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THE HIGH COURT

[2009 No. 13 MCA]

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

BETWEEN

CALEDONIAN LIFE

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

GILLIAN TOBIN AND NOEL TOBIN

NOTICE PARTIES

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

1. This case comes before the High Court as an appeal brought by the appellants, Caledonian Life, pursuant to s. 57CM(2) of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services of Ireland Act 2004, (hereinafter "the Act"). The appellants seek to set aside the finding of the respondent, the Financial Services Ombudsman, dated the 9th January, 2009. The author of the finding was Ms. Mary Rose McGovern, head of investigation in the respondent's office. The notice parties took no active part in the proceedings but were supportive of the stance adopted by the respondent.

2. The facts of the case are reasonably straightforward. The second notice party, together with his late brother Darren, sought to remortgage certain properties, operating through an agency, ICS Mortgage Store. The mortgage company, ICS, required a life assurance policy and this policy was taken out accordingly. It commenced on the 12th December, 2002, with a proposed expiry date of the 12th December, 2026. The lives assured were Noel and Darren Tobin, the monthly premium was €17.49 and two months' premium of €34.98 was extracted from the insured's bank account. The sum assured was €70,000, payable on the death of either one of them.

3. Tragically, Darren was killed in a motorcycle accident, in January 2006; his estate was left to the notice parties. By letter dated the 30th April, 2006, Noel Tobin wrote to Ms. Caroline Bentley of the appellant company seeking the necessary forms to claim on the policy consequential upon Darren's demise. A letter from Ms. Bentley, dated the 5th May, 2008, informed Mr Tobin that the policy was cancelled on the 12th January, 2003 and that no cover was in force.

4. Earlier correspondence between the mortgage provider and the notice party's solicitor, dated the 24th January, 2006, revealed that appellants were asserting that a written instruction from both Messrs Tobin was received in January 2003 by the insurance company, cancelling the life policy. This was emphatically rebutted by the notice parties; no such instruction was issued by Messrs Tobin. They assert that no notification of the cancellation of the policy was received. I should observe here that the respondent went on to find that what was a *pro-forma* letter was sent out, but to the late Darren Tobin only. A cheque returning the premium was made to him only. The record of the alleged cancellation was not retained by the appellant and it appears to have been disposed of some 13 months after the event.

5. Matters moved on from there. The respondent's office became involved, the appellants stood their ground. Considerable correspondence flowed back and forth, some of the material correspondence is recited in Ms. McGovern's finding. For ease of reference I will have the finding appended in full to this judgment, therefore, I do not propose to cite the documentation here, save in the limited respect as set out in my decision hereunder.

6. The respondent found the notice party's claim to be partially substantiated under s. 57CI (2)(g) of the Act. She described the company as being lax in a number of respects, ie. communicating with only one policy holder, returning the premium cheque again to only one policy holder and not keeping a review for a statutory period of six years in accordance with s. 202(9) of the Companies Act 1990 ("The Act of 1990"). Ms. McGovern imposed a penalty of €30,000.

7. I will briefly summarise the main arguments advanced on behalf of the parties. Counsel for the appellant, Ms. Peggy O'Rourke, raised the following points:

1. The Financial Services Ombudsman found that the life policy had been cancelled and indeed the appellant had asserted that it had been. That ended the matter. The Financial Service Ombudsman erred in law in making any award.
2. The award was made to the estate and not to the complainants, as required by the Act.
3. It was entirely inappropriate to refer to s. 202(9) of the Act of 1990 with regard to the retaining of records. This statutory period is of no relevance to the circumstances of this case. The finding in this respect in effect wrongfully levels at the appellant an allegation of criminal wrongdoing.

4. In making an award to the estate, the Ombudsman acted *ultra vires* - the finding must be set aside; in acting *ultra vires*, she is not entitled to curial deference, see *Quinn Direct v. The Financial Service Ombudsman* [2007] IEHC 323 (Unreported, High Court, Finlay Geoghegan J., 4th October, 2007).
5. The complaint to the Ombudsman addressed the issue of non-cancellation of the policy. It was agreed it was cancelled. Matters such as a failure to notify Noel Tobin of cancellation and s. 202(9) of the Act of 1990, should have been flagged in advance to Caledonian Life so that they could deal with them during the investigative stage.
6. Surely the notice parties were under an obligation to check their bank accounts.
7. The Ombudsman should have offered mediation at the outset before proceeding to investigation as required by s 57BK(1) of the Act.
8. Insufficient reasons were given for the finding,
9. The findings were "shot through" with errors, including confusing the mortgage provider (ICS BS) and the facilitator or agent (ICS Mortgage Store).

8. Counsel for the the respondent advanced the following arguments:-

1. Ms. McGowan, on behalf of the Financial Service Ombudsman, was acting within her rights to hold Caledonian Life to account. The company had not kept a record of the request to cancel the policy. Both policy holders should have been notified. Any records that had existed were only kept for 18 months.
2. There should have been a paper trail;

3. The Ombudsman achieved a result. Such documents are now kept for longer, (although there is some disputation as to whether this case brought about the actual procedural change). In any event, the problem was solved. Why send the decision back? Exactly the same result would arise; there is no contemporaneous documentation.
4. There is no suggestion that any documents were missed or ignored by the Ombudsman.
5. The Ombudsman was within his powers, as was Ms. McGovern, to bypass mediation. You cannot solve deficient bookkeeping by mediation; sending it back would bring about the same result.
6. Referring to s. 57C(1) as a "sweeper provision", Mr. McDermott argued that this demonstrated the very broad scope of the Financial Services Ombudsman's investigative and supervisory powers.
7. The family have been complaining of lack of notification from day one.
8. The main focus was always on Caledonian Life and not on the mortgage provider, and compensation was awarded within the wide discretion of the Ombudsman's decision.

