THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 381

[2015 No. 365]

[2012 No. 11281 P]

The President
Peart J.
Irvine J.

BETWEEN

FLORENCE CROWLEY

APPELLANT

AND

ZURICH LIFE ASSURANCE PLC & ORS

RESPONDENTS

JUDGMENT of the President delivered on 15th December 2016

Introduction

1. This appeal is brought by the plaintiff, Mr. Crowley, as a litigant in person against the dismissal of his action by the High Court (Hogan J.) for reasons set out in a judgment of 4th March 2015. He had brought proceedings arising out of the refusal by Zurich to allow the claim he made under a serious illness insurance policy. The second defendant is the Chief Executive Officer of the company and the third defendant is the Claims Assessor who dealt with Mr. Crowley. The fourth defendant is the Financial Services Ombudsman but he was discharged from the action by order of the High Court made by Kearns P. on 24th June 2013. These Zurich defendants brought a motion seeking a non-suit and the striking out of the action on various grounds including *res judicata*, issue estoppel or abuse of process. In his judgment on the application, Hogan J. held that, in circumstances where Mr. Crowley had pursued his claim by way of application to the Financial Services Ombudsman and had been unsuccessful and had not exercised his statutory right of appeal from the decision to the High Court, his claim was barred by reason of *res judicata*. The court looked for circumstances or features of the case that would have made it inequitable to apply the rule but could find none. The judge said that there were "objectively, no exceptional grounds which would justify me reopening or in some way going behind the decision of the Financial Services Ombudsman". Subsequent to the judgment, Mr. Crowley made unavailing attempts to get the High Court to revisit the decision because of alleged errors.

2. The matter now before this Court is Mr. Crowley's appeal against the decision of Hogan J. However, that is not all. He seeks to bring before the court, in the form of a notice of motion, a claim that the Zurich defendants have been guilty of deceit and misconduct in the handling of his policy claim and in the conduct of the proceedings. It is doubtful whether he is entitled to bolt onto his appeal an extra procedural structure of that kind but in the result the court does not have to consider that separately. The outcome of any such process must be the same as the appeal that is before the court.

3. Mr. Crowley has put before the court a large quantity of documents as well as books containing many authorities. He has put in submissions and additional submissions in which he seeks to convince the court of the many depredations that he alleges against the Zurich defendants. It is unnecessary to specify all the various allegations that he makes. Mr. Crowley's indignant allegations extend beyond the parties to their legal advisers. His submissions cite what he alleges to be details of sustained illegality designed to deprive him of his lawful entitlements. Whatever he lacks in restraint and moderation, Mr. Crowley has no shortage of industry, even if it is not directed to the real issues that arise in the case. One can understand how disappointed and angry this litigant feels because of the injustice that he perceives to have been visited upon him by the company and its officials, but I do not see any basis in the case for the very serious charges Mr. Crowley levels at all and sundry, including solicitor and Counsel.

4. In my judgment, the law on the question that arises in the appeal is clear and the High Court was correct in dismissing Mr. Crowley's claim. 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. However that may be, I am in agreement with the judgment of the High Court that the rule of *res judicata* applies in this case because the Financial Service Ombudsman's decision is final, subject to the statutory right to appeal to the High Court, and operates within a closed statutory scheme so that an applicant is not free to embark on separate court proceedings when he has got an adverse result. I also agree that there are no special circumstances present that would justify departing from the rule, assuming that it is appropriate to approach the question in that way. It follows also that any other application by Mr. Crowley to reopen the case fails with the appeal.

5. There are two complicating features of the case, the first of which has afflicted the dispute from the beginning. This is that the insurance company has been inaccurate in setting out the critical policy condition on which Mr. Crowley's claim depended. Zurich corresponded with doctors and with Mr. Crowley himself quoting versions or editions of the key illness policy provision that differed from the one in his policy. I agree with Hogan J. who said that the differences were not material because the central, essential requirement that had to be satisfied was the same in all the versions. It was, however, particularly unfortunate that the company gave the impression of carelessness or indifference in the important matter of the terms of the policy. This undoubtedly contributed, if it did not actually cause a great deal of the suspicion that Mr. Crowley harboured about Zurich's attitude to his claim.

6. The second problem arose because of an unfortunate misunderstanding of the medical evidence by the trial judge. It began with

the best of intentions and a very practical suggestion. Because there was bitter controversy arising out of the use by the company of incorrect formulations of words for the critical policy provision in correspondence with doctors, the judge suggested that the company should write to the plaintiff's treating cardiologist, Dr. Mulcahy, setting out the correct policy wording and seeking a fresh report. That was done and the doctor reported. However, the trial judge misunderstood what the doctor said in his report and he also overlooked another piece of medical evidence. In the result, the judge addressed the question of whether the medical evidence was correct as one element that could affect the application of res judicata to the case on the basis of an erroneous understanding of two important points about Mr. Crowley's condition and his treatment. This matter is, however, irrelevant to the result of the appeal because the medical evidence is all the one way, is not in dispute, and when fully and accurately understood confirms the correctness of the decision of the High Court.

