrived at unfairly and avers that he carefully considered the materials and submissions put forward by both parties.

6. The appellant replied to the affidavit of Mr. Deering by further affidavit of 11th July, 2016. In this affidavit, the appellant relies on a number of additional grounds of appeal:-

(1) That the respondent erred in failing to require Friends First to address the conclusions of all medical reports provided to Friends First;

(2) that it was unfair for Friends First to have rejected the proposed mediation of the dispute;

(3) that the respondent should have convened an oral hearing to consider the conflicts of medical evidence of qualified medical professionals. That would have afforded the respondent the opportunity to give adequate weight to the issues raised by the medical professionals;

(4) that there was an obligation on the part of Friends First, under the terms of the Policy, to provide support to the appellant to return to work, and the respondent should have investigated this issue before giving his decision;

(5) the appellant denies ever refusing to attend for medical examination at the request of Friends First;

(6) the respondent failed to consider the various medical reports made available to the respondent in the course of the investigation. The appellant then purports to summarise the conclusions of those various medical reports.

7. The respondent then replied to the last mentioned affidavit in a brief affidavit of his own on 20th July, 2016. He avers that neither the appellant nor Friends First raised the issue of an oral hearing before him at any stage during the investigation, and nor did the appellant raise it as an issue in his original notice of motion and grounding affidavit. He submits therefore that it is now too late for the appellant to raise this issue, and notes that the appellant does not seek to explain why he had not raised the issue previously.

8. Solicitors came on record on behalf of the appellant on 17th February, 2017, and they issued a motion on behalf of the appellant on 24th April, 2017, whereby the appellant seeks leave of the court to rely upon an additional ground of appeal, namely that the respondent breached the appellant's constitutional right to fair procedures by its failure to hold an oral hearing of the appellant's appeal. This application is grounded upon a further affidavit of the appellant in which he avers that he was entitled to an oral hearing of his complaint by reason of the diametrically opposed nature of the medical reports relied upon by each of the parties to the complaint, and that the entitlement to an oral hearing is one emanating from the appellant's constitutional right to fair procedures before the respondent. He further avers that

account should be taken of the fact that, at the relevant time, the appellant was a lay litigant, acting without the benefit of legal advice. In addition, he avers that there could be no prejudice to the respondent by being permitted to raise this additional issue in circumstances where the respondent was on notice of the point, the appellant having raised it in his affidavit of 12th July, 2016. Although he initially objected to the amendment to the terms of the appeal, the respondent, through his solicitors subsequently agreed to the same.

The Policy

9. The policy required Friends First to pay the appellant disability benefit during a period of disability which is defined as meaning: "a period throughout which the insured is totally unable to carry out his normal occupation due to a recognised illness or accident and during which the insured is not involved in carrying out any other occupation for profit, reward or remuneration". As is normal under such policies, Friends First, as insurer, is entitled, as a condition of liability to pay the benefit, to require the appellant to produce such reasonable information and evidence satisfactory to Friends First as it in its absolute discretion may require in order to satisfy Friends First that the appellant is totally unable to carry out his normal occupation. This requirement to information includes an entitlement to require the appellant to attend for examination by any medical doctor, consultant, occupational therapist or other relevant professional persons nominated by Friends First.

The investigation/complaints procedure

10. As I mentioned above, prior to the termination of payment of the benefit by Friends First to the appellant, the appellant had made a complaint to the respondent regarding the quantum of benefit that was being paid to him by Friends First. On 30th September, 2014, the appellant wrote to the respondent to inform him that this issue

had been resolved, but informing the respondent that another issue had arisen *i.e.* that Friends First had concluded that the appellant was no longer incapacitated and therefore no longer entitled to payment of the disability benefit. At the time of this email that decision of Friends First was under appeal by the appellant in accordance with the internal appeal procedure operated by Friends First. While both parties then continued to keep the respondent informed as to the progress of this appeal, it does not appear as though the respondent had any role at all in this process. It was only when this process was concluded, in August, 2015, with an adverse outcome for the appellant, that the decision to terminate payment of the benefit became the subject of a formal complaint. The respondent wrote to both parties on 10th August, 2015 informing them that the matter would now proceed to investigation.

11. On 9th October, 2015, Ms. Mary Rose McGovern, head of investigation in the office of the respondent, wrote to Friends First posing a series of questions relating to the appellant's occupation, his fitness for work, the admission of his claim for payment of disability benefit and the reasons for terminating payment of same. She also requested copies of all relevant documentation, including medical records concerning the appellant's claim for payment of the benefit.

12. Friends First replied comprehensibly to this letter on 6th November, 2015, and on 9th November, 2015, the office of the FSO wrote to the appellant enclosing a copy of the reply received from Friends First, and it is understood that this included all documentation sent by Friends First to the respondent, which the respondent had specifically requested should be furnished by Friends First in duplicate, for this purpose.

