

THE HIGH COURT

RECORD NO. 46 MCA
2007 68 COM

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

BETWEEN/

QUINN DIRECT INSURANCE LIMITED

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered 5th October, 2007.

The appellants carry on insurance business in the State. The respondent is the holder of an independent office established pursuant to Part VIIB of the Central Bank Act, 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004. In this judgment all references to sections of an Act are to Part VIIB of the Central Bank Act, 1942, as amended by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004 unless otherwise stated.

On 2nd April, 2007, the respondent issued a finding which upheld in part a complaint made by a Mr. Gallagher ("the complainant") against the appellants. The complainant had a motor insurance policy with the appellants. The part of the complaint upheld related to an administration fee of €25 charged by the appellants on a change of vehicle by the complainant. The appellants agreed to pay to the complainant €50 as recommended by the Investigator on behalf of the respondent in a finding

made by her on 16th February, 2007. There is no appeal in these proceedings against that part of the finding.

However, the respondent in the finding of 2nd April, 2007 included a direction pursuant to s. 57CI(4) in the following terms:

“... I hereby direct that you return these change of vehicle charges of €25 to consumers who were charged same, going back six years from today’s date. This direction is to be complied with, within the shortest period possible to identify such charges, but in any event within three calendar months. Please advise when completed and the number of policy holders who have received these refunds.”

The appellant appeals against so much of the finding as comprises such direction. The grounds of the appeal pursued at the hearing may be summarised as follows:

- (i) The direction is *ultra vires* the powers conferred on the respondent by s. 57CI(4).
- (ii) The direction was given in breach of fair procedures and in particular the respondent’s own published procedures.
- (iii) The direction was not included in the finding as required by s. 57CI(3)

Scope of appeal

The appellant’s right to appeal against the finding of the respondent is in s. 57CL. This provides:

“(1) 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.

- (2) The Financial Services Ombudsman can be made a party to an appeal under this section.

...”

Section 57CM (1) and (2) sets out the jurisdiction of the High Court on such an appeal:

“(1) The High Court is to hear and determine an appeal made under section 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.”

The scope of an appeal under these provisions was considered by Finnegan P. (as he then was) in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* (Unreported, High Court, Finnegan P., 1st November, 2006). Counsel informed me that this decision is now under appeal to the Supreme Court. Counsel for the respondent invited me to follow the approach of Finnegan P. in that judgment where, having considered the judgments of Keane C.J. in *Orange Communications Ltd. v. The Director of Telecommunications Regulation & Anor.* [2000] 4 I.R. 159, that of Kearns J. (in the High Court) in *M. & J. Gleeson v. Competition Authority* [1999] 1 I.L.R.M. 401, both of which cited with approval a passage from the

Canadian Supreme Court in *Canada (Director of Investigation and Research) v. Southern Inc.* [1997] 1 S.C.R. 748 and of Laffoy J. in relation to an appeal pursuant to s. 41(3) of the Copyright Act, 1963 in *Carrickdale Hotel Limited v. The Controller of Patents, Designs and Trade Marks & Anor.* [2004] 3 I.R. 410, he stated at p. 9:

“It is desirable that there should be consistency in the Courts in the standard of review on statutory appeals. Accordingly unless the words of the statute mandate otherwise it is appropriate that the standard of review in this case be that enunciated by Keane C.J., Kearns J. and Laffoy J. I see nothing in the wording of the statute with which I am concerned to mandate a different approach to the statutory appeal under the Central Bank Act 1942 section 57CL. 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.*”

Counsel for the appellant did not oppose this approach but rather submitted that each of the grounds relied on constituted the type of error envisaged. It is common case between the parties that if, as contended for by the appellant on its first ground, the respondent does not have the power to give a direction of the type included in the finding herein then the appellant is entitled to succeed on the appeal

against the direction. Counsel for the respondent disputes that the other grounds even if made out constitute a serious or significant error.

Vires of respondent's direction

The appellant primarily submits that the respondent has no power under Part VIIB of the Central Bank Act, 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004 to give a direction of the type included in the finding of 2nd April, 2007. It is contended that the respondent has no power to give a direction which requires the appellant to review, rectify or mitigate conduct other than the conduct complained of by and pertaining to the complainant and in respect of which a complaint has been upheld. Further, that such conduct on the facts of this case is confined to the administrative charge imposed by the appellant on the complainant at the time of a change of vehicle by him in March, 2007 without prior notice of same in the policy documents.

