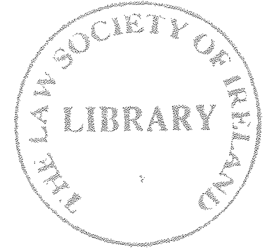
[2010] IEHC 407.



THE HIGH COURT

[2010 No. 93 MCA]

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

BETWEEN/

GRZEGORZ KOCZAN

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on November 1, 2010

1. The complexities of modern financial products, coupled with obvious information asymmetries which have clear implications for consumer welfare, clearly demonstrate the necessity for robust regulation of the conduct of financial service providers. To this end the Oireachtas has provided for the office of the Financial Services Ombudsman ("the

Ombudsman") with extensive regulatory and supervisory functions. The Ombudsman is enjoined by s. 57BB of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) to deal with consumer complaints in an informal and expeditious manner. Section 57BK(4) further provides that the 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."

2. The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the courts. It is clear from the terms of s. 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of *et aequo et bono* which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s. 57CI(2) which provide that:-

> "(2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
>
> > (a) the conduct complained of was contrary to law;
> >
> > (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

(g) the conduct complained of was otherwise improper."

3. This forms the background to the present appeal to this Court pursuant to the provisions of s. 57CL of the 1942 Act. The appellant, Grzegorz Koczan, who is originally from Poland, was employed as an operative with Kerry Foods. It is not in dispute but that, unfortunately, he sustained a serious injury to his back in the course of his employment on 31st July, 2006. The effect of the injury has been to incapacitate him, at least to the point whereby he is now only fit for light work. Some months previously in December, 2005 Mr. Koczan had taken out a life assurance and critical illness policy with Bank of Ireland Life ("the company"). The policy was designed to be a twenty year policy with an initial premium of €52.49 per month and it contained provisions designed to compensate employees for their absence from work.

4. In the wake of this accident, Mr. Koczan not unnaturally made a claim in respect of this policy. However, the last payment paid on the policy was on September 1, 2006 and the company contended that, as a result, the policy had lapsed. By letter dated May 13, 2009 the Bank did, however, offer Mr. Koczan the sum of €825, based on a figure of €165 per week. Under the policy, no sums were payable under the first four weeks of absence from work, so that the entitlements were confined to the four weeks of September 2006.

5. Mr. Koczan referred this matter to the Ombudsman, but the complaint was dismissed by a decision of the Acting Deputy Financial Services Ombudsman on 10th February, 2010. Mr. Koczan has in turn appealed this decision to this Court. I was informed during the course of the hearing that the company had elected not to take part in these proceedings.

6. Two matters raised in the appeal can be dealt with shortly. Mr. Koczan complained that he was denied the benefit of critical illness cover. But it is absolutely plain that from the terms of the policy that the critical illness cover was confined to a specified list of serious illnesses such as blindness, health attack and cancer. As the Ombudsman pointed out in her decision, back injuries - however serious for the sufferer - simply did not come within the terms of the policy. It follows that this part of the decision must be upheld.

7. So far as the issue of delay on the part of company is concerned, I must likewise affirm the ruling of the Ombudsman. There was abundant evidence to justify a finding that the delays - which were unfortunate - were attributable to a delay on the part of a treating medical practitioner of Mr. Koczan in supplying a medical report in the first instance. A further delay was caused by the delay in furnishing the company with a medical note from his medical practitioner confirming the dates of Mr. Koczan's absence from work due to illness. Whatever be

the explanation for that delay, it is clear that as the Ombudsman pointed out, any delay in the processing of the claim payment cannot be attributed to the company.

8. This brings us to the most substantial part of the appeal, namely, the Ombudsman's conclusions regarding the absence from work benefits. On this point, the company's response was set out in a letter of December 7, 2009 which stated, *inter alia*:-

> "Our records indicate that the complainant applied for his policy in 2005 and the Company issued policy documents to him in December 2005....The complainant paid his last monthly premium under the policy on September 1, 2006. The policy lapsed in accordance with Section B.1 of the policy conditions herein."

