THE HIGH COURT

[2008 No. 11 MCA]

IN THE MATTER OF SECTION 57CL OF CENTRAL BANK ACT 1942 (AS INSERTED BY SECTION 16 OF THE FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

BETWEEN

JAMES HAYES

APPLICANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

EXTEMPORE JUDGMENT of Mr. Justice John MacMenamin delivered on the 3rd day of November, 2008

1. In these proceedings, the applicant seeks an order pursuant to s. 57 CM.-(2)(b) of the Central Bank Act 1942 (as inserted by section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004), (the Act of 2004), setting aside the final decision of the respondent, (reference no. 07/33101) of 9th January, 2001. The application was brought, one day outside the time limit provided under the statute. The respondent took no point on this issue, however, and I will extend the time for making this application accordingly.

Background

2. In July, 2005, the applicant states that he took out a motor insurance policy with ARB Underwriting Ltd. ("ARB"), an insurance company, in respect of three motor vehicles legally and beneficially owned by him. He signed the Proposal Form

on 7th July, 2005. The insurance policy commenced on 15th July, 2005. ARB issued a further certificate of insurance in respect of the vehicles named in the Proposal Form for the period of 15th July, 2006 to 14th July, 2007.

3. One of the three vehicles owned by the applicant was a Toyota Hiace van (registration number 94-WD-596). But at all material times the Toyota was registered in the name of the applicant's wife, Catherine Hayes, who was a named driver on the certificate of insurance. The applicant states at para. 4 of his affidavit:-

> " I say that the vehicles (*sic*) was registered in the name of my wife as I was given to understand at all material times that it was not possible for me to have more than one vehicle registered in my own name."

I will return to this averment later.

4. On 5th December, 2006, the applicant was involved in a road traffic accident. He was driving the Hiace. A motor vehicle owned and driven by a third party was also damaged. The car's owner, a Mr. Eddie Rockett, has initiated Circuit Court proceedings. There he claims damages limited to the jurisdiction of that court. There is no claim made in the Civil Bill for personal injuries. The claim at the moment appears limited to material damage and consequential loss. The applicant subsequently notified the insurance company of the accident. He completed an incident report form on 5th December, 2006.

5. For reasons described below, ARB refused to provide indemnity in respect of this accident. The applicant's solicitor wrote to protest to the insurance company. He tried to persuade them to reverse their decision. But ARB issued a final response on 27th September, 2007. It confirmed its refusal of indemnity. This was on the basis of para. 17 of the Policy Booklet. This contained an exclusion clause, which clause provided that:-

"vehicles owned and/or registered to individual directors, business partners, employees or any person named on the certificate of motor insurance..."

were *excluded* from cover. ABD took the view that as the Hiace was registered in the name of Catherine Hayes, it was therefore a vehicle registered to "any person named on the certificate of motor insurance" within the meaning of the clause.

6. The applicant referred the insurance company's decision to the Financial Services Ombudsman. He acts pursuant to the Act of 2004. The objects outlined in s.57~~BB~~, contained in Part VII B of the Act, is to establish the Financial Services Ombudsman as an independent officer who will, *inter alia*, mediate and adjudicate complaints relating to the conduct of regulated financial service providers in their transactions with consumers.

7. On 27th November, 2007, having considered submissions from both sides, the respondent herein dismissed the applicant's complaint on the basis set out in a written determination of Mary Rose McGovern (a senior investigator in the employment of the respondent). This will be referred to as the "first decision". She found *inter alia*:-

> "The complainant was on notice from the terms of the Proposal Form that any vehicle owned by a named driver would be excluded from the policy and the reader of the Proposal Form was cautioned to refer to the exact details of the policy wording. The policy wording made it clear that any vehicle owned and/or registered in the name of a named driver will be excluded from cover, *i.e.* the policy made it clear to the complainant that even if his wife did not own the vehicle, nevertheless, once it was registered in her name it would be excluded from cover...the complaint is not upheld."
>
> She added:-

> "That the policy specifically excluded any vehicle which is registered in the name of a person named on the policy and consequently vehicle registration number 94-WD-596 was excluded from cover[s](*sic*) which was registered in the name of the complainant's wife and she was the named driver on the policy."