The essence of the submission made on behalf of the respondent is that the powers conferred on him by s. 57CI(4)(a) include a power to direct that the appellant review, rectify, mitigate conduct of the type complained of by a complainant but as it pertains to or impinges on other consumers.

These submissions must be considered in the context of the complaint made which gave rise to the finding which is the subject matter of the appeal and the proper construction of s. 57CI(4) in the context of the statutory scheme established by Part VIIB of the Act of 1942, as inserted by s. 16 of the Act of 2004.

The complaint made was wide ranging. However, the essence of it was that the appellant had charged an excessive premium at the time the complainant changed his car and subsequently imposed excessive charges when he cancelled his policy.

The latter part of the complaint was found not to be substantiated. The part of the complaint found by the respondent to be substantiated was that the appellant had charged the complainant an administrative fee of €25 at the time of the change of vehicle without having informed the complainant in the policy documents that such a charge would be made. It is the imposition of the administrative fee on the complainant without notification in his policy documents which must be considered to be the conduct in respect of which the complaint was found to be substantiated for the purpose of construing the statutory powers of the respondent.

The respondent relies upon s. 57CI(4) as giving him the power to make the direction the subject matter of the appeal. This provides:

“(4) If a complaint is found to be wholly or partly substantiated, the Financial Services Ombudsman may direct the financial service provider to do one or more of the following:

- (a) to review, rectify, mitigate or change the conduct complained of or its consequences;
- (b) to provide reasons or explanations for that conduct;
- (c) to change a practice relating to that conduct;
- (d) to pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of;
- (e) to take any other lawful action.”

The precise power relied upon is that given by paragraph (a) above. The respondent has not sought to rely on any other paragraph as giving him jurisdiction although of course paragraph (a) must be construed in the context of the entire statutory scheme including those sub-paragraphs.

The essence of the dispute between the parties is whether “the conduct complained of or its consequences” within the meaning of s. 57CI(4)(a) is confined to the conduct of the appellant to the complainant which is the subject of the substantiated complaint or whether it includes similar conduct in relation to other consumers who made no complaint. It is common case that it is confined to conduct in respect of which a complaint has been found to be substantiated.

I have concluded that “the conduct complained of or its consequences” in s. 57CI(4)(a) is confined to the conduct to or its consequences for to the individual complainant or group of complainants and does not include similar conduct by the appellant to other consumers. My reason for so construing s. 57CI(4)(a) are as follows.

The objects of Part VIIB of the Act of 1942, as inserted by the Act of 2004 are stated in s. 57BB (insofar as relevant) to be:

- “(a) to establish the Financial Services Ombudsman as an independent officer –
 - (i) to investigate, mediate and adjudicate complaints made in accordance with this Part about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service, and
 - (ii) to exercise such other jurisdiction as is conferred on the Financial Services Ombudsman by this Part;”

Pursuant to such objects in accordance with s. 57BK(1) “The principal function of the Financial Services Ombudsman is to deal with complaints made under this Part by mediation and, where necessary by investigation and adjudication”.

Both of the above focus on the investigation, mediation and adjudication of complaints made in accordance with or under “this Part”, i.e. Part VIIB of the Act of 1942.

Section 57BX(1) sets out the complaints which may be made under Part VIIB.

“(1) An eligible consumer may complain to the Financial Services Ombudsman about the conduct of a regulated financial service provider involving –

- (a) the provision of a financial service by the financial service provider, or
- (b) an offer by the financial service provider to provide such a service, or
- (c) a failure by the financial service provider to provide a particular financial service that has been requested.”

It is important to note that only an “eligible consumer” may make a complaint.

An eligible consumer (as referred to in 57BX(1) above) is defined in s. 57BA as:

“‘eligible consumer’, in relation to a regulated financial service provider, means a consumer –

- (a) who is a customer of the financial service provider, or
- (b) to whom the financial service provider has offered to provide a financial service, or
- (c) who has sought the provision of a financial service from the financial service provider;”

It appears to me to follow from the definition of eligible consumer that the complaints which may be made under s. 57BX(1) are confined to complaints in relation to the provision of a specified financial service to the complainant or an offer to provide such a service to the complainant or a failure to make a particular service that has been requested by that complainant available to him or her. Essentially, the complaints must relate to treatment by the financial service provider of the complainant either in a positive or negative way.