The Applicable Test for Appeals

9. On behalf of the respondent, reliance was placed on the decision in *Ulster Back 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 the Central Bank and Financial Services Authority of Ireland Act 2004, Finnegan P. said:-

"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" (See *Hayes v. Financial Services Ombudsman & Ors* (Unreported, High Court, MacMenamin J., 3rd November, 2008)).

11. With reference to the "deferential stance", Finnegan P. cites Keane C.J. in *Orange v. The Director of Telecommunications Regulator and Another* [2000] 4 I.R. 159 at 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."

12. 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). (See Also Barr J. in *ACT Shipping v. Minister for the Marine* [1995] 3 I.R. 406 at 431).

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

"... 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."

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

> "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. goes on to say 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

15. Section 57BB of the Act requires the Financial Services Ombudsman to perform and exercise his 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."

16. Section 57BJ(1) of the Act provides that the Ombudsman should be a "suitably qualified person". His function is distinct from that 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.

Decision

17. Any confusion or misdescription relating to the mortgage provider/agent is in my view wholly irrelevant; there is no doubt but that the focus of the investigation was on the appellant, Caledonian Life.

18. I am satisfied that both in the complaint form to the respondent and in correspondence between the notice parties and the appellant, the absence of any documentation confirming the cancellation of the policy was a very live issue and one

into which, it seems to me, the respondent was entitled to inquire. There is an ongoing dynamic to the scope of the respondent's investigative role. If, for example, he were to discover practices or procedures in an investigation which come to light, and which may require an industry-wide practice recommendation, even though such were not the immediate concern at the outset, it seems to me that it would be quite contrary to the respondent's statutory role to have him shut his eyes to same. It is a question of degree. The respondent must be allowed appropriate latitude to give proper force and effect to his broad ranging powers. However, this case does not require stretching the limits of the respondent's jurisdiction or anything like it.

19. The essential informality mandated by the Act, and the statutory warrant to act, "without regard to technicality or legal form", as provided for under s. 57BK(4), would render the making of the award to the estate of the deceased permissible, since the beneficiaries of the estate are the complainants. One could argue, perhaps, that it might have been legally "neater" to have made the award to the complainant by name. The statutory object is, however, achieved.

20. It is clear that the issue of whether the notice parties checked their bank account to see if payments were being made was addressed. The award reflects less than 50% of the value of the policy. The respondent specifically alludes to any shortcomings on the notice party's part in this regard.

21. As regards to the award, perhaps brief and focused reasons could have been given as to why that precise amount was awarded. Of course, one should not have to guess as to why an award was made. However, taking the investigative process as a whole in general, and the findings in particular, matters such as the shortfall in document retention procedures, the total value of the policy, the fact that the policy had been cancelled, and the obligation of the notice parties to check their bank

account outgoings were all clearly weighed by the respondent and in the final analysis, the award reflects that.

22. Complaint is made by the appellant of the fact that no mediation was offered by the respondent. In her affidavit, Ms. McGovern says in effect, that there wasn't any point in this and that the insurance company had never requested it. The appellant asserts that there is no obligation on the appellant to request it. One must ask whether it should be offered in all cases, given the provisions of section 57BK(1) and (2) of the Act, which provides:-

> "(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.
>
> (2) Subject to this Part, the Financial Services Ombudsman has such powers as are necessary to enable that Ombudsman to perform the principal function referred to in subsection (1)."

23. Remarking on the effects of this, Charleton J. in *J & E Davy v. Financial Services Ombudsman* [2008] I.E.H.C. 256 (Unreported, High Court, Charleton J., 30th July, 2008) says at paragraph 60 as follows:-

> "I cannot ignore the clear statutory imperative in s. 57 CA that the duty of the Financial Services Ombudsman is, on receiving a complaint, to try to resolve it by mediation. Nor can I ignore the fact that first among the principal functions conferred on the Financial Services Ombudsman by s. 57 BK is to deal with the complaint by mediation and, only where it is necessary, to proceed to investigation and adjudication."

24. He goes on to say at paragraph 61:-

> "It has been submitted on behalf of J. & E. Davy that every dispute is capable of being resolved by mediation and that experience has shown that parties who do not trust each other in any sense may come together by virtue of the mediation process. In my view, however, mediation need only be embarked upon where that carries a reasonable prospect of achieving results. Investigation and adjudication may be preferred as a starting point where, in the context of the dispute as a whole, that is deemed to be necessary by the Financial Services Ombudsman. In that regard, I believe a court would be reluctant to interfere with the discretion which is clearly vested in him by the Act. I would add, however, that in terms of fulfilling his responsibility, that it would be justified for him, in each case, to suggest to any party making a complaint that the option of mediation is available and to ask for their cooperation prior to investigation and adjudication in such a process."

25. It is important to note his reference to the party making the complaint; the object of that complaint will be a financial service provider, presumably more versed in the processes of the Act, and the availability of mediation. I do not, however, see that judgment as wresting from the respondent his or her final discretion as to whether or not to proceed to investigation. Ms. McGovern was, in my view, entitled to exercise her discretion in the manner in which she did.

26. I do believe, however, that the respondent is open to significant criticism for the linkage of s. 202(9) of the Companies Act to the failure to retain the cancellation documents. This is, in view, a significant error. First, the statutory provision bears no relevance to the case. Phrased differently, it might have served as an example of comparative value, but no more than that. Secondly, section 202(9) of the Act of 1990 carries with it criminal sanctions and, even though no such proceedings have

arisen, nor indeed could possibly do so, it is nonetheless a significant error that the apparent breach of this provision should remain recorded in the finding.

27. The appellants application is denied. In addition, I order that all references to s.202(9) of the Act of 1990 be stricken from the finding of the respondent. .