THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 250

[2016/426]

Peart J.
Edwards J.
Hedigan J.

BETWEEN

ALICE CONNORS

APPELLANT

AND

ZURICH INSURANCE PLC

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 25th day of July 2018

The Appeal
1. The appellant appeals against a High Court ruling made ex tempore on the 16th of June 2016 which struck out the plenary proceedings brought by the appellant arising from an insurance contract provided to her by the respondent. The appellant seeks the reversal of the strike out of the plenary proceedings and the reinstatement of those proceedings.

Background
2. The appellant took out a contract for insurance dated the 7th of November 2009 with the respondent to cover the home, a cottage, occupied by the appellant and her family in Newbawn, County Wexford. On the 25th of September 2010, the house was unfortunately destroyed by a fire. The fire was caused by an electric appliance. When the appellant sought to claim in respect of the incident, the respondent insurance provider refused. In a letter dated the 12th of May 2011, the respondent declined to pay out under the insurance contract on the basis that their forensic report concluded that the fire was caused by an electric heater being left on next to a sofa. The appellant says that this refusal by the respondent was wrongly made.

3. Following this refusal, apparently on the advice of her insurance broker, the appellant pursued the route of making a complaint to the Financial Services Ombudsman. On the 25th of July 2012, acting through a Deputy Financial Ombudsman, the Ombudsman denied the appellant's claim, allowing only for a compensation payment of a €900 "customer care award". The Ombudsman agreed with the respondent's conclusion that the fire occurred due to an electric heater left turned on while adjacent to a sofa and that this constituted a breach of conditions and the appellant's obligation to take reasonable steps to protect the property and prevent accidents occurring.

4. The decision of the Ombudsman is binding, but can be reviewed by way of appeal to the High Court made within 21 days of the determination. See section 57 CI (9) and section 57 CL (1) of the Central Bank Act 1942 (as inserted by section 16 of Central Bank and Financial Services Authority of Ireland Act 2004).(The 1942 Act) The appellant did not bring an appeal in respect of that determination, but instead on the 20th of September 2012, the appellant instituted High Court plenary proceedings against the respondent in respect of its refusal to pay out. In addition to this, the appellant included a claim with respect to negligence, including, *inter alia*, a claim for negligent misrepresentation.

5. On the 21st of January 2016, the respondent brought a motion to have those proceedings struck out, on the basis that the determination of the Ombudsman was a bar to those proceedings. It was agued that the claim brought therein was *res judicata* by virtue of the Ombudsman's finding. The court heard the motion on the 16th of June 2016 and acceded to it. On the 28th of July 2016, the court made two orders; the first was an order striking out the claim on the grounds that it cannot be properly pursued, the second was in relation to proceedings the appellant brought against the Financial Services Ombudsman. Counsel for the appellant indicated that he would apply for an order to extend time under Order 84C, Rule 2(5)(b) to appeal under s.57CL of the 1942 Act against the determination of the Ombudsman. This application was dismissed. This decision was not appealed.

6. It was argued by counsel for the appellant that the appellant was vulnerable, has poor literacy skills, and did not have the benefit of legal advice when making a complaint to the Ombudsman. The court did not find that this argument was borne out. The court went on to say that allowing for the extension of time would fly in the face of the statutory procedure laid out by the Oireachtas. The appellant now appeals solely against the dismissal of the plenary proceedings and seeks the reinstitution of High Court proceedings.

Grounds of Appeal
7. The grounds of appeal are as follows in that the learned judge:

> a) Failed to consider whether on the facts that the appellant's claim fell into the category of "Special Circumstances" as acknowledged by the High Court in *O'Hara v ACC Bank* [2011] IEHC 367 and also failed to consider the other special circumstances in the appellant's case differentiating it from *O'Hara*.
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> b) Failed to consider whether the court had a discretion in those circumstances to allow a claim to go forward to plenary hearing and failed to distinguish between the facts in the two cases.
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> c) Failed to consider whether the precise issues between the parties had already been litigated and fully considered and finally determined by the Financial Services Ombudsman where the appellant's plenary claim is wider than the claim before the Financial Services Ombudsman and includes not only a claim that the respondent wrongfully, and in breach of contract, failed to pay the appellant the sum of €19,250 which sum is the aggregate of the limits of cover for the house and contents under the Household Policy of Insurance dated 7 November 2009, but that secondarily, that the appellant

suffered consequent serious distress, inconvenience, loss and damage as a result of the non-payment on foot of the policy of insurance in that she, her husband and three children did not have the means to re-build the family home and have accordingly been left having to live with her elderly parents.

d) The learned judge failed to adequately consider whether injustice might result.