This construction appears reinforced by s. 57BZ(1)(e) which permits the respondent to decide not to investigate a complaint or to discontinue an investigation on the ground that “the complainant has no interest or an insufficient interest in the conduct complained of”.

It appears to be further reinforced by the provisions of s. 57CJ relating to application to the Circuit Court for an enforcement order in respect of a direction and in particular sub-s. (6) thereof. These envisage orders of the Circuit Court which would be for the benefit of the complainant and not a wider group of consumers. Also s.57CI in its entirety is also consistent with this interpretation.

As a complainant must be “an eligible consumer” within the meaning of s. 57BA and therefore a customer of, or a potential customer (in the sense of person to whom the financial service provider has made an offer or a person who has sought a particular financial service,) it follows that the conduct which may be made the subject of a complaint under Part VIIB must be part of the provision of a particular financial service to the complainant or an offer to provide such a service to the complainant or a failure to provide a service that has been requested by the complainant. It appears to follow from this that it must be conduct of the financial service provider which pertains to the individual complainant.

Put simply, a consumer may only make a complaint under Part VII B in relation to conduct of a financial service provider specifically relating to him/her. It follows that it is only conduct pertaining to a complainant which may be “conduct complained of” within the meaning of s. 57CI(4)(a).

I considered whether the phrase “or its consequences” in s. 57CI(4)(a) should be construed as indicating an intention to give a power to make a direction in relation to conduct of a financial service provider pertaining to persons other than the complainant. I concluded it should not having regard to the normal meaning of the words used and the wider ambit expressly authorised by sub-s.57CI(4)(c) referred to below.

Hence a direction in a finding of the respondent given under s. 57CI(4)(a) may only relate to conduct of the financial service provider specifically relating to the consumer who is the complainant or its consequences for that person. The authority given by this section does not extend to similar conduct of the financial service provider in relation to other consumers. On the facts of this appeal, the direction included in the finding of 2nd April, 2007, relates to conduct of the appellant to consumers other than Mr. Gallagher, the complainant whose complaint was the subject matter of the finding. It follows that the direction in the finding of 2nd April, 2007, was not authorised by s. 57CI(4)(a) and the respondent did not have power to make such a direction.

I wish to make two further observations in the context of the submissions made. Firstly, it should be noted that, on the facts herein, the complainant was an individual and hence the direction under s. 57CI(4)(a) could only relate to the conduct of the appellant to the complainant or its consequences for him. However, I do not wish to be understood as deciding a direction must always only relate to one person. It

appears from the definition of consumer in s. 57BA that a group of persons may be an “eligible consumer” for the purposes of making a complaint under Part VIIB. Where a group of persons make a complaint in relation to conduct pertaining to that group then a direction under s. 57CI(4)(a) in a finding on the complaint could relate to the conduct of the financial service provider to the group of persons who made the complaint.

Secondly, there is one aspect of the appellant’s submission on this first ground which does not appear to me correct. The appellant submitted that the respondent had no power to give a direction under s. 57CI(4) as a whole as distinct from s. 57CI(4)(a) which was wider than matters pertaining specifically to the complainant concerned. Whilst it does not arise on the facts of this appeal, this does not appear to me correct in relation to a direction given under s. 57CI(4)(c). That sub-section expressly permits the respondent to give a direction to a financial service provider “to change a practice relating to that conduct”[i.e. the conduct complained of]. This appears to expressly envisage and authorise a direction in relation to future conduct of the financial service provider affecting persons other than the individual complainant. A “change of practice” would normally affect multiple customers. It did not arise on the facts of this case as the relevant practice of the appellant had already changed. It was accepted by the respondent that the 2006 policy document of the appellant gave notice to policy holders of the administrative fee on the change of vehicle in respect of which the complaint was found to be substantiated.

Conclusion

The appellant is entitled to succeed on its appeal against the direction included in the finding of 2nd April, 2007 pursuant to s. 57CI(4) and set out at the start of this

judgment. There will be an order setting aside such direction in the finding of the respondent of the 2nd April, 2007.

Having regard to my conclusion on the first ground of appeal it is unnecessary for me to consider and determine the further grounds of appeal.