THE HIGH COURT

[2013 No. 83 MCA]

IN THE MATTER OF SECTION 57CI OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY SECTION 16 OF THE FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004) AND IN THE MATTER OF AN APPEAL FROM THE FINANCIAL SERVICES OMBUDSMAN

BETWEEN

CIARAN O'NEILL

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 27th May, 2014

1. Dublin city – along with the rest of the country – experienced some remarkable weather-related events on Monday, 24th October, 2011. Large areas of the suburbs in particular had to cope with exceptionally heavy, monsoon-like rain with associated flooding. An incident which occurred that evening has given rise to the present appeal from a decision of the Financial Services Ombudsman ("FSO") made on 26th November, 2012. The issue arises in the following way.

2. The appellant, Mr. O'Neill, made a complaint to the FSO that his insurance company. Zurich Insurance plc ("Zurich"), had wrongly failed to indemnify him in

respect of flood damage to his diesel engine Mercedes van. This damage is said to have occurred following a severe flooding incident which occurred in Newcastle, Co. Dublin on that evening of October 24th, 2011. Mr. O'Neill had encountered some flooding on the road, but as the vehicle ahead of him drove though the flood without difficulty, he made a decision to follow it. Mr. O'Neill was, after all, driving a diesel engine van which would normally have had no difficulty driving through such flooding, providing that the water level was not too high.

3. Unfortunately, however, a Jeep coming in the opposite direction created a form of tidal wave effect. This caused a cascade of water which reached the bonnet of Mr. O'Neill's van. The engine then stalled and stopped. Mr. O'Neill stayed in the van in the hope – which proved to be a vain one - that someone might offer assistance or, alternatively, that the engine might re-start.

4. Worse was to follow, as the nearby river burst its banks. The situation then became quite dangerous: the van was now submerged up to windscreen level, with water filtering into the passenger section of the cab from the pedals and steering wheel. Mr. O'Brien ultimately had to swim to safety by escaping through the open driver's door window. The van appears to have remained submerged in water for over five hours. When the van was transported to dry land, there was, according to Mr. O'Brien, a pervading smell of damp and flooding.

5. At that point the van was brought to the premises of Automotive Services, Park West, Dublin 12 so that it might be repaired. Mr. O'Neill was informed that the engine had suffered severe water damage and he was given to understand that the van would at that point be simply written off.

6. Mr. O'Neill then contacted his insurer, Zurich. The assessor subsequently appointed by Zurich requested that the engine be stripped down and re-built. Mr. O'Neill was aggrieved when Zurich agreed only to pay some of the quite significant costs associated with the cost of dismantling the engine when its assessor had directed should be done. The van itself had ultimately be written off and it was ultimately sold to a scrap dealer in Co. Carlow for a fraction of its true value.

7. In essence, Mr. O'Neill made two complaints to the FSO regarding his treatment by his insurer: first, that Zurich had failed to indemnify him for the loss which he had suffered under the commercial vehicle insurance policy and, second, that Zurich were guilty of maladministration in that it had failed to keep a proper record of telephone calls.

8. So far as the second complaint is concerned, it is not now in dispute but that Zurich representatives had originally assured Mr. O'Neill that he would be fully reimbursed for the costs of stripping and reassembling the vehicle. Zurich later reneged on that promise and informed Mr. O'Neill that while it would cover the cost of stripping the vehicle, it would not cover the cost of reassembling the engine. Zurich originally denied that such assurances had in fact been given, but it later came to light following a review of telephone records that the contrary was the case. The FSO directed that Zurich pay Mr. O'Neill the sum of €500 in respect of this act of maladministration.

9. The present appeal is, however, concerned with the first complaint. Zurich had appointed a motor assessor on 27th October, 2011, to inspect the vehicle and he prepared a report dated 2nd November, 2011. This report stated:

> "*Accident and Point of Impact*

The vehicle has sustained light flood damage.

Damages and Repairs

We have started the engine which is running, however, there is a light knocking emanating from the engine. Thus, indicating possible water ingress within the engine as a result of the recent flood damage. However, we noted that the air filter had been replaced prior to our inspection. Temporary repairs have been carried out by [the repairers] Automotive Services on behalf of the insured when it was noted on a test drive for the vehicle a noise emanating from the engine.

