THE HIGH COURT

[2009 No. 144 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 57CL OF THE CENTRAL BANK ACT 1942, AS INSERTED BY S. 16 OF THE CENTRAL BANK FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004 AND IN THE MATER OF AN APPEAL FROM A FINDING OF THE FINANCIAL SERVICES OMBUDSMAN

BETWEEN

JOHN FLYNN AND LISA MAHON

APPELLANTS

AND

THE FINANCIAL SERVICES OMBUDSMAN AND ALLIANZ PLC.

RESPONDENTS

JUDGMENT of Mr. Justice Hanna delivered the 28th day of July 2010

1. This case comes before this Court as an appeal, brought by the appellants pursuant to s. 57CM(2) of the Central Bank Act 1942 (hereinafter "the Act of 1942"), (as inserted by s. 16 of the Central Bank and Financial Services of Ireland Act 2004) (hereinafter "the Act of 2004"). The appellants seek to set aside the findings of the Financial Services Ombudsman (hereinafter the "first named respondent"), dated the 8th of June, 2009. Allianz plc. (hereinafter "the second named respondent") is the insurer, who issued to the appellants a policy of household insurance, and whose voiding of same was the subject of investigation and adjudication by the first named respondent,, carried out pursuant to s. 57CL of the Act of 1942.

2. The material background facts are as follows:-

(i) The appellants entered into a contract of insurance on foot of a proposal form signed the 11th March, 2005. The property concerned was No. 4 Neilstown Cottages, Clondalkin, Dublin.

(ii) This policy was preceded by a proposal form signed by the appellants in a section entitled "Declaration and Signature". In the proposal form that was signed and dated by Mr. Flynn on the 11th March, 2005, he answered in the negative the following question:-

Comment: Should this paragraph be given its own bullet point or is it a quote?

> 'Have your or any member of your household:
>
> (a) Been declared bankrupt or convicted or charged with arson or any offence involving dishonesty of any kind?'

The policy was renewed in 2006 and again in 2007. Critically, the 2007 renewal occurred in April of that year. The renewal schedule for the period from 20th April, 2007, to 20th April, 2008, stated as follows:-

> 'We would draw your attention to the serious consequences of failure to disclose all material facts, including changes to any data already provided which have occurred since policy inception or the last renewal date. Such facts are those which we would regard as likely to influence our assessment or acceptance of this insurance. If you in any doubt as to whether or not a fact is material, it should be disclosed.'

(iii) Insurance cover was renewed annually. No dispute arose that each renewal was governed by the same disclosure provisions.

(iv) The property was let to one Mr Gavin.

(v) One room in the premises was destroyed by fire in January, 2008 and the rest of the house was damaged by water. The circumstances were entirely innocent, and ordinarily in all likelihood, would have led to a mutually satisfactory arrangement between the parties.

3. The total loss is not in dispute; it comes to some €131,734.53. The policy had been renewed on the 20th April, 2007. Prior to this date, on the 21st March, 2007, to be precise, Mr. Flynn (hereinafter "the first named appellant) had been charged by An Garda Síochána with possession of a controlled drug, cocaine, for the purpose of sale or supply, and possession *simpliciter*. The first named appellant did not disclose this fact when renewing the insurance policy.

4. It appears that the insurance company became aware of the charges pending against the first named appellant as a consequence of judicial review proceedings brought by him in an attempt to quash the charges. It seems he obtained leave on the 30th July, 2007. The substantive hearing of the judicial review proceedings took place on the 18th February, 2008, and Dunne J. refused the relief sought.

5. What occurred at this juncture, and the consequences as far as the insurer was concerned, is set out in paragraphs 8 to 11 inclusive of the affidavit of Mr. Cully, on behalf of the second respondent:-

"8. My colleague, Mr. Noel Burke interviewed Mr. Flynn on the 28th March. In the course of that interview I understand that Mr. Flynn conceded that he had a criminal conviction for being drunk and disorderly which dated back a number of years. In addition Mr. Flynn conceded that he had previously been convicted for smuggling cigarettes in his suitcase on return from vacation in respect of which

offence he was fined. This information had never been disclosed voluntarily by Mr. Flynn to Allianz. Mr. Flynn was questioned about High Court proceedings that he was involved in. He was not prepared to discuss those proceedings. Mr. Flynn referred to a charge pending which he stated had no relevance to the insurance proposal. However he declined to discuss the nature of that charge or to provide any information relating to it.

9. . .

10. In any event, the central fact is that Allianz refused indemnity in respect of this claim on the basis of the non-disclosure of what it regarded as a material fact. I confirm that from my underwriting experience a criminal charge of this nature, on its own, even absent conviction, is regarded by the second named respondent as something of great materiality that would have led to a declinature on the part of Allianz to continue on cover for the appellants in respect of their home insurance had to been brought to our attention.