The applicant sought an internal review of this decision. On 9th January, 2008, the respondent upheld the decision to dismiss this complaint. (This will be referred to as the appeal decision.)

The applicant's case

8. The applicant's case is made by reference to the contents of the "General Policy Information" section of the Proposal Form. This stated that "vehicles owned by individual directors, partners, employees, or any named drivers" are excluded from cover under the policy. The applicant says that nowhere in the form did it explicitly state that the vehicles registered in the name of any of the types of specified persons would be excluded from cover. He contends that there was an inconsistency between the contents of the Proposal Form and the policy. (The former does not itself stipulate that vehicles registered in the name of any one of the classes of persons specified in the General Policy Information section will be excluded from cover.) However, this exclusion is contained in the policy. Paragraph 17 of the latter specified that vehicles registered in the names of any of the classes of persons specified therein will be excluded from cover. The applicant avers that having read the Proposal Form, he was left with the impression that only vehicles owned by any of the classes of person specified in the "General Policy Information" section of the Proposal Form would be excluded from cover. He says that it was never specifically drawn to his attention, that vehicles registered in the name of any of the classes of persons specified in the

Proposal Form would also be excluded from cover. He says that he relied on the contents of the Proposal Form as indicative of the scope of the exclusion from cover. He avers that he only received the Policy Booklet (which contained para. 17) in October, 2005, some three months after the inception of the insurance policy. It will be seen, however, that the accident, occurred on 5th December, 2006. Therefore, the policy had been renewed for a further year at the time of the occurrence.

9. The applicant claims that the respondent, in making the decision, failed to apply the accepted rule of construction of insurance policies, that any ambiguity must be construed against the insurer and in favour of the insured. It is claimed that the respondent erred in law, in failing to resolve such ambiguity in the applicant's favour, and in failing to find that the scope of the exclusions from cover under the policy was limited to those specified in the Proposal Form, that is, vehicles owned by any of the classes of person specified in the "General Policy Information" section of that form. He contends that the respondent failed to attach sufficient weight to the fact, that his attention was not specifically drawn to the *proviso*, that vehicles registered in the name of persons named in the certificate of insurance were excluded from cover under the policy.

The decisions

10. In her first decision, Ms. McGovern found:-

> "The policy wording made it clear that any vehicle 'owned and/or registered' in the name of a named driver would be excluded from cover, *i.e.*, the policy made it clear to the Complainant that even if his wife did not own the vehicle, nevertheless, once it was registered in her name it would be excluded from cover."

She continued:-

> "The declaration signed by the complainant upon the execution of the Proposal Form on 7th July, 2005, confirmed *inter alia* that the statements made in the proposal were true and correct (*i.e.* including statements as to ownership) and that the proposer had not withheld any material information. In my opinion, if the vehicle in question was registered in the complainant's wife's name, but he himself owned it, this is information which was material to the proposal at that time and it was therefore at this point, that the company ought to have been notified of the situation by the complainant or his broker."

11. It is important to emphasise that in this case no procedural point is taken against the respondent. Counsel for the respondent has brought my attention to the recent decision of Charleton J. in judicial review proceedings *J. & E. Davy Trading as Davy v. Financial Services Ombudsman and The Attorney General*, 30th July, 2008. There the respondent's procedures were successfully challenged. No such challenge is brought here.

12. Counsel for the applicant has properly indicated the limited scope of this challenge. A simple point is made, that is to say, that there was a failure on the part of the respondent, both at first instance and on appeal, to direct himself to the alleged ambiguity or inconsistency between the Proposal Form and the policy. A preliminary issue arises for consideration first.

Inconsistent cases made

13. I find, that the case made in affidavit is rather different from that which was put in correspondence to the respondent. In the appellant's affidavit it was said that:-

1) The Proposal Form and Policy Booklet were inconsistent and ambiguous; and

2) the exclusion was not specifically drawn to the appellant's attention at any stage prior to his signing of the Proposal Form of 7th July, 2005, and that he did not receive the Policy Booklet until October, 2005.