Submissions of the Appellant

8. The appellant submits that a determination of the Financial Services Ombudsman is not capable of giving rise to *res judicata*, including the rule in *Henderson v Henderson*. The appellant submits that the consideration of the constitutional implications of *res judicata* arising from the determination of the Ombudsman is appropriate, referring to the case of *O'Hara v ACC Bank PLC* [2011] IEHC 367 whereby Charleton J found that proceedings would not be allowed to go ahead as the claim in question had already been determined by the Financial Services Ombudsman. The appellant submits that in order to be constitutional, the Ombudsman may only exercise limited judicial powers. The powers exercised by the Financial Services Ombudsman are significant, and from a remedial prospective, appear in some cases to go beyond the usual constraints of the High Court. It is submitted that nowhere in the relevant legislation is there an indication that to avail of the complaints procedure of the Ombudsman is to cut off the fundamental right of access to the courts. Therefore, it is submitted that it is difficult to treat the powers of the Ombudsman as limited and even more so if *res judicata* arises.

9. The appellant further submits that the determination of the Deputy Ombudsman is not a decision that gives rise to *res judicata*. The appellant quotes MacMenamin J in the case of *Hayes v Financial Services Ombudsman* (Unreported, High Court, 3rd November 2008), who described the complaint process before the Ombudsman as:

> *"…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 High Court would engage with the issue."*

The appellant submits that this characterisation is correct and that Ombudsman is an informal process in comparison to High Court proceedings. Therefore, it is difficult to see how the determination of the Financial Services Ombudsman is *res judicata*.

10. The appellant submits that even if *res judicata* or a *Henderson v Henderson* type estoppel arose, there are grounds justifying the reinstatement of the proceedings. The Rule in Henderson is an iteration of the *res judicata* principle, but specifically applies to a situation where a claim could have been previously advanced in other proceedings but were not, and as a result are barred from proceeding in separate later proceedings. The complaint initially made by the appellant to the Ombudsman was not drafted by a legal practitioner. It is submitted that it would be self-defeating to effectively require comprehensive legal pleading in what is supposed to be an informal complaints process.

11. The appellant refers to the plenary summons lodged in this matter, whereby reference is made to the negligence of the respondent, including misrepresentation. These elements were not considered by the Deputy Ombudsman and it is submitted that *res judicata* does not arise nor does the rule in *Henderson* apply, as the complaint process to the Financial Ombudsman is not a form of litigation and should not be treated as such.

12. The appellant submits that the consideration of injustice did not involve a proper merits review. It is submitted that when considering whether there was a risk of injustice, the High Court ought to have decided to continue with the proceedings, or else have canvased the prospect of injustice occurring more thoroughly.

13. The appellant submits that even if submissions regarding *res judicata* and the Rule in *Henderson* are rejected, there are a number of reasons as to why the plenary High Court proceedings should be reinstated. The appellant refers to the "merits-based analysis" as described by Hardiman J in *Ahmed v The Medical Council* [2004] 1 ILRM 372. Relevant matters applicable to the applicant to be considered in such a test include:

a) The prejudice to the appellant in that she has lost her family home, its contents, and has been forced to leave it along with her husband and three children.

b) That she has been denied compensation for her loss.

c) That the respondent's policy conditions indicated that recourse was a possibility via the Financial Services Ombudsman, while making a representation that the right to legal proceedings would be unaffected.

d) That the Financial Services Ombudsman gave no indication of the possibility of a *res judicata* occurring or the applicability of the Rule in *Henderson.*

e) That there was a lack of good faith and inequality of bargaining power.

f) That the appellant was not formally educated, and although now is legally represented, did not have the benefit of legal representation before the Financial Services Ombudsman.

g) That the determination of the Ombudsman is vitiated by material errors and omissions, including a failure to identify and apply the relevant law.

h) That the respondent never alleged that the appellant acted in bad faith or was grossly negligent in leaving an electric heater turned on. As a matter of law, negligence or gross negligence does not suffice for avoiding paying out on an insurance policy of this kind.

i) That the respondent unduly delayed in bringing a strike out motion on the basis of *res judicata* after the determination made by the Financial Services Ombudsman.