11. As far as I am concerned such a criminal charge would be indicative of dishonesty, and indeed would be at the more serious end of the scale of dishonesty."

6. It should be noted that no attempt was made to cross-examine Mr. Cully and, to that extent, what he said remains unchallenged. The criminal charges were dismissed by the District Court on the 22nd September, 2008.

7. The second named respondent. refused the payout, cancelled the policy and refunded the premium for 2007.

8. The Ombudsman found in favour of the second named respondent.

The Applicable Test for Appeals

9. On behalf of the first named respondent, reliance was placed on the decision of Finnegan P. (as he then was) in *Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman and Others* [2006] I.E.H.C. 323 (Unreported, High Court, Finnegan P., 1st November, 2006), in identifying the test to be applied by the court on hearing an appeal pursuant to s. 57CL of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004. He said at p. 9 :-

> "To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in *Orange v The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal.*"

10. I note that this decision is currently under appeal to the Supreme Court. However, the test, as analysed by Finnegan P., has been relied upon in other courts and has been described as "a well established and accepted test" (as per MacMenamin J. in *Hayes v. Financial Services Ombudsman & Ors* (Unreported, High Court, MacMenamin J., 3rd November, 2008) at p.12).

11. In written submissions, Mr. Paul A. McDermott on behalf of the first respondent (as supported verbatim by Mr. Rossa Fanning on behalf of the second respondent) breaks down the test to be applied in a court on hearing an appeal pursuant to s. 57CL of the Central Bank Act 1942, as inserted by s.16 of the Central

Bank and Financial Services Authority of Ireland Act 2004 into five separate elements, namely that:-

(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 a series of such errors;

(v) In applying this test the Court will adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman."

12. With reference to the "deferential stance", Finnegan P. cites Keane C.J. in *Orange Communications Ltd. v. The Director of Telecommunications Regulation and Another (No. 2)* [2000] 4 I.R. 159 at p.184 as follows:-

> "In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the

adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant."

13. This is not a novel approach by the courts in this jurisdiction. (See Hamilton C.J. in *Henry Derry and Sons v. Minister for Social Welfare* [1998] 1 I.R. 34 at pp. 37 – 38 and Barr J. in *A.C.T. Shipping v. Minister for the Marine* [1995] 3 I.R. 406 at p.431).

14. Although not a judicial review, appeals of the type with which we are concerned here have many of the features of judicial review. In *Hayes v. Financial Services Ombudsman and Another* (cited above) MacMenamin J. said at pp. 13 – 14:-

"... 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. . . .

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 issues.

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."

15. Agreeing with MacMenamin J. above, McMahon J. in *Square Capital Ltd. v Financial Services Ombudsman and Others* [2009] I.E.H.C. 407 (Unreported, High Court, 27th August, 2009) says at p. 7 of his judgment:-

"From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions."

McMahon J. further notes at pp. 8 - 9:-

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

Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

The Function of the Financial Services Ombudsman

16. Section 57BB of the Act of 1942, as inserted by s. 16 of the Act of 2004, requires the Financial Services Ombudsman to perform and exercise his or her function and powers under the Act in an informal way. It provides as follows at section 57BK(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."

17. Section 57BJ(1) of the Act provides that the Ombudsman should be a "suitably qualified person". His function is is distinct to that of like, but of a court. He must not have regard to matters of form or legal technicalities. He can make orders of a type not open to a court. He can, for example, direct change in practice by a financial service provider which, in turn, could have indirectly wide implications.

18. At paragraphs 8 and 9 of his judgment in *Hussey v. Financial Services Ombudsman and Another* (Unreported, High Court, Hedigan J., 16th February, 2010) Hedigan J. observed at p. 3:-

> "8. Although a specialist Tribunal, the office of the Ombudsman seems to have many of the attributes of an arbitrator or mediator. It can make many recommendations in relation to future conduct, the giving of explanations for their actions etc., such as would not be normal for a

Court or Tribunal. The Ombudsman is charged to act in an informal way. He is not to have regard to technicality or legal form.

9. This type of appeal is not *de novo*. It is supervisory and has many of the attributes of a judicial review. There is involved also a measure of curial deference to a specialist Tribunal. The legislature has granted a certain role to the Ombudsman and the Court should follow the approach outlined by Keane C. J. in *Orange* that Finnegan P. referred to."

Arguments

19. Briefly stated, Mr. Kenneth Fogarty S.C. counsel for the appellants argues:-

- The charges laid against Mr. Flynn were not material and did not require disclosure.
- The query on the proposal form referred to a charge involving dishonesty. The first named appellant faced no such charge.
- That the first named appellant was subsequently acquitted.
- The Ombudsman could not lawfully come to the conclusion she did and her finding that the appellant's complaint was unsubstantiated should be set aside

20. On behalf of the first respondent, Mr. Paul Anthony McDermott argued that:

- The evidence in the case warranted the Ombudsman's decision.
- There are no, or no substantial grounds, for interfering with the decision. Even if there were a perceptible error, such error was within jurisdiction and not amenable to interference by this Court.