13. The appellant replied by letter of 17th November, 2015, and with his reply he enclosed four medical reports, none of which had been available on the date on which

Friends First made its decision on 4th August, 2015. The earliest of the reports was dated 23rd September, 2015 and the latest was dated 17th November, 2015. This material was sent to Friends First on 18th November, 2015. Friends First replied by letter of 27th November, 2015 from a Mr. John Nolan, customer relations manager. This letter is of some considerable significance and I think it is worth quoting in full:-

"Dear Ms. McGuinness,

I refer to your letter dated 18th November, 2015 with a further submission from Mr. Baskaran dated 17th November, 2015 including new medical reports. I have asked our health claims manager, Colum Flanagan, to review these reports with our chief medical officer and their reply is:

'I've discussed this case again with our CMO and we already have a significant amount of medical evidence, addressing both his physical and psychological complaints, which supports our position that Mr. Baskaran cannot be considered to be totally unable to follow his occupation of hostel manager.

I have reviewed the most recent psychiatric report he has provided from Dr. Maria Romanos and note that this was prepared on a single consultation, based on Mr. Baskaran's account, and she has also confirmed that she did not have access to any collateral information. However, I think it would be reasonable for us to make the offer to Mr. Baskaran to attend for a further independent psychiatric assessment in view of the differing opinions in this report compared with the previous report from Dr. Devitt which found him fit to return to work.

Mr. Baskaran attended for an FCE earlier this year which found him fit to return to work from a physical perspective and we provided an

opportunity for Professor McCormack to review this and he agreed that he was fit for certain physical activity. Again, and in an attempt to help to bring a resolution to this case, we would be prepared to offer Mr. Baskaran to attend for a further independent orthopaedic assessment.'

I believe that this is a reasonable approach and would also suggest that we use different consultants to review the full medical file with the examinations and provide their opinions. If your office and Mr. Baskaran are agreeable to this approach we will arrange appointment times for the further independent medical examinations.

Yours sincerely,

John Nolan."

14. It is fair to point out that at this juncture there were of the order of 25 medical reports concerning Mr. Baskaran. Of these 25 reports, just five were reports procured at the request of Friends First from consultants nominated by Friends First. The remaining reports were from the appellants own consultants and medical advisors.The number of reports available at the time undoubtedly influenced the response of the appellant to the proposal set out in Mr. Nolan's letter. In his reply, declining to attend for further examination, he stated as follows:-

"I do not feel to agree an another assessment/s by the provider, for the reasons, it will become endless and also the following reasons:

1. Specialists and my G.P. now referred me to the rheumatologist, pain specialist and physiotherapy.
2. I have at present seen by the specialist for my psychiatric illness and waiting to see the psychiatric nurse for the counselling, if needed, for

another assessment by the independent specialist should be organised through the Ombudsman and not by the provider.

3. Functional capacity tests by the physiotherapist discussed with me during their test that I need to attend for physiotherapy exercises which was not in her report. Which I have raised in my previous submission, provider has not mentioned in their reply about the therapy whether the discussion has taken place on the days with FCE.

4. I would like the Ombudsman to take their opinion for what is appropriate to finalise the dispute."

Medical Reports

15. Friends First required the applicant to be examined on three occasions by a specialist in occupational medicine, Dr. Patricia Holland. In her first report, dated 13th July, 2011, Dr. Holland concluded that the appellant was genuine and unfit for work by reason of a combination of mental health difficulties and a possible disc prolapse. In her second report of 16th April, 2012, she remained of the view that the appellant was unfit for work, while expecting some reservations. In a third report dated 5th November, 2012, she expressed the view that the appellant was exaggerating his physical symptoms, although she noted he was awaiting certain assessments, the outcome of which was required She also suggested obtaining a psychiatric report from his treating psychiatrist.

16. There are also a number of reports from the appellant's G.P., a consultant psychiatrist treating the appellant, a consultant neurosurgeon treating the appellant and a consultant orthopaedic surgeon treating the appellant. All of these reports expressed the view that the appellant was, at the time of examination, unfit for work.

In a report dated the 22nd April, 2014, Dr. Angela Noonan, consultant psychiatrist, opined that:-

> "I do not think Baskaran will be able to return to work in the hostel where he was assaulted. The assault triggered his PTSD.
>
> His back pain is an added impediment to work."

17. The reference to "PTSD" is a reference to an earlier diagnosis that the appellant was suffering from post-traumatic stress disorder as a result of an assault he suffered in the workplace, at the hands of one of the hostel's clients. According to one medical report, this event occurred in November, 2010 when one of the residents of the hostel held a knife to the appellant's throat. Although referred to in the medical reports, the appellant's claim for disability benefit was grounded upon the injury to his back which, in his claim form, he said occurred on 4th March, 2011, and there is no reference in that form to the assault or to post traumatic stress disorder. Nor is there any reference to it in the accompanying report completed by the appellant's general practitioner, Dr. Ekky, which was submitted in support of the appellant's claim for benefit under the Policy.