9. Section B.1 of the policy provides:

> "*Premium payment*
>
> The amount of the initial payment and the frequency of payment are shown in the Schedule.
>
> It is your responsibility to ensure that all premiums are received by us. We allow 30 days for late payment of premiums. If a claim arises during this time any outstanding premiums will be deducted from any benefits payable.
>
> If you have assigned your policy we are obliged to notify the assignee if premiums are not paid.
>
> If before the second policy anniversary a premium is still outstanding at the end of the calendar month allowed for allowed for late payment, the policy will lapse without value. If after the start up charging period a premium is outstanding after the 30 days allowed

for late payment, you may notify us that you wish the policy to become paid-up (see Section B, Condition 3).

If the premium is not paid within the 30 days allowed for late payment, the following terms apply:-

- If your fund value is zero, your fund and all benefits will cancel immediately without further notice;
- If there is a positive fund value, the benefits will continue. We will deduct policy charges from your fund value every month. The benefits will continue until your fund value is zero. The policy and all benefits will cease from the date that your fund value cannot pay the policy charges.
- If you tell us that you want to cancel your policy, it will be cancelled from the date that we receive the cancellation form. If on the date that we receive this form you have a fund value, this amount, less any taxes or levies applicable, will be paid to you."

10. It was common case during the course of the appeal that the issue here was whether the company had given Mr. Koczan fair warning via the terms of the policy that his policy would lapse if he did not keep up the payments, even after the triggering event of the injury. Mr. Koczan, who appeared in person, contended that so far as he was concerned, he had regarded the policy as being like a motor insurance policy, so that the essential question was whether the policy was in force at the time of the accident.

11. On this point, however, the Ombudsman stated:

"The Complaint also submitted a claim under the Absence from Work section of his policy and he believes that he should be entitled to 52 weeks of benefit as defined under the policy wording. While the Company eventually upheld this aspect of the Complainant's claim it submits that he was only entitled to claim for 5 weeks benefit (€825).

Below I have included the relevant policy wording pertaining to this aspect of the Complainant's claim:

'5. Absence from Work Benefit

Absence from Work benefit is payable in respect of each whole week of temporary disability due to an injury or illness after the later of the first 4 weeks and the date of notification of a claim for Absence from Work Benefits.

Notification of a claim for Absence from Work Benefits must be received within one month of the event giving rise to such a claim. Absence from Work Benefit is payable subject to a maximum of 52 weeks' benefit in total during the duration of the policy.'

Taking the above extract into consideration, I note that in the event of a valid claim and the Complainant's [continuing] to maintain a valid policy he would have been entitled to a maximum of 52 weeks of benefit of €165 per week due to his absence from work through injury or illness. However, the policy states that no benefit is payable for the first 4 weeks of absence from work.

That said, I note from the Company's submissions that it states that the last monthly premium it received from the Complainant was on 1 September 2006 and that the policy subsequently lapsed a month later due to non-payment of premiums. With this in mind, I find that the Complainant was only entitled to payment for a period of five weeks. Therefore I find that the Company paid the correct benefit of €825 to the Complainant."

12. Mr. Koczan now appeals to this Court pursuant against this decision pursuant to the provisions of s. 57CL of the 1942 Act because he maintains that the Ombudsman "did not consider all circumstances written and explained by me." While it is true that, as counsel for the Ombudsman, Mr. McDermott, forcefully contended, the appellant did not identify "what particular circumstances" the Ombudsman failed to consider, some allowance must be made for the informal nature of this adjudicatory process, coupled with the fact that s. 57BK(4) envisages that the Ombudsman himself or herself will conduct a general review of the issues according to the far-reaching supervisory jurisdiction therein provided for. Indeed, one might also add that further allowance should perhaps have been in the circumstances of this case given that Mr. Koczan was not professionally represented and that his command of written English - while very good indeed - lacked the fluency of a native speaker.