14. The appellant therefore seeks the reinstitution of High Court proceedings that commenced on the 20th of September 2012, for the reasons outlined above, as it is necessary to do justice between the parties.

Submissions of the Respondent

15. The respondent makes submissions on a number of issues arising on the appeal. The respondent refers to the legal framework in place, being the statutory scheme which provides for the making of a complaint to the Financial Services Ombudsman, and the right of appeal to the High Court, as provided for by 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). The Statute provides that the decision of the Ombudsman is binding, but that the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding. It is submitted that it is within the context of the relevant statute that the relevant legal principles as established by the authorities must be considered.

16. It is submitted that for this Court to allow this appeal, it would be necessary for the Court to overturn two of its own decisions, *Murphy v Canada Life Assurance Ireland Ltd & Anor* [2016] IECA 128, and *Crowley v Zurich Assurance plc & Ors* [2016] IECA 381, which are not referred to in the appellant's submissions. Both cases apply the reasoning of the High Court in two judgments which the appellant argues should be overturned, those being *Murray v Trustees & Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27 and *O'Hara v ACC Banks plc* [2011] IEHC 367. It is submitted that the appellant fails to address the reasoning in these judgments. In Murphy, having considered the 1942 Act, it was stated by Hogan J that:

> *"There is a clear public interest in the finality of litigation…It would be quite inconsistent with that legislative intent if these statutory provisions could be effectively circumvented by issuing new High Court proceedings.."*

That decision was upheld in this Court in *Crowley*, where it was stated by Ryan P:

> *"It is not clear to me that res judicata requires for its application to satisfy some unspecified extra requirements…The legal principle of res judicata, in my view, disposes of a claim in circumstances where it is applicable and it is not a matter of discretion for the court whether it will or will not respect it."*

It is submitted that these authorities establish beyond doubt that when a matter has been determined by the Financial Services Ombudsman, *res judicata* has arisen and cannot be litigated by way of fresh proceedings in the High Court, other than by way of appeal.

17. The respondent refers to the appellant's submission that, on constitutional grounds, the relevant statutory framework surrounding a finding of the Financial Services Ombudsman may not operate to produce *res judicata*. The respondent submits that having regard to the reasoning of the decisions in *Murray*, *O'Hara*, *Murphy* and *Crowley*, that this proposition is unstateable. While the appellant is not seeking a declaration of unconstitutionality, it is not possible for the appellant to advance the contention that, on constitutional grounds, a decision of the Financial Services Ombudsman may not give rise to *res judicata*. This is recognised by Charleton J in *O'Hara*, who stated that allowing a party to relitigate a matter which had been before the Ombudsman would, in the absence of abuse of process, *"undermine the will of the Oireachtas. No court is entitled to so decide, save in circumstances of unconstitutionality."* Regardless, the appellant acknowledges that the constitutional point was not argued in the High Court. On this ground alone, it is submitted that it cannot now be raised on appeal.

18. The respondent submits the contention that the finding does not, on the facts, give rise to *res judicata*. The appellant's reference to negligent misrepresentation has been dropped. Therefore, in these proceedings the appellant seeks to relitigate solely the precise issue that was determined by the Financial Services Ombudsman, i.e., whether the respondent was entitled to decline cover. Moreover, even if the words "negligent misrepresentation" were included in the Plenary Summons, it would not be open to the appellant to raise it as a basis in these proceedings as that point was never advanced in the High Court. The court is referred to the ruling of Henchy J in *Movie News Ltd v Galway County Council* (Unreported, Supreme Court, 25 July 1973), that as a matter of law, save in exceptional cases, a point cannot be raised *"under the guise of an appeal".* Regardless, it is submitted that even if the point had been advanced in the High Court, that court could not have considered it, as there was no affidavit evidence from the appellant in that regard. Finally, in this regard, even if this point had been pleaded, raised in the High Court, and grounded on the elements required to advance such a claim, it would be futile, as there was no misrepresentation evident.