18. The consultant orthopaedic surgeon responsible for treating the appellant, stated in a report dated 3rd November, 2014 that the appellant was unable to work at that moment in time on account of discogenic back pain and left L5 sciatica. He said that the appellant was being referred for further epidural injections and was attending a pain clinic in the Mater Hospital. Professor McCormack repeated this opinion in a further report of 15th November, 2014. In this report he noticed that an MRI scan in March 2012 had confirmed a tear in the back wall of the appellant's L5-S1 disc, which was in keeping with his ongoing low back pain.

19. However, Mr. David O'Brien, a consultant neurosurgeon who was treating the appellant, stated in a report dated 24th March, 2014 (to Friends First) as follows:-

> "In relation to your definition of 'totally unable by reason of fitness or accident to follow the occupation of 'hostel manager', I honestly cannot find a physical reason for this gentleman's symptoms. There may well be a psychological component to it. This is as far as I can take it."

20. Friends First obtained a report from an independent consultant psychiatrist, Dr. Patrick J. Devitt, dated 4th July, 2014. This is a very comprehensive report running to some seven pages. Dr. Devitt required the appellant to undertake some tests in respect of some of which he found the appellant to be deliberately uncooperative. He also felt that the appellant was exaggerating his limp, and that his limp was inconsistent, at one point walking as though it was his right knee was hurting him, and at another walking as though it was his left knee was painful. Dr. Devitt stated that it was clear that the appellant's reason for not working was the fact that he felt exploited by the owner of the hostel with whom he was quite annoyed. Dr. Devitt stated that the appellant did not appear depressed, but rather angry. He said there was no evidence of anxiety and the appellant was not psychotic.

21. His overall conclusion was that the appellant was unhappy at his place of work, working long hours and feeling exploited. The appellant was also unhappy with the type of cliental that he had to deal with and he felt vulnerable to assault and disruption. Dr. Devitt said that it appears to him that these were the reasons why the appellant terminated his employment and that the appellant had no intention of returning. Dr. Devitt was of the opinion that even if the appellant's symptoms were to be believed, there was no indication that they were disabling in nature. He noted that the appellant's treatment was not of an intensive nature. He concluded that the

appellant was not totally unable by reason of any mental sickness or accident to follow his occupation of hostel manager. While I cannot be certain, it appears to me from the papers handed into court that it was this report that led to the initial termination of payment of disabled benefit to the appellant.

22. Because of the ongoing nature of the appellant's complaints, and the somewhat conflicting information regarding the same, Friends First arranged for the appellant to undergo a functional capacity evaluation. The appellant initially resisted undergoing this evaluation, on the grounds that he was concerned that he would be unable to perform some of the tests or that they might even be damaging for his health. Eventually however, he agreed to do so, having been advised by Professor McCormack that he had no difficulty with the appellant undergoing such an evaluation.

23. The functional capacity evaluation went ahead on the 29th and 30th April, 2015. The report was unhelpful to the appellant. The assessor concluded that appellant was fit for the physical demands of his job, even though he also concluded that the appellant was not always cooperative in the tests undertaken.

24. Friends First then obtained a further report from Professor McCormack dated 25th June, 2015. This report is somewhat mixed. Professor McCormack states that:-

> "This man's symptoms are real but subjective in their severity and I have therefore no doubt that this man could work but I do think that he has a high risk of experiencing recurrent symptoms in the course of such work and although therefore he may be deemed physically suitable for work, I personally would have concerns about him returning to the workplace given his physical and psychological status. Notwithstanding that I have to reiterate that his refusal to cooperate fully with physical functional assessment reflects

his psychological rather than physical status and it appears that this man simply does not want to do certain things for fear that such things may hurt him rather than because he is physically unable to do such things.

Therefore, from a purely physical perspective I would agree with his assessor recently that he is fit for certain physical activities but I do question the wisdom of him returning to a workplace where he may not be able to function safely."

25. Friends First also obtained another report from Mr. O'Brien, consultant neurosurgeon, who reported in similar terms on 8th July, 2015, concluding as follows:-

"Therefore, to answer your question with regards to this patient's incapacity to return to his occupation as a hostel manager, from a physical perspective, I do think there is a possibility that he could return to work but what is impeding him is his overall psychological mind set. In addition to this report, I will write to his general practitioner, Dr. Khalil Ekky to refer him on to a psychiatrist."

Private Investigator's Reports

26. In the course of dealing with the claim of the appellant, Friends First commissioned the services of a private investigator. He provided two reports to Friends First. It is fair to say that the investigations did not reveal the appellant doing anything that was inconsistent with his complaints but that did not stop the private investigator from concluding that the appellant was "exaggerating his symptoms somewhat". In his decision, the respondent observed that he had seen a report from the private investigator dated 7th November, 2012 (there were, in fact, two reports) and states that:-

"having read the report, it does not appear to me that the comments therein pertaining to the movements of the complainants *(sic)* are particularly helpful to his complaint. However, it does not appear that the company has relied on the content of that report in declining the claim, and as noted above, I accept that its decision was adequately supported by the medical evidence available to it in August 2014."

