Approved Judgment

No Redaction Needed

Record No. 2014/506 MCA

THE HIGH COURT

IN THE MATTER OF THE CENTRAL BANK ACT 1942 AS AMENDED AND IN THE MATTER OF PART VIIB THEREOF AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57CL THEREOF

DEIRDRE EARLS

Appellant

- and –

THE FINANCIAL SERVICES OMBUDSMAN

Respondent

- and –

FBD INSURANCE PLC

Notice Party

JUDGMENT of Mr Justice Max Barrett of 9th July, 2015

PART I

BACKGROUND

1. If a couple of random bullets graze my property and the damage is so utterly trivial that I never make an insurance claim, and the event is so haphazard that I put it from my mind, is that a fact that my new home insurer can rely upon lawfully to disavow my home insurance policy when my house is years later destroyed by fire? Ms Earls does not think so. FBD does. The court does not have to resolve this issue. However, it does have to consider whether the Financial Services Ombudsman erred in law when addressing a complaint brought by Ms Earls against FBD in respect of the dispute arising between the two.

2. In March 2008, a taxi was stolen somewhere in Limerick City, driven into St Mary's Park, and a machine-gun used to spray bullets indiscriminately. Apart from the criminals involved, nobody knows why this event happened, or who the intended target was. It is not clear whether the bullets were fired at houses in St Mary's, some of which were hit by bullets, or whether the intended target was a person walking in the area. It is possible that the shooting was connected with a criminal feud which was then on-going in Limerick City. But even this is not certain. What is certain is that neither Ms Earls nor her house was the target of the shooting.

3. Fortunately, Ms Earls was away on holiday with her partner at the time of the incident. On her way home from her holidays, Ms Earls made a preliminary call to AXA, her then home insurers. But when she and her partner returned to St Mary's, they discovered that the damage which had occurred to Ms Earls' property was minimal. One bullet had struck the front wall. Another had struck the border-wall that marks the boundary with her neighbour's house. But the damage was limited and Ms Earls, an honest woman, made no claim. As she puts it in her affidavit evidence, "*[T]here was nothing to claim for.*"

4. The court does not wish in any way to diminish the fact that, when it comes to the shooting incident, Ms Earls and her neighbours were clearly the hapless victims of a random and vicious incident that evinced no respect for human life. However, the court cannot but note, indeed Ms Earls emphasises in her affidavit evidence, the trivial nature of the damage that was occasioned to her property as a result of the incident. Indeed, had Ms Earls not been away on holiday when the incident occurred, had she seen the damage herself immediately after it happened, it seems implicit in her affidavit evidence that she would not even have troubled AXA with a telephone call. As it was, she chalked up the event to experience. It was nothing to do with her, it was not targeted at her, and she had suffered next-to-no damage. That was the end of matters as far as she was concerned.

5. After 2008, Ms Earls' home insurance premium increased year-on-year but in truth it had done so since she bought her home back in 2002. She had no reason to think that the incident of March 2008 was anything to do with the hike in insurance premia, and there is nothing in the evidence that would lead the court to conclude otherwise. When, in

November 2010, Ms Earls' partner found cheaper home insurance being offered by FBD on the internet, Ms Earls switched her home insurance to FBD.

6. When asked on the FBD website "*How many accidents or claims have you had in the past 5 years?*" Ms Earls' partner entered "*0*". Based on the inputted information, a policy documentation pack arrived a couple of days later. Ms Earls signed the necessary policy documentation and sent it back to FBD.

7. Almost three years later, in August 2013, Ms Earls and her partner were away on an overnight visit that included a trip see Ms Earls' mother in Kileely. While they were away someone set Ms Earls' house on fire. The fire caused serious damage to Ms Earls' house. Structurally, the building remains intact. However, the inside was very badly damaged. The fire seems to have burnt itself out internally but there was a lot of smoke damage.

8. As a result of the fire, Ms Earls was left homeless. She was reduced to a peripatetic existence, staying at her partner's house in Pallaskenry, and with friends and relatives. She had no clothes to her name apart from the clothes she had with her when she visited her mother. All her belongings were destroyed in the fire. But her troubles were only beginning.