19. It is submitted that the appellant *had* a right to take legal action following the determination of the Ombudsman in the form of a statutory appeal. She did not do so, notably at a time *after* she had instructed solicitors.

20. In relation to the contention that special circumstances arise to overcome *res judicata*, it is submitted that the following reasoning of Ryan P in *Crowley* is correct:

> *"The legal principle of res judicata, in my view, disposes of a claim in circumstances where it is applicable and it is not a matter of discretion for the court whether it will or will not respect it."*

It is submitted that the special circumstances advanced by the appellant are wholly without merit. The respondent submits that the appellant only revealed to the respondent that she had instructed solicitors in advance of the finding by the Ombudsman, after the application the subject of this appeal was heard. The instruction took place on the 13th of June, before the finding, and therefore eradicates the existence of any basis for all of the special circumstances claimed by the appellant. In this respect, the respondent has regard to s.57CI (9) of the 1942 Act, which provides that it is the finding which is binding, and not the making of the complaint. The appellant did not withdraw the complaint at any stage between the date of instructing solicitors and the date of the finding made on the 25th of July 2012. Had the appellant done so, *res judicata* would not arise. Furthermore, it is submitted that the statement made by the appellant by way of letter to the respondent that *"Our complaint before the Financial Ombudsman has been withdrawn as our instructions are to issue proceedings"* appears to be untrue, and is another reason to refuse this appeal.

21. It is submitted that the appellant had the benefit of legal advice, whereby the steps that ought to be taken to avoid *res judicata* were identified to her. Through her legal representatives, the appellant communicated to the respondent that these steps had been taken, when in fact the appellant failed to withdraw the complaint while also declining to appeal the finding within the required timeframe.

22. It is therefore submitted that the appellant did not act in the appropriate manner, even with the benefit of having legal advice at all material times. Considering all of the circumstances, it is submitted that this Court should dismiss the appeal.

Decision

23. The statutory scheme which provides for the making of a complaint to the Financial Services Ombudsman and the right of appeal in respect of such a finding to the High Court is governed by Part VII B of the 1942 Act. Section 57 CI(9) provides:

> *"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."*

Section 57 CM(4) provides:

> *"The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts)."*

24. The central issue that arises in this case has already been conclusively decided by this Court in two decisions. In the first of these, *Damien Murphy v. Canada Life Assurance Ireland Ltd. and Ireland Life Assurance plc*. [2016] IECA 129, the court dealt with the case where a plaintiff had made an unsuccessful complaint to the FSO. He did not appeal, but issued proceedings for breach of contract against the insurer. In his judgment Hogan J, with which Irvine and Mahon JJ agreed, he stated at para. 1 as follows:

> *"In essence, the question presented in this appeal is whether, once a matter has been dealt with by the Financial Services Ombudsman ('FSO'), it is then open to a disappointed claimant to issue fresh proceedings in the High Court seeking damages as against the financial services provider for breach of contract."*

25. Later, in the same judgment, Hogan J. continued:

> *"8. In my view, it is perfectly clear, both as a matter of principle, statute and authority that, broadly speaking, a claimant cannot advance a complaint to the FSO and then, should that claim prove unsuccessful, re-litigate the same matter before the High Court under the guise of separate proceedings. There is a clear public interest in the finality of litigation, coupled with a requirement that a litigant should advance the entirety of a claim and not endeavour to litigate matters in a piecemeal basis. The potential for the abuse of the litigious process by repeated applications is manifest.*
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> *9. These principles are reflected in the doctrine of res judicata, so that a matter which has been finally judicially decided cannot generally be re-opened. The principles of res judicata serve not only to protect these important public interests, but also to safeguard the legitimate interest of litigants to ensure that they are not harassed by the unnecessarily burdensome litigant who endeavours to re-open matters which have already been judicially determined.*
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> *10. The doctrine does not apply simply to judicial findings, but also to administrative determinations which, in the nature of things, are final. In this context it is perfectly clear that determinations of the FSO enjoy this binding character and status. Section 57CI(9) of the Central Bank Act 1942 ('the 1942 Act') (as inserted by s. 9 of the Central Bank and Financial Services Authority of Ireland Act 2004) expressly provides to this effect by stating that:*
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> > *'Subject to the outcome of any appeal against a finding of the Financial Services Ombudsman in respect of a complaint, the finding is binding upon the complainant, the regulated financial service provider concerned and every other person who is a party to the complaint.' (italics supplied).*
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> *11. As the italicised words make clear, the Oireachtas intended that adjudications by the FSO would have a binding character, subject only to an appeal. It would be quite inconsistent with that legislative intent if these statutory provisions could be effectively circumvented by issuing new High Court proceedings which attempted in effect to re-litigate the same matters that were already determined by the FSO in the course of the adjudication upon the earlier complaint."*