27. Both of these reports were included in the papers furnished by Friends First to the respondent and accordingly, the appellant also received copies of these reports. The appellant, however, made no comment upon these reports in his submissions and they do not feature in the pleadings of the case. The first objection of any kind made in relation to these reports was in the submissions of counsel in preparation for this hearing.

Submissions of appellant

28. Counsel for the appellant make the following arguments:

Sufficiency of Medical Evidence

(1) There is medical evidence in support of the appellant's claim for benefit, and they quote extensively from those reports that favour the appellant.

Failure to hold an oral Hearing

(2) The respondent erred in failing to hold an oral hearing to determine the dispute as to whether or not the appellant was fit for work. It is submitted on behalf of the appellant that there was an onus on the respondent to hold an oral hearing, as it was only by the holding of such a hearing that the conflict of fact, as to whether the appellant was or was not fit for work could be resolved. Counsel for the appellant

rely on *Kiely v. the Minister for Social Welfare* [1977] 1 I.R. 267 in which Henchy J. said:-

"The fact that power to determine the appeal summarily is given only in those terms means that an oral hearing is mandatory unless the case is of such a nature that it can be determined without an oral hearing, that is to say, summarily. An appeal is of such a nature that it can be determined summarily if a determination of the claim can be made fairly on a consideration of the documentary evidence. If, however, there are unresolved conflicts in the documentary evidence as to any matter which is essential to a ruling of the claim, the intention of the regulations is that those conflicts shall be resolved by an oral hearing."

29. That case was concerned with a claim made under the Social Welfare (Occupational Injuries) Act 1966 for payment of death benefit which was payable when an insured person died as a result of an injury caused by accident in the course of insurable employment. An earlier Act, the Social welfare Act 1952, and regulations made thereunder, set out the mechanism for appealing decisions of deciding officers, and appeals officers were empowered to conduct oral hearings in cases which they considered could not be resolved summarily, and it was to such appeals that Henchy J. was referring in the passage cited above, which is relied upon by the appellant. The dispute in the case centred around whether or not the late husband of the deceased had died as a result of injuries caused in the course of his employment. There was a considerable divergence of opinion between the medical experts of the parties. The appeals officer convened an oral hearing and the substantive issues in the case were concerned with the conduct of that hearing, and related issues, but the appellant relies

on the case by way of analogy and submits that the respondent in this case, presented with a conflict of medical evidence, should have convened an oral hearing.

30. In the same vein, the appellant relies upon the decision of Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240. In that case, the legislation also gave the appeals officer discretion as to whether or not to hold an oral hearing, and as regards the exercise of that discretion, Costello P. stated:-

> "There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."

31. Costello P. then continues to analyse why an oral hearing should have been conducted in that case, and in general terms, it may be said that he concluded that the conflict of evidence as regards matters of fact was such that it could only be resolved by way of oral hearing.

32. As regards oral hearings in the specific context of appeals to the respondent, the appellant relies upon the cases of *Hyde v. Financial Services Ombudsman* [2011] IEHC 422, and *O'Neill v. Financial Services Ombudsman* [2014] IEHC 282, in each of which cases, Cross J. and Hogan J. respectively concluded that an oral hearing was required in order to resolve disputes as to fact upon which the claim in each case depended. In *O'Neill*, Hogan J. stated:-

> "In these circumstances, the conclusion that, viewed objectively, the requirements of fair procedures compelled the holding of an oral hearing in

this case is inescapable. While it may be true that not all of the decisions of this Court on the question of whether the FSO should have held an oral hearing can be perfectly reconciled, nevertheless the underlying theme which emerges from this corpus of case-law is that an oral hearing is necessary where there is a manifest conflict of fact, the resolution of which is critical to the outcome of the appeal."

33. In that case, the dispute between the parties was whether or not the appellant's vehicle had suffered flood damage which would have entitled him to indemnity under the terms of his insurance policy.

34. Counsel for the appellant refers to other authorities which endorse and apply the principle that an oral hearing should be held by the respondent in circumstances where there is a conflict of fact, resolution of which is critical to the outcome of the appeal.

Failed to take account of relevant evidence.

35. It is also submitted that the respondent failed to take into account relevant evidence, the evidence being medical reports which were submitted by the appellant after the appeal decision of Friends First. These the reports to which I have already referred at paras. 4(1) and 13 above, and are as follows:-

(i) a report dated 23rd September, 2015, from Mr. Taufiq al-Sattar, a Consultant Neurosurgeon;

(ii) a report dated 30th October, 2015, from a Dr. Maria Romanos, Consultant Psychiatrist;

(iii) another report from Prof. McCormack, dated 10th November, 2015; and

(iv) a report from a general practitioner, Dr. Amanda Maguire, dated 11th March, 2016.