The Facts

7. While it might seem to be logical to begin and perhaps to conclude consideration of the case by examining Mr. Crowley's appeal on the question of *res judicata*, the central, dominating issue is whether Zurich misconstrued the policy terms or their application to his illness and treatment in refusing his claim. Part of the consideration of the *res judicata* issue involved the medical evidence as to the procedure that Mr. Crowley underwent. I propose, firstly, to examine the claim that Mr. Crowley made under the insurance policy to see whether the rejection of his claim was apparently valid and to endeavour to assess whether there is any real substance to the fundamental issue that gives rise to the claim. I will then proceed to consider the matter of *res judicata*.

8. Mr. Crowley took out an insurance policy to cover serious illness which first came into effect on 1st December 2002. He kept up his premium payments and the policy was in force in 2010, when he underwent an angiogram investigation on 9th April which disclosed stenosis of the coronary arteries. He was referred for angioplasty procedure to Dr. David Mulcahy, consultant interventional cardiologist, who carried out the treatment at Tallaght Hospital on 12th April. The treatment consisted of insertion of stents in three places in the left anterior descending artery of Mr. Crowley's heart. I will refer later to Dr. Mulcahy's description of the procedure that he carried out.

9. Mr. Crowley made an application for payment of benefit under his serious illness policy. He had originally taken out this policy with Eagle Star, but Zurich Life was the relevant insurer at the time of Mr. Crowley's treatment. The company refused the claim on the ground that Dr. Mulcahy had only treated one coronary artery and not two or more as the policy required according to the insurer. Mr. Crowley wrote to the company asking them to reconsider the refusal and they did so, but again declined the claim. Then, Mr. Crowley made a formal appeal to Zurich Life but with the same result. He was entitled to apply to the Financial Services Ombudsman and this he did. That official considered the claim, but also rejected it. Mr. Crowley reapplied to the Ombudsman, but again to no avail. The Ombudsman's decision letter to Mr. Crowley informed him that he had a right to appeal to the High Court against the decision, mentioning the time limit and the fact that he could apply to the High Court for an extension of time if that was necessary. Mr Crowley did not avail himself of this option of appealing to the High Court, nor did he seek an extension of time after the appeal period had expired. Instead, he instituted the proceedings which are now the subject of appeal to this Court.

10. The issue that determines Mr. Crowley's entitlement to recover benefit is whether the procedure that Dr. Mulcahy carried out on 12th April 2010 was covered by the policy. The relevant provision of the policy is as follows:

> "The undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. The Procedure must be to correct at least 50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the necessity for the procedure will be required."

The issue is whether the procedure Dr. Mulcahy performed was to correct narrowing of two or more coronary arteries. The 50% diameter narrowing did not arise.

11. The medical evidence is contained in a series of reports and information provided by Mr. Crowley's treating doctors and another consultant whose assistance he sought. I set out this information in chronological form as follows:

> • 9th April 2010: Dr. Dan O'Gorman, consultant cardiologist, reported to Mr. Crowley's General Practitioner, Dr. O'Connor, on the results of his angiogram as follows:
>
> "There are three consecutive stenoses in the LAD just after the trifurcation of diagonal and S1. There is a small D2 which has a 50% stenosis at its origin."

He gave his conclusion: "Consecutive LAD stenosis. For consideration of PCI."

> • 13th April 2010: Dr. David Mulcahy, consultant cardiologist, reported that Mr. Crowley was admitted to Tallaght Hospital where he underwent angioplasty and stenting of his complex mid LAD disease on 12th April.
>
> • 12th May 2010: A coronary angiogram at the Blackrock Clinic reported, inter alia, widely patent LAD stent "after small ostially pinched 2nd diagonal (75%). Dominant RCA with diffuse mild atheromatous disease & 40% discount narrowing."
>
> • 23rd June 2010: Dr. John O'Connor, the plaintiff's General Practitioner, completed a form for the company in connection with the claim in which he described the diagnosis and surgical procedure as follows:
>
> "LAD stenosis requiring PCI stent – inserted 9/4/2010"

The doctor responded to the request in the form to advise of the number and sites of the graft: "LAD 1 stent"

Item 9 on the form posed a question as follows:

> "Did the patient undergo an interventional technique involving the use of transluminal coronary catheters to correct significant stenosis (at least 50% diameter narrowing) of two or more coronary arteries?"

Dr O'Connor answered: "No."

> • 15th October 2010: Dr. Mulcahy wrote to Zurich in response for a request for a report as follows:

"Many thanks indeed for your correspondence of 20 September about Mr. Crowley who has submitted a claim under serious illness policy. You will be aware that he underwent coronary angiography with Dr. Dan O'Gorman having been admitted with an episode of chest pain to Naas Hospital. Coronary angiography at that time revealed a non—obstructed left mainstem and three consecutive stenoses in the LAD just after the trifurcation of the diagonal and the first septal branch. There is a small second diagonal branch with an ostial pinching. Left circumflex and right coronary have minor plaque.