9. Ms Earls had paid for the 'Home Emergency Assistance' package offered by FBD. Under that package, FBD was supposed to provide an emergency repair service to secure Ms Earls' home and prevent any further loss or damage occurring. FBD, however, denied that Ms Earls had taken this package and indicated further that if Ms Earls did not

board up the house herself they might not indemnify her for the loss occasioned by the fire. So Ms Earls secured her home at her own expense. She avers: "*FBD later acknowledged that my policy covered emergency assistance but refused to refund me the cost of securing my home even then.*" Presumably this was because, as will be seen hereafter, FBD was to decide that in fact Ms Earls was not covered by it at all.

10. FBD appointed Thornton Loss Adjusters as their investigator. Ms Earls asked First Call Assessors to assist her with her claim. In September 2013, Ms Earls, her partner, and a representative of First Call attended a meeting with FBD at the latter's offices. During the course of the conversation, Ms Earls avers in her affidavit evidence, "*[T]hey asked why I had [not] told FBD about the shooting and we answered 'because we weren't asked'*". A question was asked why no claim had been made to AXA and an answer apparently volunteered by an FBD representative before Ms Earls had a chance to answer. The representative suggested that it was because of the paperwork involved. Ms Earls regrets now that she did not challenge this answer at the time, though we could all likely do some things better if we were to do them again. Ms Earls avers:

> "*Mistakenly, we didn't dismiss this answer or fight our ground as we didn't think much of it and the meeting just went on. To my limited knowledge there is not a lot of paperwork involved and in any event what could we have claimed for. I can distinctly remember pointing out during that meeting that there was no real damage caused by the bullets anyway although [the FBD representatives] took no notice of this.*"

11. FBD appears to have had two attempts at voiding Ms Earls' home insurance policy. The first time around it appears to have been unconvinced that Ms Earls had in fact been living at her home. It asked for repeated evidence of her residency such as electricity, gas and refuse bills. A perhaps unexpected boon to Ms Earls' *bona fides* in this regard was that the Gardaí had by now installed street cameras at St Mary's as an anti-crime measure. As a result, Ms Earls was able to source film footage of her coming to and from her home. This seems to have had the desired effect. "*Eventually,*" Ms Earls avers, "*[FBD] stopped voiding the policy on this basis and close instead to rely on my 'non-disclosure'*".

12. By registered post, dated 8th October, 2013, FBD sent a letter to Ms Earls' now boarded-up home where she no longer resided. In this letter FBD, indicated that it intended to treat Ms Earls' home insurance policy as void. The relevant portion of the letter reads:

> "*[W]e have been advised by our Claims Department that relevant material facts were not disclosed by you at the inception of the policy. You declared that you had no previous claims in the five year period prior to inception of the policy; we note from the content of your statement to our loss adjuster...that you reported a claim with AXA in respect of damage caused to your property by gunfire in March 2008.*
>
> *As this is the case, and in view of the non-disclosure of the previous claim and its serious nature, which are both relevant material facts which should have been disclosed when seeking a quotation for home insurance, we have no option to treat the above policy as null and void from inception.*"

13. The sharp-eyed might be forgiven for reading this last-quoted text and asking whether the court has made some mistake in its account thus far of the background facts. Did the court not state but a few paragraphs ago that Ms Earls never made a claim with AXA following the event of March 2008? The court did state that, and the court was entirely correct in this regard. No claim within any ordinary sense of the word was made by Ms Earls to AXA in respect of the event of March 2008. She spoke with AXA in March 2008 but made no claim. Describing such a process as 'reporting' a claim does not turn a non-claim into a claim. Ms Earls had and has no home insurance claims history apart from her claim for the fire damage done to her house in August 2013.

14. Ms Earls is considerably vexed by FBD's disavowal of her policy. She views herself as having behaved honourably in effecting her policy and expects FBD to honour that policy. As she succinctly puts it in her affidavit:

> "*I have no previous insurance claims and I have no court convictions. I am unemployed and my income is disability allowance. I suffer from a number of medical problems....I regard myself as an honest, law abiding, decent person. I have been the victim of crime and I have suffered a peril for which I was insured against yet my policy has been voided. I am not a wealthy person and the value of my home and belongings is not large but it is all I have.*"

15. On Ms Earls' behalf, First Call made a complaint to FBD that it had seen fit to disavow the home insurance policy. On 23rd November, 2013, FBD acknowledged receipt of the claim and set out its position as follows:

"Ms Earls' property was the subject of a gunfire attack in March 2008. The damage resulting from this attack was reported to her then insurers. Ms Earls has advised that she did not actually pursue the claim due to the level of paperwork required by her insurers. Given the very serious nature of such an incident, it is entirely reasonable to expect that Ms Earls would recall this when she proposed for Insurance with the Company in November 2010. However as is clear from the signed Proposal Form, a copy of which I attach for ease of reference, at no time did Ms Earls put Company Underwriters on notice of this serious incident from March 2008 or that a claim had been reported to AXA in respect of same. I very respectfully refer you to the declaration which your client signed on 2 November 2010:

> *'I confirm that I have declared all facts likely to influence the Insurer in deciding on the acceptance of the risk and the terms to apply.*
>
> *I declare that the above statements are true and complete and I have not suppressed or mis-stated any material fact. I desire to effect an insurance with FBD Insurance plc in the terms, limitations and endorsements of the FBD Home MultiPeril Policy to be issued by the Company and the Company's Memorandum and Articles of Association and I agree that this proposal will form the basis of the contract between me and the Company and will be deemed as incorporated in the Policy to be issued.'"*

16. The court cannot but note in passing that there is much in the introductory narrative to the above-quoted text that appears to stem from a misunderstanding of the facts and/or to be plain wrong:

- first, if some criminals drive a stolen taxi down my street, shoot bullets at a target or targets unknown, and a couple of bullets hit the walls of my property, have I been the subject of a 'gunfire attack'? As neither myself nor my property was singled out as the subject of that criminal heedlessness, it does not seem correct to state, on the basis of some inadvertent and inconsequential damage to my property, that I have been subject to a 'gunfire attack'.
- second, an insurance company that is doing something as financially serious as disavowing a home insurance policy could at least trouble itself to get the facts right – and if it gets the facts wrong, one might reasonably expect the insurer's Complaints Department to pick up on the error. Ms Earls never made any claim, within the ordinary meaning of the word, to AXA. The fact that she never made that claim had nothing to do with the level of paperwork required by AXA. She had and has no home insurance claims history apart from her claim for the fire damage done to her house in August 2013. Stating that Ms Earls "*reported*" a claim when she spoke to AXA does not have the effect of converting her non-claim into a claim.
- third, if the court might paraphrase its understanding of Ms Earls' affidavit evidence, it is that slight damage was caused to her property by two bullets during an entirely random incident that had nothing to do

with her and which, in terms of damage to her property, was so trivial she never made any claim for it and did not think it relevant when, for reasons of cost, she moved to a new home insurer. To the court that seems a more correct description of events than that of FBD in the above-quoted text.

17. As to the reliance by FBD on the policy text, this is in effect an *uberrimae fidei* ('utmost good faith') point which was touched on by counsel in argument and is returned to in Part IV below.

PART II

MS EARLS COMPLAINS TO THE FINANCIAL SERVICES OMBUDSMAN

18. Clearly getting nowhere with FBD as regards a pay-out on her claim, Ms Earls complained to the Office of the Financial Services Ombudsman which issued a Finding in August 2014.

19. At p.4 of the Finding, the Deputy Financial Services Ombudsman sets out her understanding of the duty of *uberrimae fidei* ('utmost good faith'):

> "*A contract of insurance is voidable if a party fails in negotiations to disclose a fact material to the risk. A material fact is any fact that will influence the judgment of a prudent underwriter in its assessment of the risk. The duty to disclose all material facts ultimately falls on the proposer.*

To underwrite a risk an underwriter needs to know all the proposer's details. This complies with one of the fundamental doctrines of insurance, uberrimae fidei, i.e. *utmost good faith in disclosing all facts...*".