36. It is submitted that the respondent fettered his discretion by refusing to take these reports into consideration and erred in law in doing so. These reports, it is submitted, were favourable to the appellant and should have been taken into account by the respondent.

Took into account undisclosed documents.

37. It is submitted that the respondent took into account "undisclosed" materials. This argument relates to an allegation that the respondent, in coming to its decision, took into account the contents of the private investigator's reports referred to above. The respondent relies upon the comment in the decision of the respondent that it did not appear to the respondent that the comments in the reports of the private investigator, pertaining to the movements of the appellant, were particularly helpful in his complaint.

38. The appellant argues that the respondent should have sought comment from the appellant in relation to these reports, if the respondent intended to rely upon the reports in any way. It is further submitted that it is not clear how the respondent could conclude that Friends First had not relied upon the reports.

39. It is further submitted that there are echoes in this regard of an issue that arose in *Kiely v. Minister for Social Welfare*, in which a medical assessor sent an opinion to the decision maker after the oral hearing, which opinion was received and acted upon by the decision maker without affording the appellant in that case an opportunity of commenting upon the same or controverting the opinion in any way. That conduct was found to be *fatally flawed* by Henchy J.

40. It is also submitted on behalf of the appellant that the reports of the private investigator constitute another reason why the respondent should have convened an oral hearing: so that the private investigator could be cross examined as to his findings.

Mistake as to fact.

41. The final point raised on behalf of the appellant is that the respondent made an error as to fact in that, on the face of his report, he states that the appellant's neurosurgeon suggested in a report that the appellant had been exaggerating, whereas Mr. O'Brien had not made that suggestion in either of his reports (although it was referred to in other reports). It is submitted that this conclusion of the respondent was inconsistent with a later conclusion of the respondent which simply states that Mr. O'Brien raised the question of the appellant's ability to return to work from a psychological perspective. While acknowledging that this latter conclusion more accurately reflected the opinion of Mr. O'Brien, nonetheless, it is submitted that the respondent failed to appreciate and record correctly the conclusions of Mr. O'Brien. This point was made in submissions on behalf of the appellant, but not pleaded.

Submissions on behalf of the Respondent

Scope of appeals to respondent.

42. Firstly, the respondent makes comprehensive submissions as to the scope of appeals to the respondent. The respondent relies on the decision of this court in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman and Ors* [2006] IEHC 323. In that case, Finnegan P. determined that the standard of review on statutory appeals such as this was that laid down by Keane C.J. in the case of *Orange Communications Ltd v. The Director of Telecommunications Regulation and Anor.* [2000] 4 I.R. 159 wherein Keane C.J. said at p. 184:-

> "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. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court 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 arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant."

43. It is submitted that this approach has been accepted and followed by this court ever since. As regards the functions of the respondent, performance of which fall under review in appeals such as this, in the case of *Hayes v. Financial Services Ombudsman* [2008] 11 MCA, McMenamin J. noted, at paras. 33 and 34 as follows:-

> "33. "What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.
>
> 34. The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be

used by the courts, such as whether the conduct complained of was unreasonable *simpliciter*; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57CL(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

44. In *Square Capital v. Financial Services Ombudsman & Ors* [2009] IEHC 407 McMahon J. agreed with the analysis of McMenamin J. and, at pp. 8-9 of his decision stated:-

"It is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this court from the Ombudsman's decision is not a full rehearing of the case where the court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

45. In *Smartt v. Financial Services Ombudsman* [2013] IEHC 518, Hedigan J. stated, at para. 12:-

"It is not for this Court to either agree or disagree with the [FSO's] finding as long as it is reasonably based upon the evidence before him."

46. In the context of an appeal from the Pensions Ombudsman, Kearns P., in the case of *Willis v. Pensions Ombudsman* [2013] IEHC 352 stated at pp. 30-31 :

"A high threshold must be crossed by any appellant from a decision of a financial/pensions ombudsman. The Court has no difficulty in accepting that the relevant test for a statutory appeal against a decision of the Pensions Ombudsman should be the same as that provided for in respect of the Financial Services Ombudsman as laid down by Finnegan P. in *Ulster Bank v. Financial Services Ombudsman …."*

47. Later, at p. 36 of the same judgment, Kearns P. stated:-

"I am satisfied that this Court should only step in to set aside his conclusions (being those of an expert in this area) where a clear and serious legal error may be demonstrated. No such error has been demonstrated and there can be no doubt but that his decision achieved a fair result insofar as this particular complainant was concerned."

48. It may be observed at this point that the respondent accepted that in a case such as this, revolving, as it does, around the state of health of the appellant, the respondent does not have any special expertise, and so there is no question of affording a deferential recognition to the expertise of the respondent, as there might be in other cases.