13. To anticipate somewhat, the key point here, surely, is whether the terms of the policy might reasonably be understood as conveying to the customer that keeping up payments *after* the accident was essential if the policy was not otherwise to lapse. Indeed, irrespective of the question of the construction of the actual policy document, then the Ombudsman might have to consider the question of whether policy terms which providing for the lapsing of the policy in such circumstances were potentially unfair or misleading and thus potentially

came within the terms of s. 57CI(2)(c) on the basis that such terms were "unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant" within the meaning of these statutory provisions.

The Jurisdiction under Section 57CL

14. The jurisdiction of this Court is provided for in the first instance by s. 57CL(1) of the 1942 Act:-

> "If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding."

15. That jurisdiction is further supplemented by the provisions contained in s. 57CM, which provide in relevant part as follows:-

> "(1) The High 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 orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:-
>
> (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;
>
> (c) an order remitting that finding or any such direction to that Ombudsman for review.

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court."

16. Before proceeding further, it may be convenient to draw attention to a preliminary argument advanced by Mr. McDermott on behalf of the Ombudsman, namely, that significance should be attached to the fact that, as he put it, the appellant had not brought judicial review proceedings "to challenge anything that the Ombudsman did in terms of the procedure that he followed or in terms of his jurisdiction." In this regard, reliance was placed upon the following dictum of McMahon J. in *Square Capital Ltd. v. Financial Services Ombudsman* [2009] IEHC 467 where he stated that:-

> "It is significant to note that the appellant has not brought judicial review proceedings to quash the decision for want of jurisdiction."

17. This dictum must, of course, be understood in its proper context. In *Square Capital* the appellant maintained that its financial dealings with the complainant had not been performed in its capacity as a financial service provider within the meaning of s. 57BB(a)(i) of the 1942 Act. In that case the appellant company had advised the complainant to purchase two properties for investment purposes without previously disclosing that it was the owner of the properties in question. The essence of the appellant's arguments under this heading was that it never acted as a financial service provider to the complainant in respect of the purchase of these two properties and that, as McMahon J. put it, it contended "that it merely acted as a vendor of property, just as a real estate agent might, and that such an activity [was] not within the provisions of the Act as being a financial service."

18. Of course, if the appellant's argument in that case had been correct, then the Financial Services Ombudsman would have lacked any subject matter jurisdiction whatever in respect of the matter, since, by virtue of s. 57BB(a)(i), that jurisdiction is predicated on a complaint "about the conduct of regulated financial service providers involving the provision of a financial service…". The provision of a financial service is thus constituted as a precursor of the very jurisdiction of the Financial Services Ombudsman: it is, if you will, a precedent fact to that jurisdiction. It is in that context, therefore, that the comments of McMahon J. in *Square Capital* must be understood.

19. There are, doubtless, certain categories of cases where the legal argument raised falls properly to be canvassed by means of judicial review rather than by way of a statutory appeal. As indicated in *Square Capital*, an argument directed towards a total lack of subject matter jurisdiction is perhaps one such case. Judicial review might also be appropriate where the complaint relates to the integrity or basic fairness of the decision-making process, so that in justice the decision-maker ought to be afforded an adequate opportunity of defending his or her position in judicial review proceedings which admit of the possibility of cross-examination and oral evidence. There may well be other cases - such as, e.g., those touching on the constitutionality of legislation or the validity of statutory instruments - where the legal issues cannot properly be raised by way of appeal (whether by virtue of the special rule contained in Article 34.3.2 of the Constitution or otherwise) and which must be dealt instead with by means of a declaratory action: cf. the discussion of this issue in the judgment of Kearns J. in *SM v. Ireland (No.1)* [2007] IESC 11, [2007] 3 IR 283.

20. These cases must be, however, be regarded as the exception rather than the rule. It is well established that the Oireachtas must be presumed to know the law and the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference - albeit a rebuttable inference - that the Oireachtas "must have intended that the Court would have powers in addition to those already enjoyed at common law" in respect of its judicial review jurisdiction: see *Dunne v. Minister for Fisheries* [1984] I.R. 230 at 237 per Costello J.. That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so: see, e.g., the comments in this regard of Laffoy J. in *Teahan v. Minister for Communications (No.1)* [2008] IEHC 194.