We have requested Automotive Services to carry out a compression test, we have requested a receipt of the printout to establish if the apparent damage sustained to the engine was a result of the claim under review...."

10. Mr. O'Neill had retained his own motor assessor to inspect the vehicle. In this report it is stated:-

"The vehicle was brought to Automotive Services in Park West Industrial Park, Dublin 12. The engine was dismantled and examined by the undersigned. The compression was down in No. 1 cylinder. The head gasket was found to be the cause which was in all probability caused by water ingress into the engine, not sufficient water to damage the pistons and con rods, but sufficient to create a small hydraulic lock which in turn damaged the cylinder head gasket.

Conclusion

> From my examination of this vehicle there is no doubt whatsoever that the damage on the vehicle is as a direct result of the vehicle being submerged in four to five feet of water."

11. Zurich's motor assessor then considered this report in turn. In a subsequent report dated 19th January 2012 Zurich's assessors stated that they had conducted their own inspection of the vehicle on 1st November 2011, eight days after the (alleged) flooding incident. They added that they could find no evidence of damp within the passenger compartment of the van, even though the repairers, Automotive Services, had told them that "the interior passenger compartment was damp when the vehicle arrived at their premises" very shortly after the incident in question.

12. A further oddity was that whereas the report of Automotive Services of 16th December 2011 stated that they had "replace[d] water damaged starting motor" in the course of the repairs, Zurich's assessor stated that they had received a telephone call from Automotive Services Service Manager to the effect that they "were unable to find any damage sustained to the engine components." The report from Zurich's assessor concluded that Mr. O'Neill's assessor must have been mistaken with regard to the conclusions which he had reached.

13. In arriving at its conclusions so far as the merits of the insurance claim was concerned, the FSO naturally referred to these various reports before stating:

> "I am satisfied the company was entitled to decline the claim on the grounds that the damage was not caused by flood damage based on the two reports provided by the company's motor assessors."

14. Here it is notable that the FSO stated that the case did not present such a conflict of fact such as would require "the holding of an oral hearing to resolve any such conflict.". I have to say that I found this a rather surprising observation, because

the case itself seems to involve an almost diametric conflict of fact between the two reports of the respective vehicle assessors in respect of the most central feature of the claim. The report prepared by Zurich's assessor concluded that there was no real damage caused by the flooding, while the report prepared by Mr. O'Neill's assessor reached exactly the opposite conclusion. There were also significant factual issues raised in any consideration of the report prepared by Zurich's assessor and that prepared by Automotive Services (as repairer) on questions such as whether damp was present in the passenger compartment and whether any of the engine parts had in fact suffered flood damage.

15. It may be accepted that if an insurance company were to conclude in error that a vehicle did not suffer flood damage when as a matter of fact it had, such a conclusion would presumably not be permitted to stand by the FSO. After all, s. 57CI(2)(e) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004)("the 1942 Act") provides that:

> "A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
>
> ... (*e*) the conduct complained of was based wholly or partly on a mistake of law or fact..."

16. In a case of this kind, any such mistake of fact would have to be regarded as so fundamental that it would engage the supervisory functions of the FSO under this sub-section. If this so, then the FSO must be prepared to adapt its procedures so that this statutory supervisory power can properly be exercised. This means that the claimant must be given an adequate opportunity of demonstrating why the FSO should be prepared to exercise these supervisory powers in aid of his or her claim on the ground of material error of fact.

17. . In the present case Mr. O'Neill's complaint was effectively rejected simply because the insurance company could show that it was acting on foot of an assessor's report which supported its own conclusions. Yet the situation is more somewhat more complex than the FSO's decision might have been prepared to allow.

18. In the first place, the context of the claim is surely relevant. The basic facts of Mr. O'Neill's account do not ever seem to have been disputed. If this is correct, then it would not be at all surprising if the van suffered flood damaged as a result of being submerged in several feet of water for several hours during the course of the quite exceptional rainfall the Dublin region had experienced in the course of that that afternoon. Indeed, the conclusion to the contrary which Zurich's assessors had admittedly reached might at one level seems surprising and counter-intuitive.