But the issue raised in the appellant's original complaint to the respondent focused on whether the fact that *he* owned a vehicle meant that the exclusion did not apply. While the same subject is referred to, it is in a different context.

Discretion

14. Declaratory proceedings are a discretionary remedy. The fact that the procedure adopted by the Financial Ombudsman, on foot of the Act, is to be informal does not relieve an applicant of duties there and before the court in these proceedings. There is an obligation of candour. I now turn to a further issue.

Applicant a car trader since 1995

15. The applicant says he understood that only *one* vehicle could be registered in the name of a single owner. I find it difficult, as did the respondent, to reconcile this averment with the fact that he was engaged in the buying and selling of cars since 1995. In the proposal form he states that he had handled twenty one vehicles in the twelve months prior to the date of the form.

Three cars registered in the applicant's name

16. A perusal of the Proposal Form shows that four vehicles were to be insured. These included a Vento, the Toyota Hiace, an Austin Cambridge and a Ford Transit. Three of those were said to be registered to and the beneficial property of the applicant. Only the Hiace was registered in the name of the defendant. I am unable to reconcile the ostensible reason which the applicant has given for placing the Toyota policy in his wife's name (*i.e.* that he thought that only one registered car could be

placed in the name of a person) with the fact that three vehicles mentioned in the proposal were, in fact, all registered in his name.

No explanation for evidential inconsistency

17. At the hearing, various efforts were made to explain or rationalise this situation. For example, it was stated that one of the vehicles was an antique vehicle. But it was registered in the applicant's name, nonetheless. The two other vehicles were not antique. While this is not a judicial review, conduct and credit are still factors which may be taken into account, in deciding whether to grant relief. This is to be seen in the context of an issue earlier referred to, where the applicant specifically referred to his having *read* the Proposal Form and being "left with the impression" that only vehicles owned by any of the classes of person specified in the "General Policy Information" section of the Proposal Form, would be excluded from cover.

One named driver: Catherine Hayes

18. The vehicle in question was registered in the name of the applicant's wife. She was in fact, *the* named driver on the certificate of insurance. No other person is mentioned as a named driver; liability is covered for:-

> "any person with the permission of the insured for the purpose of demonstration use only, provided they are accompanied at all times by the insured or an authorised driver named hereunder: Catherine Hayes."

To the applicant's contention that it was not possible for him to have two vehicles insured in his own name, the respondent pointed out "he has been buying and selling cars since 1995". Eleven years had therefore elapsed between his commencing in the second-hand car trade and the date of the accident. The

respondent's observation, raising the issue of credit, cannot be said to be at variance from common sense.

A different case made to the insurer

19. In this context, it is appropriate to refer to a letter dated 30th March, 2007, written by the appellant's solicitor, A.B.D., on his instructions. There, he referred to the Insurance Certificate. Among a number of other matters, it baldly stated on client's instructions:-

> "Furthermore, we would ask you to note in this connection, that the vehicle involved in this collision was *not* the property of James Hayes." (emphasis added.)

On the basis of the sworn affidavit evidence, these instructions, as reflected in this letter, were simply incorrect. In fact, in a further letter of the 2nd August, 2007, it was specifically stated by the appellant's solicitors, that their client was the owner of the motor vehicle in question. But the variation in instructions demonstrates, yet again, the difficulty created by the inconsistency.

What the applicant said about the policy

20. The applicant states that he only received the policy in October, 2005. But the accident occurred on 5th December, 2006. While he says that he only received the Policy Booklet in October, 2005, and says further,'that he was never at any material time on notice of the possibility, that vehicles registered in the name of any of the classes of persons specified in the Proposal Form, were excluded from cover under the terms of the insurance policy, he does *not* say that he never read the policy itself prior to the accident. He does not say he was actually unaware of the provisions of the Policy Booklet. Instead, a rather delphic formula is used in his affidavit. This is to the effect that he was never "*at any material time* on notice of the possibility, that

vehicles registered in the name of any of the classes of persons specified in the Proposal Form, were excluded from cover under the terms of the insurance policy". But I attach little importance to this. It may be a mere question of phraseology.