20. At p.6 of the Finding, one finds what counsel for Ms Earls described as the "ratio" of the Deputy Financial Services Ombudsman's decision. Per the Deputy Financial Services Ombudsman:

> "*Having carefully examined all the evidence before me, I consider that the shooting incident which occurred to the Complainant's property in 2008 was a material fact, which ought to have been, but was not disclosed to the Company at the point of proposing for cover in November 2010. I understand that the Complainant finds herself in a very difficult situation at present, due to the fire damage caused in August 2013. However, the Company has acted in accordance with the terms of the contract of insurance to invalidate the policy in this case as there was a non-disclosure of a material fact, that is the shooting incident in March 2008. Therefore, I cannot uphold this complaint.*
>
> *It appears from the Complainant's submissions that she was of the view that as she had previously disclosed the shooting incident to her previous insurer (a third party insurer), but did not pursue her claim, she was not required to disclose same to her new insurer. In this regard she raised the issue that she responded to all questions in section 4 "supplementary questions" of the written proposal form correctly. These questions included* inter alia *the following:*

How many accidents or claims have you had in the past 5 years? 0'

I would explain in this regard that as the Complainant intended to accept a new insurance policy with a new insurer, the onus was on the Complainant again to make a full disclosure of all material facts under the proposal for the new policy. Notwithstanding the fact that the Complainant did not pursue her claim in 2008 with the third party insurer, there remained an onus on the Complainant to 'declare all facts likely to influence the Insurer in deciding on the acceptance of the risk and the terms to apply.' *It is my view that a reasonably prudent underwriter would be influenced in its decision to write a risk if it was informed that the risk property to be insured had previously been subjected to a gunfire attack. The Company correctly asserted that any view taken by the third party insurer was irrelevant to the Company's assessment of the risk. Furthermore, it correctly informed the Complainant that it would not have had access to any centralised claims database at the time the Complainant proposed for insurance...*".

21. At this point in her travails Ms Earls was, of course, the "*Complainant*".

PART III

THE NATURE OF THE COMPLAINT NOW BEFORE THE COURT

22. The court does not understand there to be much if anything separating the parties as regards their respective understandings of the role of the court in its review of the

decision of the Financial Services Ombudsman in the within application pursuant to s.57CL of the Central Bank Act 1942, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004. Even so, it is appropriate for the court briefly to summarise the applicable law and principles concerning its role in this regard.

23. In *Ulster Bank* v. *Financial Services Ombudsman & Ors* [2006] IEHC 323, Finnegan P. laid down the authoritative test for an application such as that now before the court. Per Finnegan P., at p.9 of his judgment:

> "*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 differential standard is that applied by Keane C.J. in* Orange *v.* The Director of Telecommunications Regulation & Anor *and not that in the* State (Keegan) *v.* Stardust Compensation Tribunal".

24. This last-quoted passage can be broken down into the following elements: (i) the burden of proof is on the appellant; (ii) the onus of proof is the civil standard; (iii) the courts should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole; (iv) in light of the above principles, the onus is on the appellant to show that the decision reached was vitiated by a serious and significant error or a series of such errors; and (v) in applying this test, it is appropriate for the court to have regard to the degree of expertise and

specialist knowledge of the Ombudsman. Notably, this break-down of the test was followed by McMenamin J. in the High Court decision of *Molloy* v. *Financial Services Ombudsman* (Unreported, High Court (McMenamin J.), 15th April 2011).

25. In the relevant passage from *Orange* that was applied by Finnegan P., Keane C.J. stated, 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 degree of expertise and specialised knowledge available to the first Defendant."*

26. In summary, the process arising now to be discharged by this Court is very different from a *de novo* appeal where the appellate body looks at the entire matter afresh and

makes up its own mind as to what it would do in the case. This constrained process is consistent with the stance adopted in a long line of cases where the courts have evinced an unwillingness to second-guess the decision of an expert body. Perhaps most prominent among the cases that might be cited in this regard is that of *Henry Denny & Sons* v. *Minister for Social Welfare* [1998] 1 I.R. 34, and the observations of Hamilton C.J., at pp.37–38 of his judgment that:

> *"[T]he Courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should not be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the Courts to review their decisions by way of appeal or judicial review."*

27. Caution is needed of course. As Harold Macmillan observed, we have not overthrown the divine right of kings to fall down for the divine right of experts. None of us is immune from error. So it is important that deference to expertise should never become an impediment to thorough judicial consideration in accordance with the law.

28. Finally, as to the options open to the court by way of orders to be made in the within application, these are set out in s.57CM of the Central Bank Act, 1942. Thus: (1) the court is to hear and determine an appeal made under s.57CL and may make such

orders as it thinks appropriate in light of its determination; (2) the resultant orders that may be made by the court include, but are not limited to, (a) an order affirming the finding of the Financial Services Ombudsman, with or without modification, (b) an order setting aside that finding or any direction included in it, and (c) an order remitting that finding or any such direction to the Financial Services Ombudsman for review. Lastly, if the court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, the Ombudsman is required to review the finding or direction in accordance with the directions of the court.