21. Returning now to the present case, it is plain that Mr. Koczan's complaints fall squarely within the subject matter of the Ombudsman's jurisdiction, relating as they do to complaints about the conduct of a financial services provider. While Mr. Koczan could probably successfully have challenged the decision of the Ombudsman in separate judicial review proceedings for reasons which I will presently outline, it was quite unnecessary for him to have taken such a step.

22. If, moreover, Mr. McDermott's argument were correct, it would presage the creation of new issues of characterisation in the sphere of public law. If, for example, a decision maker enjoys a basic subject matter jurisdiction in respect of the dispute in question, but he or she later

errs in the interpretation of the applicable legislation, fiendishly complex questions of characterisation would then arise as to when the right of appeal ended and judicial review began. The experience of legal systems generally - whether it be the procedure/substantive law distinction in private international law or the English experience of the public law/private law divide in the wake of *O'Reilly v. Mackman* [1983] 2 A.C. 147 - has been that these type of characterisation rules are difficult to apply consistently and often lead to unprofitable litigation, as in their efforts to achieve a satisfactory underlying rationale for the original distinction, the courts are driven to ever higher levels of complexity and sophistication in their treatment of the underlying characterisation rules. Not only would such a state of affairs be undesirable in itself if such could be avoided, but at a more basic level, special cases aside, such a state of affairs would be at odds with the fundamental objective of the legislation creating the present statutory appeal, which is, as we have just seen, that to the greatest degree possible consistent with the fair administration of justice, an appellant should be permitted to canvass all possible arguments within the parameters of that appeal.

23. It follows, therefore, that at least so far as this type of case is concerned, no weight whatever should attach to the fact that the appellant elected to proceed by way of statutory appeal and did not commence separate judicial review proceedings, since, for the reasons just stated, it was quite unnecessary for him to have done so.

The Present Appeal

24. We may now finally turn to the heart of the present appeal. Recalling the essential complaint of Mr. Koczan - namely, that the policy did not disclose that it was essential to ensure that payments were continually made *even* after the incapacitating accident at work - it becomes

necessary to parse the key words of Section B.1, the provision relied on by the company for this purpose. For ease of reference, I propose to break up the relevant sections of this clause for the purposes of analysis, ascribing a letter to each relevant portion.

25. A: "It is your responsibility to ensure that all premiums are received by us. We allow 30 days for late payment of premiums. If a claim arises during this time any outstanding premiums will be deducted from any benefits payable."

As I read A, it seems merely to say that any outstanding premiums will be deducted from the out of work benefits which are payable on foot of a valid claim. It does not say that the actual policy will lapse or will be rendered ineffective if the policy holder does not keep up payment of the premiums after the incident giving rise to the claim.

26. B. "If you have assigned your policy we are obliged to notify the assignee if premiums are not paid."

27. This clearly has no relevance to the present case.

28. C. "If before the second policy anniversary a premium is still outstanding at the end of the calendar month allowed for late payment, the policy will lapse without value. If after the start up charging period a premium is outstanding after the 30 days allowed for late payment, you may notify us that you wish the policy to become paid-up (see Section B, Condition 3)."

29. C seems to deal with the situation of late payments immediately before the end of the second policy anniversary. Again, it has no direct relevance to present case.

30. D. "If the premium is not paid within the 30 days allowed for late payment, the following terms apply:

- If your fund value is zero, your fund and all benefits will cancel immediately without further notice;

- If there is a positive fund value, the benefits will continue. We will deduct policy charges from your fund value every month. The benefits will continue until your fund value is zero. The policy and all benefits will cease from the date that your fund value cannot pay the policy charges.

- If you tell us that you want to cancel your policy, it will be cancelled from the date that we receive the cancellation form. If on the date that we receive this form you have a fund value, this amount, less any taxes or levies applicable, will be paid to you."