19. In these circumstances, it does not appear to me that the FSO could properly have rejected Mr. O'Neill's complaint without at least some form of oral hearing. There was, after all, a clear conflict of fact which was central to the resolution of the complaint. If, moreover, the contention of the applicant's assessor is correct, the report prepared by Zurich's assessor failed to understand the nature of the problem or to diagnose it correctly. Yet the findings of the FSO amount to saying that simply because Zurich obtained an assessor's report which supported its contention that the damage to the engine was not caused by flooding, it was entitled to reject the complaint, no matter how factually erroneous or flawed that conclusion might be.

20. One might, however, ask how such a conclusion would be consistent with the power of the FSO under s. 57CI(2)(e) of the 1942 Act to correct for material error of fact, especially when the underlying account of the complainant in respect of the flooding incident had never been challenged.

21. Here it must be recalled that the power conferred by the 1942 Act is a classic example of where, by reason of the presumption of constitutionality, it is to be assumed that "proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted" in a manner which conforms to the constitutional guarantee of basic fairness of procedures: see *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317, 341, *per* Walsh J. Where, as here, the conflict of fact is a stark one and the resolution of this conflict is central to the fair disposition of the complaint, then it is impossible to avoid the conclusion that some form of oral hearing is objectively necessary in order to give effect to this constitutional guarantee.

22. It is true that the conclusion is likely to be an unwelcome to an Office which, as I have recently had occasion to observe (see *O'Brien v. Financial Services Ombudsman* [2014] IEHC 000), is presently struggling to cope with a huge volume of work. Moreover, as I observed in *Lyons v. Financial Services Ombudsman* [2011] IEHC 454, cases of this kind pose a form of existential dilemma for the FSO. Is the process administered by it designed to be something akin to the mediation of disputes? Or is it designed to be a less formal and expeditious method of dispute resolution which operates separately from the ordinary commercial courts and law of contract by reference to criteria which are almost akin to those applied to public bodies in judicial review proceedings?

23. Any analysis of the 1942 Act suggests that the FSO fits into the latter category of cases. The decision is, after all, a binding one (subject to a right of appeal to this Court) and the statutory criteria of review contained in s. 57CI of the 1942 Act are clearly inspired by public law principles, rather than by reference to standard private law orthodoxies. This is underscored by the fact that any attempt to re-litigate the

same matters as contained in the complaint will normally be regarded as an abuse of process when it is not otherwise a *res judicata*: see, *e.g.*, *Gallagher v. ACC Bank* [2012] IEHC 396.

24. 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.

25. This is illustrated by cases such as *Lyons*, *Hyde v. Financial Services Ombudsman* [2011] IEHC 422 and *Smith v. Financial Services Ombudsman* [2014] IEHC 40. In *Lyons*, the appellants complained that they had been given certain oral assurances by a financial institution regarding interest only loans. The financial institution in question had emphatically denied that any such assurances had been given. The FSO concluded that there was no reason to doubt the assurances given by the bank.

26. I concluded that, viewed objectively, this amounted to a breach of the appellant's constitutional right to fair procedures:

> "It must, after all, be recalled that the existence of an oral agreement or understanding regarding a supposed entitlement on the part of the appellants to an interest-only loan deal for a ten year period was of the essence of the appellants' complaint....in the present case..... the appellants could not realistically hope to establish the underlying merits of their case without an oral hearing."

27. A similar approach had been taken by Cross J. in *Hyde v. Financial Services Ombudsman* [2011] IEHC 422. In that case the appellant contended in her complaint to the Ombudsman that the credit institution in question had agreed to advance the sum of €965,000 for a property transaction. Some €715,000 was required for the actual purchase of the property and it was envisaged - or so the appellant maintained - that the balance would be paid for renovations. She further contended that the bank had represented orally that the balance of €250,000 would be paid down subsequently, but that it had resiled from this commitment when difficulties or disagreements arose in relation to the servicing of the €715,000 mortgage. Cross J. held that "without an oral hearing, I do not see this how the appellant's complaint....could be fairly or properly determined".