Informality of process before respondent

49. Secondly, it is submitted that it is clear from both the legislation and the authorities that the procedures of the respondent are less formal than those of a court. Section 57BK(4) of the Act, provides that the respondent is:-

> "…entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

50. Accordingly, it is submitted that the court should not review the finding of the respondent as though it were reviewing the procedures adopted by an inferior court and should not apply the same standards of procedure as it would to a court.

Failure to comply with rules of The Superior Courts

51. Thirdly, it is submitted that such informality as applies to appeals to the respondent does not apply to appeals from decisions of the respondent to this court. Appellants must comply with the Rules of the Superior Courts ("RSC") so far as such appeals are concerned, and in this appeal the appellant has failed to comply with the prescribed procedures. Accordingly, the appellant should not be entitled to rely upon grounds of appeal that he has not pleaded, and that are raised for the first time in the submissions of the appellant. It is submitted that the issues raised by the appellant in his appeal are vague, the only clear point being made being that the respondent should have convened an oral hearing. The appellant should not be entitled to rely upon additional grounds, advanced for the first time in the submissions of counsel.

Sufficient Evidence for Decision of Respondent- No requirement for Oral Hearing

52. The respondent submits that there was sufficient evidence in the medical reports to justify the conclusion of the respondent, and that no oral hearing was required or necessary. While the medical reports were not unanimous, there is no requirement for unanimity of medical opinion. In this regard, the respondent relies

upon the case of *Dola Twomey v. FSO* (Unreported, Feeney J., 26th July, 2013). In that case, there was a dispute between the appellant and her insurers, Irish Life as to whether or not she was incapable of work by reason of Post Traumatic Stress Disorder. In a very detailed *ex tempore* decision, Feeney J. distinguished between what he described as a conflict of fact (in the normal sense of that concept) and a difference of medical opinion. At p. 14, he stated:-

> "An oral hearing may be required as a matter of fair procedures, but such a requirement arises where there is a clear identified dispute as to particular events central to the case, and where there is not sufficient documentary evidence to enable the FSO come to a conclusion on the evidence and further resolution of the dispute requires oral evidence."

53. Later, at p. 17, as regards the case before him, he stated:-

> "Here, there was no factual dispute; there was a difference of medical opinion but the question that the FSO had to consider was: did Irish Life have medical opinion sufficient to allow it to make the decision? It did. That on the balance of the objective medical evidence, that the appellant was not disabled as per her policy. That process did not, on the facts of this case, require an oral hearing." And finally, as regards this issue, Feeney J. stated at p. 19 of his judgment: "There is a difference between disputed facts and different expert opinions, and in considering whether different expert opinions require an oral hearing, regard must be had to whether or not there are disputed facts…. central to any requirement for an oral hearing is the presence of both disputed facts and that such facts are central or crucial to deciding the matter under consideration."

54. Feeney J. also considered what would be achieved by an oral hearing on the facts of that case:-

> "The Ombudsman is not a medical expert, and it is not clear what type of an oral hearing the applicant envisages should have been held. The Ombudsman is not seeking to come with his own diagnosis in place of a diagnosis reached by the doctors. Rather the Ombudsman was assessing the conduct of Irish Life in assessing whether or not it had acted properly in declining the claim."

55. This last passage was cited with approval by White J. in *Ní Mhathuna v. FSO* [2014] IEHC 110, a case upon which the respondent also relies. In rejecting the argument that the FSO should have directed an oral hearing in that case, White J. stated, at paras. 37-39, as follows:-

> "37. This appeal to the respondent did not revolve around a material dispute of fact. Medical experts differed in their opinion on the appellant's incapability by reason of illness or injury of (sic) following the occupational duties of a secondary teacher.
>
> 38. The responsibility placed on the respondent was to decide if the notice party, had decided incorrectly to refuse compensation under the group policy scheme to the appellant.
>
> 39. If the respondent formed the view after careful consideration that this matter could be decided without oral evidence. It was within his discretion to do so."

<u>No error in excluding certain reports from consideration</u>

56. It is submitted that the respondent did not err in not taking account of medical evidence submitted post-dating the decision of Friends First. The respondent relies

upon the decision of the Court of Appeal in *UCC v. ESB* [2017] IECA 248, where Ryan P. stated:-

> "The first and fundamental point is that this is an appeal from the decision of the High Court. A party is not entitled to make a case on appeal that he has performed further experiments or calculations and is now in a position to show that the evidence given at the trial was not correct or not fully correct or was in some other way undermined. The appeal process is a review of the decision of the High Court on well-settled principles."

57. The respondent also relies on the decision of the Supreme Court in *Rye Investments Limited v. Competition Authority* [2012] IESC 52, in which Clarke J. (as he then was) stated, at para. 4.3:-

> "In the ordinary way, and at least in very many cases, evidence of what occurred after a decision in the High Court will not be relevant. It would not be in accordance with the requirement that appeals to this court be conducted in an orderly fashion that a party could simply place before the court irrelevant evidence not considered by the High Court and invite this court to take such evidence into account on an appeal."