PART IV

THE DUTY OF UTMOST GOOD FAITH

29. It is trite law that an insurer has the right to avoid a contract of insurance in its entirety if the insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into. The questions of fraud and misrepresentation are common to all contracts. Non-disclosure is peculiar to a class of contracts, of which the contract of insurance is the prime example.

30. It appears generally to be accepted both in Ireland and the neighbouring jurisdiction that the duty of disclosure was likely first, and certainly most famously, identified by Lord Mansfield in *Carter* v. *Boehm* (1766) 3 Burr. 1905, as applied in this jurisdiction by Henchy J. in *Aro Road and Land Vehicles Limited* v. *The Insurance Corporation of Ireland* [1986] I.R. 403 and affirmed by Finlay C.J. in *Kelleher* v. *Irish Life*

Assurance Company Limited [1993] 3 I.R. 393 at p.401. The last two cases mentioned were among a trio of useful Supreme Court precedents placed before the court for consideration in the within application. The third was *Chariot Inns Limited* v. *Assicurazioni Generali S.p.a.* [1981] I.R. 199.

31. The court turns now to examine each of those cases. Before doing so, the court notes in passing that this case is concerned with a consumer contract and thus all of the comments and findings of the court in the within judgment are made exclusively within that context.

A. Chariot Inns Limited v. Assicurazioni Generali S.p.a.

[1981] I.R. 199.

32. In *Chariot Inns*, a director of Chariot was a director of another company which had previously made claim under a fire insurance policy. When Chariot came to place its own fire insurance, the director of Chariot acting in that capacity stated that Chariot had no previous fire claims history. Following a later fire at Chariot's premises, the defendant insurer disclaimed liability on the ground that the plaintiff had failed to disclose material facts to the defendant insurer. Chariot sued the insurer successfully on the policy in the High Court but lost on appeal to the Supreme Court where a single judgment was delivered by Kenny J. (Henchy and Griffin JJ. concurring). What principles can be drawn from the Supreme Court judgment? It seems to the court that there are at least four key principles arising.

33. First, the correct answering of questions asked is not the sole obligation of the insured; s/he must disclose all matters material to the risk. Thus, per Kenny J. at pp.225–226:

> "*[T]he correct answering of any questions asked is not the entire obligation of the person seeking insurance: he is bound, in addition to disclose to the insurance company every matter which is material to the risk against which he is seeking indemnity.*"

34. Second, the test of materiality falls to be gauged by reference to the hypothetical prudent insurer, in deciding whether he would take the risk and, if so, in determining the premium he would demand, *i.e.* it is an objective test. Per Kenny J., at p.226:

> "*What is to be regarded as material to the risk against which the insurance is sought? It is not what the person seeking insurance regards as material, nor is it what the person seeking insurance regards as material. It is a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and, if so, in determining the premium which he would demand.*"

35. As will be seen later below, this test was subsequently refined by McCarthy J. in *Aro Road.*

36. Third, the sole and final arbiter of materiality is the court (or in the within proceedings, the Financial Services Ombudsman). Per Kenny J., at p.226:

"*In the last resort the matter has to be determined by the court: the parties to the litigation may call expert witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such witness.*"

37. Fourth, as to the test of materiality, Kenny J. adopted the test stated in the Marine Insurance Act, 1906, *viz.* that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether such prudent insurer will take the risk.

B. *Aro Road and Land Vehicles Limited* v. *The Insurance Corporation of Ireland*

[1986] I.R. 403.

38. This was a case in which a carrier, acting as the agent of a corporate customer for which it was to transport goods, arranged for insurance of the goods in transit. Some of the goods were destroyed while in transit. When the customer sought to be indemnified under the insurance policy, the insurer denied coverage on the basis that there had been non-disclosure of the fact that the managing-director of the customer, had been convicted of various offences of dishonesty two decades previously. In the High Court, Carroll J. stated that she did not think the convictions would have been material to the risk. However, she accepted evidence on behalf of the defendant that a reasonable underwriter would have regarded the convictions as relevant to the risk, and she dismissed the plaintiff's claim.