28. The decision of Barrett J. in *Smith* is also in similar terms. Here a couple in their late 50s contended that they had been advised by a financial institution to invest in what they contended was a highly unsuitable (and high risk) investment vehicle known as Jubilee Consortium, the precise terms of which investment they had not been properly advised. Just as in *Lyons*, the financial institution had denied the assertions made by the complainants. The FSO rejected the complaints without an oral hearing.

29. Barrett J. set aside this decision, saying:

> "There are assertions and counter-assertions by Mr. and Mrs. Smith and Ulster Bank and by declining to hold an oral hearing the Financial Services Ombudsman in effect denied Mr. and Mrs. Smith the opportunity to test by way of cross-examination various factual issues arising between the parties, the determination of which was necessary to enable the Smiths to establish the merits of their case. Such issues include but are not limited to: whether Mr.

and Mrs. Smith or either of them had any meaningful contact with Mr. Goodman before they invested in the Jubilee Consortium; what advice, if any, Mr. McHugh gave Mr. and Mrs. Smith before they invested in the Jubilee Consortium; whether Mr. and Mrs. Smith acted on the advice of Mr. McHugh when they invested in the Jubilee Consortium; whether Mr and Mrs Smith received an information memorandum in advance of their investment in the Jubilee Consortium; and whether Mr. and Mrs. Smith were apprised of the high risk nature of the Jubilee Consortium investment before they participated in same. The failure by the Financial Services Ombudsman to allow these issues to be tested at an oral hearing denied Mr. and Mrs. Smith the opportunity to establish the merits of such case as they sought to make and thus is an error of such significance as to vitiate the finding. As the question of whether there should be an oral hearing is a matter that is not within the specialised area of knowledge of the Financial Services Ombudsman, the issue of the deference to be accorded to that expertise does not arise."

30. The present case is, if anything, an even clearer case than *Smith* given that the conflict of fact arose from a stark disagreement between the respective vehicle assessors in circumstances where the conclusions that the engine was not, in fact, damaged by flood waters or that the flood water had not seeped into the passenger compartment might - to lay eyes, at least - seem surprising.

31. Some form of oral hearing would clearly have assisted the resolution of this factual dispute. Among the obvious questions which would fall for consideration in such circumstances might include: whether water damage to an engine is to be expected if a diesel van of this kind remains immersed in flood waters for five or six house? Did Automotive Services replace a water damage starting motor and, if so,

was this motor retained for inspection by Zurich's assessor? Did Automotive find evidence of water damage to the passenger compartment and, if so, how can this be aligned with the conclusion of Zurich's assessor that no evidence of damp was found? Did the service manager of Automotive tell Zurich's assessor that no damage to the engine component had been found and, if so, was this factually correct?

Conclusions

32. For all of these reasons it is impossible to avoid the conclusion that the Ombudsman's decision was vitiated by a serious error, negating as it did in the circumstances of this case the very substance of the appellants' constitutional right to fair procedures. I am again conscious that this decision (along with the decisions in cases such *Lyons, Hyde* and *Smith*) may have many inconvenient consequences (including, perhaps, considerable resource implications at a time of austerity) for the Ombudsman's office.

33. Yet the fact remains that, as matters stand, the essence of the appellant's case could not have been properly evaluated in the absence of an oral hearing. As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures: see generally, *Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 14. This has further consequences, for, as Cross J. noted in *Hyde* and Barrett J. said in *Smith*, the resolution of the question as to whether there should be an oral hearing is not a matter which goes directly to the specialist expertise of the Ombudsman.

34. In any event, as I pointed out in *Lyons*, none of this could take from this Court's bounden duty to uphold the constitutional rights of the appellants and to provide them with an effective remedy where (as here) such a right has been

infringed: see, *e.g.*, my own judgment in *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214.

35. For all of these reasons, therefore, I propose to allow the appellant's appeal pursuant to s. 57CM(2)(b) of the 1942 Act. I will further remit the appellants' complaint to the Ombudsman for re-hearing in accordance with s. 57CM(2)(c) .

Approved

Gerard Hogan

28th May 2014