21. In this regard, it should be emphasised that the Proposal Form stated that:-

> "The above is only an outline of the cover that is available. For exact details please refer to the Policy Wording. Your broker will only be too happy to provide you with a specimen wording".

Thus, it was not a question of the Proposal Form conflicting with the insurance policy; rather the form outlines the cover, and the policy provided the exact details.

The respondent's case

22. Essentially, the respondent says that the appellant has failed to establish that, taking the adjudicative process as a whole, the decision made was *vitiated* by any serious or significant error, or a series of such errors, and thus, the appeal should be dismissed.

Another issue as to the proposal form

23. But against all these considerations, there is another factor. It is necessary to go to the Proposal Form again. Section 4 deals with vehicle details. Beneath that heading is written:

> " Note –
>
> refer to general policy information on back of this form for a list of excluded vehicles."

This much has already been referred to in the decisions of the respondent. But below that again is contained, in still smaller print, the following requirement:-

> "Please list all vehicles currently owned by you. (If insufficient space, please use a supplementary declaration)."

Below that, there is a grid provided with boxes for the model, engine size, year, value, registration, main driver and use of the vehicle in question. Each of the vehicles which are mentioned earlier, are outlined there. But under the heading "main driver", the following answer is provided in relation to the Vento, the Toyota Hiace and the Austin Cambridge. It is "self or wife". In relation to the final vehicle, the Ford Transit, the main driver is described as "self". Use of each of the vehicles is described as being "private".

24. The interpretation of the policy must be seen as against this entire factual background. In this context a court of law, if called on to deal with interpretation might wish to enquire if there is evidence of lack of consensus *ad idem* between the parties and whether the doctrine of *contra proferentem* (if properly raised) might apply to the proposal form and policy together. It will be recollected that in the accident report form the applicant did state, when asked to give full details of the owner/keeper and the insurers of the vehicle:-

> Registered in the name of the Insured, Wife, Catherine Hayes, who named on the policy, MT00064369 (*sic*). He did not conceal this fact.

Legal Principles

25. In *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman and Others* (Unreported, High Court, 1st November, 2006), Finnegan P. (as he then was), laid down the following test for an appeal of this kind, under the Act of 1942 (as inserted by the later Act of 2004) (the "Act"):-

> "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 series of such errors.* In applying the test, the Court will have regard

> to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J., in *Orange v. The Director of Telecommunications Regulation and Another* and not that in *The State (Keegan) v. Stardust Compensation Tribunal* (1986)I.R. 642."

26. While this decision is under appeal to the Supreme Court, I understand the above test has now been cited with approval and applied in a number of other statutory appeals such as Circuit Court Appeals, from decisions of the Data Protection Commissioner. In addition, it has been the threshold principle applied when other statutory appeals from the respondent have come before the High Court. It must now be seen, therefore, as a well established and accepted test.

27. The principle ultimately can be seen as having the following elements:-

I. The burden of proof is on the appellant;

II. The onus of proof is the civil standard;

III. The court 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 series of such errors;

V. In applying this test, the court may adopt what is known as a deferential stance and may have regard to the degree of expertise and specialist knowledge of the respondent.

28. Furthermore, this is not a *de novo* appeal where this court looks to all the material *ab initio* and makes its own determination of what it should do (see also the

decision of Keane C.J. in *Orange Communications Ltd. v. The Director of Telecommunications Regulation and Another* [2000] 4 I.R. 159 at p. 184).

29. The traditional reluctance of the courts to interfere with decisions of specialist bodies is, of course, well established (see *Henry Denny and Sons(Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I.R. 34 at p. 37-38, Hamilton C.J. in a passage now so well known it is unnecessary to cite in detail; see also *ACT Shipping (PTE) v. Minister for the Marine* [1995] 3 I.R. 406 at 431Bar J.).

30. Thus, while a statutory appeal (such as this) is not a judicial review, and where the decision maker is acting within his own area of professional expertise, the test set out by Finnegan P. suggests that it bears many of the features of a judicial review. In particular, it is clear that there may be a permissible error if it is within jurisdiction, albeit only insofar as that error falls short of being one which is serious and significant.