26. Later, in the same judgment, Hogan J. continued:

> *"14. In my view, just as in Murray, this is a case which plainly calls for the application of the principle of res judicata. I can quite appreciate that the plaintiff was disappointed with the decision of the FSO. But if so, his remedy was to appeal that decision to the High Court pursuant to s. 57CL(1) of the 1942 Act. What, I fear, he cannot do is not to appeal that decision but later endeavour to re-litigate the matter in separate proceedings seeking damages against the financial services provider for breach of contract.*
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> *15. This, however, is precisely what the plaintiff has sought to achieve in the present proceedings by commencing these proceedings. As Kelly J. pointed out in Murray, this would be entirely inconsistent with the statutory scheme, the binding character of the FSO determination and the general effect of s. 57CI(9) of the 1942 Act. It follows, therefore, that I consider that White J. was entirely correct in his conclusion that these proceedings were barred by the doctrine of res judicata and are, for this reason, doomed to fail."*

27. As to whether there exist reasons that might permit the Court to go behind the rule of *res judicata*, this court, in *Florence Crowley v. Zurich Life Assurance plc. & Ors*. [2016] IECA 381, very firmly ruled out any such exception to the *res judicata* doctrine. In referring to comments of Hogan J who was the trial judge in the High Court, Ryan P, with whom Peart and Irvine JJ agreed, stated as follows:

> *"4. Hogan J. applied a test that was more favourable to the plaintiff in looking beyond the question of res judicata to whether there were reasons that would justify refusing to apply that legal rule. It is not clear to me that res judicata requires for its application to satisfy some unspecified extra requirements, subject to the wholly exceptional jurisdiction that courts always had at common law to set aside a judgment that was obtained by fraud. The legal principle of res judicata, in my view, disposes of a claim in circumstances where it is applicable and it is not a matter of discretion for the court whether it will or will not respect it."*

28. In the light of these authorities, the decision of the High Court was plainly the correct one. In relation to the remaining grounds raised by the appellant, no question of constitutionality arises for consideration since no challenge is brought to the constitutionality of the Act which enjoys a presumption in its favour in that regard. Moreover, it is conceded the point was not raised in the High Court and, thus, cannot be raised before us. As to the point concerning a plea of negligent misrepresentation, this was neither pleaded nor raised in the High Court and arose for the first time in the appellant's submissions in this appeal. Thus we cannot address this issue.

29. Moreover, the claim of special circumstances sought to be raised by the appellant cannot be entertained in circumstances where, in excess of one year prior to the finding of the FSO, she had engaged her current solicitors to act on her behalf in her claim against the respondent. They notified the respondent by letter dated 4th August 2011 that they had been instructed on her behalf. They advised that High Court proceedings were being drafted and asked the respondent to nominate solicitors. They stated in this letter that the complaint to the FSO had been withdrawn. In fact, the complaint was never withdrawn and proceeded before the FSO. The finding of the FSO was made on 25th July 2012. The only avenue of appeal open to her at that stage was an appeal to the High Court. This, she failed to do. Instead, the High Court proceedings issued on 20th September 2012. No explanation has been proffered for this rather strange conduct of her claim against the respondent. However, she was represented by solicitors throughout this time and cannot sustain a complaint that she did not know about the restrictions provided in the statutory scheme upon which she had embarked. This scheme is one created to favour those in the appellant's position. It provides for a simplified, expeditious, cost-free method of resolving disputes with service providers. Those deciding to embark upon it, however, do so at the cost of being precluded from pursuing their claim through Court proceedings.

30. In all the circumstances, in my judgment, the High Court judge was entirely correct. The appeal should be dismissed.