39. In the Supreme Court, the judges were unanimous that the appeal should succeed but divided into a majority judgment (of McCarthy J; Walsh and Hederman JJ. concurring), and a minority judgment (of Henchy J; Griffin J. concurring). Notably, in that case, as in the case of Ms Earls, although a great number of different issues were canvassed, the ultimate issue that fell to be resolved was the right claimed by the insurer to repudiate liability on the basis of non-disclosure. What principles can be drawn from the Supreme Court judgments in *Aro Road*? It seems to the court that there are at least six key principles arising.

40. First, the sole and final arbiter of materiality is the arbiter, not the insurer. Thus, per McCarthy J., at p.411:

> *"Carroll J. considered that the convictions could not be material....Nonetheless, accepting that Mr Smart was expressing the view of a reasonable and prudent underwriter, she felt that the defendants had discharged the onus on them to prove a material non-disclosure; she felt obliged, so to speak, to suppress her own view of materiality in favour of that of Mr Smart, once she assessed him to be a reasonable and prudent underwriter. Notwithstanding that she still held to her view that the convictions were not material, Carroll J. deferred to the view of Mr Smart; in my judgment, she was incorrect in so doing, being herself the sole and final arbiter."*

41. Second, absent a question directed towards the disclosure of a particular fact, the arbiter must give consideration to what a reasonable insured would think relevant;

relevance in this particular context is not determined by reference to an insurer alone. Per McCarthy J., at p.412:

> *"In my view, if the judgment of an insurer is such as to require disclosure of what he thinks is relevant but which a reasonable insured, if he thought of it at all, would not think relevant, then, in the absence of a question directed towards the disclosure of such a fact, the insurer, albeit prudent, cannot properly be held to be acting reasonably."*

42. Touching on this issue of reasonableness again, at a later point of his judgment, McCarthy J. states, at p.414:

> *"Is it reasonable of an underwriter to say:- I expect disclosure of what I think is relevant or what I may think is relevant but which a reasonable proposer may not think of at all or, if he does, may not think is relevant? ....If the determination of what is reasonable were to lie with the insurer alone I do not know how the average citizen is to know what goes on in the insurer's mind, unless the insurer asks him by way of the questions in a proposal form or otherwise. I do not accept that he must seek out a proposed insurer and question him as to his reasonableness, his prudence and what he considers material. The proposal form will ordinarily contain a wide ranging series of questions followed by an omnibus question as to any other matters that are material....For the reasons I have sought to illustrate, in my view, the learned trial judge failed correctly to apply the*

very stringent test; in my judgment, the insurers failed to discharge the onus of proof that lay on them."

43. Third, and sometimes forgotten, a contract of insurance is a contract of the utmost good faith on both sides. Per McCarthy J., at p.412 of his judgment, "*A contract of insurance is a contract of the utmost good faith on both sides*".

44. Fourth, as regards the substance of the duty of utmost good faith, per McCarthy J., at p.412 of his judgment, "*the insured is bound to disclose every matter which might reasonably be thought to be material to the risk against which he is seeking indemnity*". However, the arbiter of reasonableness is the determining tribunal. Thus, per McCarthy J., at p.412 of his judgment, "*[T]hat test of reasonableness is an objective one not to be determined by the opinion of underwriter, broker or insurance agent, but by, and only by, the tribunal determining the issue.*"

45. Fifth, the duty of utmost good faith requires a genuine effort to achieve accuracy using all reasonably available sources; to require disclosure of all material facts which are known to an insured may well require an impossible level of performance. Per McCarthy J., at pp.413–414 of his judgment:

"*[T]he test remains one of utmost good faith. Yet, how does one depart from such a standard if reasonably and genuinely one does not consider some fact material; how much the less does one depart from such a standard where the failure to disclose is entirely due to a failure of recollection? Where there is no spur to the memory, where there is no*

proposal form with its presumably relevant questions, how can a failure of recollection lessen the quality of good faith? Good faith is not raised in its standard by being described as the utmost good faith; good faith requires candour and disclosure, not, I think, accuracy in itself, but a genuine effort to achieve the same thing using all reasonably available sources....If the duty is one that requires disclosure by the insured of all material facts which are known to him, then it may well require an impossible level of performance."