31. Section 57BB.-(c) of the Act of 2004, provides that the objects of part VIIB of the Statute (which establishes this role) include the object:-

> "(*c*) to enable *such* complaints to be dealt with in an informal and expeditious manner;"

32. Section 57BK.-(4) of the Act provides that the respondent is:-

> "~~(4)~~ The Financial Services Ombudsman 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."

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. 57CI(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.

35. Nor is it to be expected that a decision of the respondent should be as detailed or formal as a court judgment. As O'Flaherty J. observed in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 at 111:-

> "We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to a minute analysis".

It is necessary, with these considerations in mind, to revert to the evidence and submissions thereon.

Consideration

36. There were no points of claim in the applicant's papers. In a complaint form to the respondent dated 10th July, 2007, under the rubric "what is your complaint?" the applicant stated:-

> "It is my submission and contention that simply because my wife's name appears on the motor vehicle registration documentation, does not mean that she is the owner of the vehicle, nor does it void the policy. This is clearly confirmed, I submit, by virtue, of the fact that she is a named driver in any event on the policy of insurance and I submit that the company are not entitled to repudiate the policy of these species grounds" (*sic*).

This complaint was rejected by the senior investigator/deputy ombudsman Mary Rose McGovern, who applied what she found was the plain and express meaning of the insurance policy.

37. In the internal appeal from this finding, the applicant's solicitor wrote that:-

> "our client submits and contends that he had a valid policy of insurance in this instance at all material times and, in particular, he relies upon the provisions of s. 76(1)(e) of the Road Traffic Act 1961, a copy of which is enclosed for reference purposes."

In his decision, the respondent held that this is inapplicable, as no question of the invalidity of the policy arose. This again is a different point, not now relied on.

38. The case now being made by the applicant has been outlined earlier. It is, first, that the Proposal Form and Policy Booklet were "inconsistent" and thus "ambiguous" and should therefore have been construed in favour of the appellant; second, the fact that vehicles registered to a named person were excluded was not

specifically drawn to the appellant's attention at any stage prior to his signature of the Proposal Form on 7th July, 2005; third, the fact that he did not receive the Policy Booklet until October 2005, meant he was not on notice of the exclusion.

39. This nuanced approach, at the very minimum, lays a different emphasis to the issues at first raised by the applicant with the respondent. Those simply focused on whether or not, the fact that the appellant owned the vehicle meant the exclusion did not apply, the issue of the contents of the proposal form, and whether the applicant was misled.

40. As a matter of logic, I find it difficult to see how the decision of the respondent can now be attacked on the basis of issues that were not properly raised or ventilated before him. For example, questions as to what was, or was not, drawn to the attention of the applicant at the time that he signed the form; or whether he was misled; had the applicant raised them in a timely fashion when the complaint was before the respondent, might have required to have been considered or investigated. They were not considered, because they were not raised, any more than the *contra proferentem* point on which the applicant now so strongly relies. The respondent was not put "on inquiry" of these questions or any issue which might have required cross examination or discovery.

41. No application has been made by the applicant to submit any new evidence in this appeal. Therefore, no such evidence has been adduced. In the course of this hearing, it was necessary for counsel for the applicant to obtain instructions on a number of issues relating to the contents of the Proposal Form. But these were not in evidence in this court. The applicant was not subject to cross examination on these explanations given. *A fortiori* they were not before the respondent.

Decision

42. Taking the adjudicative process as a whole, I have not been persuaded, on the evidence, that there is a sufficient degree of probability that the decisions reached were *vitiated* by a serious or significant error or series of such errors. The view taken by the decision makers were within jurisdiction. It has not been demonstrated that the decisions made were erroneous to a degree that would go outside jurisdiction.

43. The precise point which is now relied on was one not made before the decision maker. Absent a satisfactory explanation, a court should be slow to have regard to a point which might (but was not) have been made at first instance or within the internal appeal mechanism. This, it will be noted, was in the context where the appellant, at least at the appeal stage, had legal advice.

44. For the reasons outlined the application will be declined.