21. On behalf of the second respondent, Mr. Rossa Fanning agreed with the foregoing submissions of the first respondent. The approach taken by the second respondent was consistent with the legal principle of materiality to risk as established by Kenny J. in *Chariot Inns v. Assicurazioni Generali* [1981] I.R. 199 (hereinafter "*Chariot Inns*"). The Ombudsman could not have reached any conclusion other than that which she handed down. Further, the appellant's counsel was engaging in literalism in his interpretation of "dishonesty".

Decision

22. The Ombudsman came to the conclusion that all material facts had not been disclosed to the second named respondent. She had regard to the reference to "charges" in the proposal form together with the ongoing duty of disclosure of material facts and the requirement to disclose any changes in the circumstances at the renewal of the policy.

23. The Ombudsman came to the conclusion that the drugs charges involved dishonesty.

24. The first named appellant should have disclosed the charge at renewal. Had he done so, and if the second named respondent had been aware of them, there would have been no cover in place.

25. The Supreme Court has dealt comprehensively with the test of materiality in *Chariot Inns,* which is the appropriate authority. In that case, the court applied the test to set down in s. 18(2) of the Marine Insurances Act 1906, which provides:-

> "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

In the Supreme Court Kenny J. stated at pp. 226 – 227 that:-

"The rule to determine the materiality of a fact which has not been disclosed to an insurer was expressed by MacKinnon L.J. with his customary pungency in *Zurich General Accident and Liability Insurance* v. *Morrison* [1942] 2 K.B. 53 at p.60 of the report:-

> 'Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the assured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium, and if this be proved it is not necessary further to prove that the mind of the actual insurer was so affected. In other words, the assured could not rebut the claim to avoid the policy because of a material misrepresentation by a plea that the particular insurer concerned was so stupid, ignorant, or reckless, that he could not exercise the judgment of a prudent insurer and was in fact unaffected by anything the assured had represented or concealed.'

The statement of Samuels J. in *Mayne Nickless Ltd.* v. *Pegler* [1974] 1 N.S.W.L.R. 228 on the law relating to the materiality of facts not disclosed to insurers was approved and followed by the Judicial Committee of the Privy Council in *Marene* v. *Greater Pacific Insurance* [1976] 2 Lloyds's Rep. 631 Samuels J. said :-

> 'Accordingly, I do not think that it is generally open to examine what the insurer would in fact have done had he had the information not disclosed. The question is whether that information would have been relevant to the exercise of the insurer's option to accept or reject the insurance proposed. It seems to me that the test of materiality is this: a

fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions.'"

26. Recently in *Coleman v. New Ireland* [2009] I.E.H.C. 273, (Unreported, High Court, Clarke J., 12th June, 2009) Clarke J. in reviewing the law on disclosure said at p. 7:-

"The requirement that a proposer for a policy of insurance must make full disclosure is more than well settled. Thus, an insurer can avoid a policy of insurance where either:-

A. The insured fails to disclose a material fact; or

B. The proposer makes a positive misrepresentation in the course of the negotiations.

Furthermore, an insurer may be entitled to avoid a contract of insurance where there has been a breach by the proposer of a term of the contract of insurance warranting that a certain set of facts is the case. Whether, and to what extent, there has been any such warranty is a matter of construction of both the insurance policy itself together with connected documents such as any proposal form."

27. It is well-established that an individual with a criminal offence, or who has a criminal record, or who fails to disclose same to an insurance company, is putting himself or herself under a general moral hazard and this may entitle the insurer to void an insurance policy. This might occur even where a conviction bears no resemblance whatsoever to the hazard insured against (See *Latham v. Hibernian Insurance Company Ltd. And Others*, (Unreported, High Court, Blayney J., 4th December, 1991).

28. The parties should note that I am grounding this decision on the material that was before the Ombudsman and no other material (See Kelly J. in *Murray v. The Trustees and Administrators of Irish Airlines (General Employees) Superannuation Scheme* [2007] 1.E.H.C. 27 (Unreported, High Court, Kelly J., 25th January, 2007)).

29. It is, in my view, regrettable that the first named appellant, who stands wholly innocent of the drugs charges which were levelled against him, must find himself in a position where he cannot recoup insurance on a premises seriously damaged in wholly innocent circumstances, but I am not persuaded that the first named respondent fell into any error and was fully entitled to decide as she did. She was entitled, in my view, to conclude that the charges involved dishonesty. Further, on general principles, the second named respondent should have been informed of the charge. I find no significant error in the first named respondent's findings and must therefore refuse the appeal.

14/10/2010