46. The court does not consider that the presence of a proposal form in this case lessens the strength or general relevance of McCarthy J.'s last-quoted observations to the duty applicable to an insured in this regard.

47. Sixth, McCarthy J. states, at p.414 of his judgment, that in the case of "*over-the-counter*" insurance "*in the absence of fraud, the insurer is not entitled to repudiate on grounds of non-disclosure*". Regrettably, McCarthy J. does not define what he means by "*over-the-counter*" insurance. The examples to which he refers are carrier and travel insurance. Thus per McCarthy J. in *Aro Road*, at pp.414–415:

"*Without detracting from what I have said in respect of the general law of insurance, in my judgment, that law is materially affected by over-the-counter insurance such as found in cases of the present kind, in other forms of transit and in personal travel, including holiday insurance. If no questions are asked of the insured, then, in the absence of fraud, the insurer is not entitled to repudiate on grounds of non-disclosure. Fraud*

might arise in such an instance as where the intending traveller has been told of imminent risk of death and then takes out life insurance in a slot machine at an airport. Otherwise, the insured need but answer correctly the questions asked; these questions must be limited in kind and number; if the insurer were to have the opportunity of denying or loading the insurance one purpose of the form of the transaction would be defeated Expedition is the hallmark of this form of insurance. [Counsel]...suggested that the whole basis of insurance could be seriously damaged if there was any weakening in the rigidity and, I must add, the severity, of the principle he sought to support. The force of such an argument as a proposition of law is matched by the improbability of the event."

C. *Kelleher* v. *Irish Life Assurance Company Limited*

[1993] 3 I.R. 393

48. This was a case in which a husband and wife availed of life assurance that was offered 'free of medical evidence' to a certain level. They did not reveal that the husband was being treated for cancer, presumably because the policy was offered 'free of medical evidence'. When the husband died, the insurer refused to pay and held that it was an express or implied condition of the contract between insured and insurer that all material facts are disclosed that might influence the assessment and acceptance of the proposal by the insurer. Ms Kelleher brought a failed action in the High Court but succeeded on appeal in the Supreme Court. Giving judgment for a unanimous court, Finlay C.J. referred, at p.403 of his judgment, to a paragraph in *MacGillivray on Insurance Law*, which continues to survive largely intact in the present edition, as to

how it is more likely that questions asked in a proposal form will limit an applicant's duty to disclose (although the opposite can apply). Finlay C.J. continued, at p.404 of his judgment:

> *"I would be...satisfied that the true and acid test must be as to whether a reasonable man reading the proposal form would conclude that information over and above it which is in issue was not required."*

49. It appears to the court that there are two key principles to be drawn from the Supreme Court decision in *Kelleher*. First, the form of questions asked in a proposal form may make the applicant's duty to disclose more strict than the general duty arising under the doctrine laid down in *Carter* v. *Boehm*; it is more likely, however, that the questions asked will limit the duty of disclosure. Second, the acid test in this regard is whether a reasonable person reading the proposal form would conclude that information over and above that which is in issue is required.

PART V

SUMMARY OF APPLICABLE PRINCIPLES ARISING

50. The applicable principles arising from *Chariot Inns*, *Aro Road* and *Kelleher* can perhaps be summarised as follows.

1. Utmost good faith

(1) A contract of insurance is a contract of the utmost good faith on both sides. (*Aro Road*).

2. Disclosure of material matters

(2) The correct answering of questions asked is not the sole duty of the insured. S/he must disclose all matters which might reasonably be thought to be material to the risk against which s/he is seeking indemnity. (*Chariot, Aro Road*).

(3) The duty involves exercising a genuine effort to achieve accuracy using all reasonably available sources. (To require disclosure of all material facts may well require an impossible level of performance). (*Aro Road*).

(4) The form of questions asked in a proposal form may make the applicant's duty to disclose more strict than the general duty arising; it is more likely, however, that the questions will limit the duty of disclosure. The acid test is whether a reasonable person reading the proposal form would conclude that information over and above that which is in issue is required. (*Kelleher*).

3. Test of materiality

(5) Materiality falls to be gauged by reference to the hypothetical prudent insurer. (*Chariot*).

(6) Absent a question directed towards the disclosure of a particular fact, the arbiter must give consideration to what a reasonable insured would think relevant; relevance in this particular context is not determined by reference to an insurer alone. (*Aro Road*).