31. There would appear to be nothing in D which indicates that the policy will lapse if payments are not kept up after the accident. Indeed, the reverse is possibly true. One could conjecture a claimant who had built up a large fund after substantial premium payments and who then suffered a work-place accident. D appears to suggest that, so far from lapsing, if such a claimant failed to keep up payments after the accident, he or she would nonetheless receive benefits - perhaps even substantial benefits - under the fund until it had been dissipated.

32. Over and above the actual wording of the policy itself, there is the further consideration that some might think that it would be desirable - perhaps even necessary - that such policies should expressly make provision for the plight of an employee in the position of Mr. Koczan, namely, where the policy holder is simply unable to continue payments under the policy precisely because he or she can no longer earn the money to make such payments by reason of the work place accident in question. It was in respect of that contingency that the insurance

policy was presumably taken out in the first place. In any event, it might be thought that, if the policy were to lapse in such circumstances, considerations of basic fairness required that such be stated in express and direct language. Yet, for the reasons just stated, the language of Section B.1 could (at best) be described as obliquely hinting at the possibility of the policy lapsing in such circumstances.

33. These are issues which squarely raise the question of whether the terms of the policy or the practice of the company in question were "unreasonable, unjust, oppressive" within the meaning of s. 57CI(2)(b) and s. 57CI(2)(c). Yet, with due respect to the Ombudsman, I do not think that she addressed these arguments at all in the course of her decision. Her entire conclusion was predicated on the assumption that the company had correctly stated that the "policy subsequently lapsed a month later [in October 2006] due to non-payment of premiums." But she never subjected the actual wording of the relevant provisions of the policy to the analysis which has just been conducted by me in the course of this judgment. Even if she had and even if (contrary to my own analysis) she were to have found that the terms of the policy did, in fact, justify its lapsing, she would nonetheless have been obliged to proceed to examine whether these terms were "unreasonable, unjust, oppressive" within the meaning of the relevant statutory provisions, but she failed to do so. It should be added, of course, that the question of the construction of the policy document and arguments relating to potential unfairness etc. are matters which are quintessentially within the provenance of the Ombudsman's statutory jurisdiction. These are matters for her to consider in the first instance using her special skill and experience and nothing in this judgment should be understood as in any sense pre-judging the outcome of the review by the Ombudsman which I am about to direct.

Conclusions

34. In *Ulster Bank v. Financial Services Ombudsman* [2006] IEHC 323, Finnegan P. stated that an appellant could prevail on an appeal under s. 57CL only where he or she had established "as a matter of probability" that:

> "taking the adjudicative process as a whole, the decision reached was vitiated by a series of 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."

35. Applying that test, I am coerced to the conclusion that the Ombudsman's decision was vitiated by two serious and significant errors in that (a) she accepted the company's assertions regarding the lapsing of the policy at face value without subjecting it to detailed analysis by reference to the actual terms of the clause relied upon by the company and (b) she did not examine whether such terms were or might be unjust, unreasonable or oppressive within the meaning of s. 57CI(2), even if they bore the construction contended for by the company. Put another way, she failed to have regard to highly material considerations which might well have dispositive so far as Mr. Koczan's complaint was concerned. Had Mr. Koczan elected to proceed by way of judicial review, I believe that he would have succeeded on the ground that the Ombudsman had simply failed to have regard to material considerations in arriving at her decision. If that would have been the situation in judicial review proceedings, it must be true a fortiori in the case of a statutory appeal. It is for these reasons that I believe that the decision cannot stand.

36. In conclusion, therefore, I propose, as indicated, to affirm the findings of the Financial Services Ombudsman pursuant to s. 57CM(2)(a) of the 1942 Act insofar as they relate to the

critical illness and delay questions. However, insofar as the decision relates to the absence from work benefits, I propose to allow the appeal.

37. In that regard, therefore, I will set aside the findings of the Financial Services Ombudsman on that point in accordance with s. 57CM(2)(b). I will further direct pursuant to s. 57CM(2)(c) that she re-examine and review Mr. Koczan's complaint so far as it relates to the absence from work benefits issue in the light of this judgment.

Approved

Gerard Hogan

November 8, 2010