58. Furthermore, it is submitted that in any event, Friends First offered the appellant the opportunity to submit to further medical assessment (the purpose of which was to consider the latest medical reports), but the appellant refused to attend for further medical examinations. It is submitted that the refusal of the appellant to attend for further orthopaedic and psychological assessment was unreasonable and that the court should take into account his conduct in this regard.

Decision

59. It is clear from a review of the exhibits that the respondent, from the time of receiving the complaint of the appellant, considered that complaint and processed it diligently with independence and efficiency. Correspondence received from the appellant was sent to Friends First for its consideration and comment, and *vice versa*. The respondent obtained the entire file relating to the matter from Friends First, and sent it to the appellant for his consideration. The appellant was afforded the opportunity to see for himself the basis upon which Friends First made the decision to terminate payment of disability benefit to him and to see all documentation upon which that decision was based. He was afforded every opportunity to consider and make submissions in respect of that documentation, and the decision of Friends First. While I will deal below with the specific issues raised by the appellant in this appeal, it is clear that, in general terms, and taking the adjudicative process as a whole, there was no error or series of errors on the part of the respondent.

60. The specific arguments raised by the appellant are:-

1. The respondent erred in excluding from consideration four medical reports provided by the appellant after the decision of Friends First to terminate payment of the disability benefit;
2. The respondent erred in relying upon the refusal by the appellant to attend for further orthopaedic and psychiatric assessments. This is expressly pleaded by the appellant himself, in his first affidavit of 19th April, 2016, although in his second affidavit of 11th July 2016 he denies refusing to attend for further examination;

3. The respondent erred in failing to take proper account of those medical reports that favoured the appellant, and further erred in failing to convene an oral hearing to consider the conflicts on the medical reports;
4. The respondent erred in taking into account undisclosed documents (the reports of the private investigator in failing to convene an oral hearing to hear evidence from the private investigator retained by Friends First and
5. The appellant made an error of fact as regards a conclusion formed by Mr.O'Brien.

I will deal with each of these points in the order set out above.

Exclusion of additional medical reports and refusal to attend for further examination

61. I will deal with items 1 and 2 under the same heading, as one flowed from the other. The first decision of Friends First was made on 8th August, 2014. The appellant appealed that decision, and Friends First rejected that appeal by letter dated 4th August, 2015. The appellant then made the complaint the subject of this decision to the respondent. In his decision, the respondent gave consideration to the contents of all medical reports at the time that Friends First made its initial decision to terminate benefit, and such medical reports as became available between that date, and the determination of the appeal by Friends First approximately twelve months later. However, the respondent excluded from consideration the four medical reports subsequently provided by the appellant, on the basis that they could not have been considered by Friends First at the time that it made its final decision. It is submitted on behalf of the appellant that the respondent fettered his discretion in excluding these reports from his consideration and therefore erred in law.

62. This submission must be rejected for two reasons. Firstly, as a matter of common sense, the approach taken by the respondent was correct. The respondent was engaged in reviewing the decision of Friends First which was based upon the information that it had available to it at that time. Clearly Friends First could not be criticised for failing to take into account reports that were not even in existence at the time that it made its decision, and if the respondent had taken those reports into consideration, he would have erred in doing so.

63. But all of this notwithstanding, the respondent had correspondence with Friends First about these reports. Even though they had no obligation to do so, Friends First considered those reports and, in effect, offered to reconsider the matter provided that the appellant attended for further independent psychiatric and orthopaedic assessments. This offer was communicated to the respondent to the appellant who, by letter of 11th December 2015 to the respondent stated:-

> "I do not feel to agree another assessment/s by the provider, for the reasons, it would become endless and also for the following reasons…."

The "following reasons" related to his ongoing review by pain specialists and a psychiatric nurse. He also said that the functional capacity test by the physiotherapist identified a need for him to have physiotherapy, which Friends First had not taken into account.

64. He concluded this letter by requesting the respondent to obtain the opinion of the various people whom he was continuing to attend, as to what would be appropriate to finalise the dispute.

65. Although counsel for the appellant submitted that some allowance ought to be made for the fact that English is not the first language of the respondent, and that this was not a clear refusal to attend for a further independent medical assessment, I

cannot accept this argument. The appellant has a good command of English and he was clearly not agreeing to or was expressly refusing to undertake further independent assessments, perhaps for the very understandable reason that the process was becoming "endless". But it was an unambiguous refusal. The fact that he concluded this letter by asking the respondent to undertake investigations with third parties does not alter the character of the earlier refusal. Moreover, the respondent obviously has no remit to undertake such investigations as the appellant was requesting.

66. All of this is regrettable because Friends First were clearly offering the appellant one final opportunity for independent medical review. If there had been any deficiencies in the process up to this date, either within Friends First or on the part of the respondent (and in my view there not) such deficiencies were cured by this offer.