4. Over-the-counter insurance

(7) In the case of over-the-counter insurance, of the type identified in *Aro Road*, the insurer is not entitled, in the absence of fraud, to repudiate on grounds of non-disclosure. (*Aro Road*).

5. Determiner of materiality

(8) The sole and final determiner of materiality is the arbiter, not the insurer. (*Chariot, Aro*).

PART VI

HAS THE FINANCIAL SERVICES OMBUDSMAN ERRED IN LAW?

51. Because it falls to the court to review decisions of the Financial Services Ombudsman and because the court sometimes finds fault with those decisions, there is perhaps a risk that Ombudsman and court may sometimes be perceived as being opponents. The truth is very different. Both are engaged in the law and justice 'business', and certainly this Court freely acknowledges the public good served by the Office of the Financial Services Ombudsman in ensuring that financial services law and regulation is observed.

52. In this particular case, the court considers that the Deputy Financial Services Ombudsman has erred in law on at least five grounds.

53. First, it is not clear to the court that due regard was had to the fact that a contract of insurance is a contract of the utmost good faith on both sides. (*Aro Road*). Sole regard appears to have been had to whether, on the facts, Ms Earls manifested the utmost good faith. No regard appears to have been had to the issue of whether, on the facts, FBD did so. In this respect, the Office of the Financial Services Ombudsman may wish to consider the possibility that a reasonably assertive claims policy may have strayed across the line into an unreasonably avaricious claims policy which sought to dislodge a genuine claim on specious grounds under the ostensibly legitimising umbrella of *uberrimae fidei*.

54. Second, as regards the disclosure of material matters, the Deputy Financial Services Ombudsman appears from her Finding to have proceeded on the basis that if a material fact is not disclosed then, *ipso facto*, there has been a breach of the duty of disclosure. So, for example, she states that "*A contract of insurance is voidable if a party fails to disclose a fact material to the risk.*" As is clear from the above analysis of the relevant Supreme Court case-law, this may not always be the case in all instances. Specifically, it does not appear to the court from a reading of the Deputy Financial Services Ombudsman's Finding that she had any regard to the fact that, per McCarthy J. in *Aro Road*, the duty arising for an insured in this regard is to exercise a genuine effort to achieve accuracy using all reasonably available sources (in Ms Earls' case her own memory and experience, following her accurate and genuine characterisation of the March 2008 event as, in the end, a 'nothing' so far as property damage was concerned).

55. Third, it is not apparent in the Finding at any point that the Deputy Financial Services Ombudsman has considered the possibility that the form of questions asked in a proposal form may, *Kelleher*-style, limit the duty of disclosure arising, even though it appears from the pleadings that the form of questions asked has been raised as an issue. The Deputy Financial Services Ombudsman points in her Finding to the importance of reading policy terms and conditions but it does not seem to the court that this observation properly addresses this third issue.

56. Fourth, insofar as the test of materiality is concerned, the Deputy Financial Services Ombudsman points to the observation in *Chariot* that materiality falls to be gauged by reference to the hypothetical prudent insurer. However, it is nowhere apparent that the

Deputy Financial Services Ombudsman has had regard to the fact that, per McCarthy J, in *Aro Road*, absent a question directed towards the disclosure of a particular fact, the arbiter must give consideration to what a reasonable insured would think relevant; relevance in this particular context is not determined by reference to an insurer alone. In this regard, the Office of the Financial Services Ombudsman may wish to have regard to the issue of whether in the apparent absence of any question as to whether a particular property has been the subject of any criminality, a general reliance on an 'any other material facts'-type question satisfies the particularity that McCarthy J. expressly envisions as requiring the disclosure of a certain fact.

57. Fifth, there is no acknowledgement in the Deputy Financial Services Ombudsman's decision as to whether or not she is dealing with over-the-counter style insurance, whether of the type envisioned in, or anticipated by, the judgment of McCarthy J. in *Aro Road*, and the consequences of this, if so.

PART VII

CONCLUSION

58. For the reasons stated above, the court: (1) considers that the Respondent erred in law in determining the Appellant's complaint against the Notice Party; (2) sets aside the Finding of the Respondent; and (3) remits this matter to the Respondent for review.

Approved:
9/VIII/15