67. Moreover, the authorities referred to by the respondent at paras. 56 and 57 above, although referring to appeals within the superior courts, would in my view, apply with equal force to a quasi-judicial procedure such as that in which the respondent was engaged in considering the appeal of the appellant.

Oral Hearing and failure to take account of medical reports favouring appellant

68. It is well established by the authorities to which I have referred above, that the respondent is under no obligation to conduct an oral hearing unless there is a conflict as to matters of fact that can only be resolved by such a hearing. The cases of *Kiely* and *Galvin* are distinguishable because those cases involved statutory appeals in which the appeals officer was the ultimate decision maker, who was expressly conferred with the power to conduct an oral hearing . That is very different to the position of the respondent, who is reviewing the decision of the decision maker, and who, while conferred with certain powers if the complaint is substantiated on specified grounds, cannot overturn that decision, although he may direct other action.

69. There was no conflict of fact in this case, but there was a conflict of medical opinion. In the end, that conflict was reduced to the psychological status of the appellant. That is clear from the report of Professor McCormack of 25th June 2015. While the psychological status of the appellant should not be disregarded, he was afforded the opportunity for further independent evaluation in this regard, which he declined and Friends First was in those circumstances entitled to rely on the comprehensive report it had obtained from Dr. Devitt.

70. It is also clear from the authorities to which I have referred above, that a conflict of medical opinion is not a conflict as to matters of fact, and the respondent is not a medical expert whose function it is to adjudicate on conflicts of medical opinion. The function of the respondent in considering the appellant's complaint was, in general terms, to assess whether or not Friends First acted reasonably, properly and lawfully in declining the claim of the appellant. But the respondent was not, as McMenamin J. said in *Hayes v Financial Services Ombudsman*, engaged in resolving a contract law dispute. An oral hearing to consider the medical evidence was unnecessary and would have been inappropriate.

Reports of Private Investigator

71. It is submitted on behalf of the appellant that in his decision, the respondent took into account the reports of the private investigator, and did not afford the appellant the opportunity to comment upon same. It is further submitted that that an oral hearing was required in order to scrutinise the evidence gathered by the private investigator who provided the reports to Friends First, and to subject that private investigator to cross examination. There are three problems with these arguments.

72. The first is a procedural issue. This issue was not raised on behalf of the appellant until the first day of the hearing of this appeal. Accordingly, it was not

raised or pleaded in accordance with the RSC. This is in spite of the fact that the appellant was furnished with copies of the private investigator's reports early on in the course of the investigation process of the respondent, and raised no comment or objection. Since the appellant has not pleaded the point, the respondent did not have the opportunity to put forward any evidence of his own on the issue. For this reason alone, this argument should be rejected.

73. However, it should also be rejected for substantive reasons. The respondent examined all of the medical reports obtained by or submitted to Friends First and satisfied himself that Friends First had ample medical grounds to terminate payment of the benefit. Although observing that the reports of the private investigator would not have been helpful to the appellant, the respondent was satisfied that these reports did not form the basis upon which Friends First arrived at its decisions.

74. Furthermore, as I have said above, it is clear from the medical reports, and even those of Professor McCormack who was particularly supportive of the appellant, that the issues inhibiting the appellant from returning to work were not physical but psychological and so therefore the appellant's case for payment of the benefit, in its latter stages, depended on establishing, to the satisfaction of Friends First, a psychological basis for admitting his claim, as distinct from proving physical impairment. The reports of the private investigator could have had no relevance to the appellant's psychological state.

75. I am also satisfied from the evidence that it is highly unlikely that the reports complained of influenced the decision of the respondent, and certainly not to any significant degree. The respondent had before him ample material upon which to form the conclusions that he did, without reference to the reports of the private investigator, and he, in turn, formed the same view of the decision of Friends First.

Error as to Fact

76. The appellant argues that the respondent made an error as to fact in that he records that Mr. O'Brien, consultant neurosurgeon, suggested that there was an element of exaggeration at play on the part of the appellant, but Mr. O'Brien nowhere stated this in either of his reports. The appellant acknowledges however that later in his conclusions the respondent more accurately records the findings of Mr. O'Brien.

77. As I mentioned above, this point was not pleaded either. The fact that it is not pleaded is no mere technicality. Had it been pleaded, the respondent would have had a chance to respond to say if this error in any way influenced his decision, and, if so, to what degree. The Court does not therefore have the benefit of the respondent's evidence on the point. For this reason, this submission cannot be considered. However, that said, it is apparent that the respondent considered all of the medical reports, including two other reports from two different consultants, Dr. Devitt and Dr. Holland, each of whom clearly considered that the appellant was exaggerating, and explained the reasons (and they each had several reasons) for this opinion.

78. For all of these reasons, I am satisfied that there has been no error of any kind on the part of the respondent in arriving at his conclusions, and that being the case this appeal must be dismissed.

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