In view of the presentation and the angiographic findings, he was referred for consideration of angioplasty and stenting of his LAD lesions and this was performed on 12 April after preloading with Plavix in addition to Aspirin. The three sequential lesions were stented using a 2.75 mm x 32 mm TAXUS Liberte. The small pinch to second diagonal branch which was subtended by the stent was left alone. He was referred for consideration of inclusion in the cardiac rehabilitation program. He will be maintained on dual antiplatelet therapy for one year and on Aspirin for life. Hopefully, this information is suitable for your records."

• 27th October 2011: Dr. Dan O'Gorman, consultant cardiologist, wrote to Mr. Crowley as follows:

"I am writing this letter to confirm what we discussed today in the outpatients. Your angiogram in April 2010 showed that there were three consecutive stenosis in the left anterior descending vessel. There was a small diagonal branch of this vessel, which had a 50% narrowing at its origin. Whereas it is technically possible to insert three independent stents current medical practice would indicate that it is much safer for the patient to cover all three lesions with the one stent. Placing a further stent in the small branch vessel again would be technically possible however would not be indicated as it was not likely to be causing significant Ischaemia and by inserting a stent one would put an excellent result in the main vessel at risk.

It is very reassuring that your exercise test today was negative at a high workload."

• 7th January 2014: Dr. Mulcahy responded to a letter from Zurich. The insurer on this occasion stated that it had become apparent that a previous request quoted a definition from a different policy and provided the correct wording in Mr. Crowley's policy as follows:

"The undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. The procedure must be to correct at least 50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the necessity for the procedure will be required."

Dr. Mulcahy replied as follows:

"Many thanks for your correspondence on 31st December about Mr. Florence Crowley's claim under a serious illness policy having undergone angioplasty and stenting of three sequential lesions in the mid segment of the left anterior descending coronary artery on 12th April 2010, and having been referred for this to myself by Dr. Dan O'Gorman, Consultant Cardiologist in Naas Hospital who performed the diagnostic coronary angiogram on 9th April 2010. I note there was some concern about definitions relating to Mr. Crowley's policy of insurance.

With regards to your new definition the undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. Dr. Dan O'Gorman, consultant cardiologist in Naas hospital referred the patient for consideration of stenting of his three sequential LAD lesion and I as a consultant interventional cardiologist carried out the procedure three days later. As can be seen from the original report the procedure was carried out on three sequential lesions within the same coronary artery and thus the procedure was not to correct at least a 50% diameter narrowing of two or more coronary arteries. The patient had a small branch of the same artery that was stented which itself had a narrowing and which we left alone as an appropriate clinical decision.

Mr. Crowley did not have significant (greater than 50%) lesions of either of the other two main coronary arteries at the time he underwent stenting of his LAD.

I hope this information is suitable for your records." [Emphasis added]

• 23rd July 2014: Dr. Niall Mahon, consultant cardiologist, wrote to Mr. Crowley confirming that he did have significant disease of the diagonal branch of the left anterior (the doctor's letter says interior) descending coronary artery: "Secondly, the diagonal branch is indeed a coronary artery that supplies oxygen to a segment of myocardium". Finally, he said that medication was a recognised and effective treatment for coronary artery disease and that Mr. Crowley would require lifelong medications.

• 1st September 2014: Dr. Mulcahy wrote to Mr. Crowley confirming that the diagonal branch of the left anterior descending coronary artery is itself an artery.

• 14th September 2015: Dr. Mahon said that he believed that Mr. Crowley had narrowing of greater than 50% in two coronary arteries (70% LAD, 50% diagonal). The figure for the diagonal given by the doctor does not of course confirm that the narrowing was greater than 50% but the policy required at least 50%.

12. In the course of his judgment, Hogan J. embarked on a consideration of whether there might be some excluding circumstances whereby *res judicata* would be avoided. Having rejected two possible features of the case that Mr. Crowley relied upon, as to which I am in agreement with the trial judge, the final matter was the contention that the medical conclusions were flawed. Paragraphs 34 to 36 of the judgment deal with this point, as follows:

"34. So far as the third argument is concerned, the contention here is that the medical conclusions were flawed in that, as Dr. Mulcahy's subsequent report made clear, one branch of the same artery was also stented. The plaintiff then contended that a branch of the artery should itself be regarded as a coronary artery in its own right. I again adjourned the proceedings to give the plaintiff the opportunity to adduce medical evidence which corroborated this claim.

35. The plaintiff subsequently informed me that he had approached a variety of consultant cardiologists for this purpose,

but they either declined on the ground that they were not insured to give advice of this kind or for other similar reasons. In the end, the plaintiff was unable to supply any further medical evidence to support this contention.

> 36. Since the plaintiff has been unable – for whatever reason – to obtain medical evidence which demonstrates that the branch of a coronary artery should be regarded as an artery in its own right, I am driven to the conclusion that the plaintiff cannot demonstrate the existence of special circumstances which would defeat the application of the *res judicata* rule on this account either."

13. It is unfortunately the case here that that the judge made two errors. The errors are in paras. 34 and 35 of the judgment. At para. 31 of the judgment, the judge quoted the report that is highlighted above dated 7th January 2014 from Dr. Mulcahy as follows:

> ". . . the procedure was carried out on three sequential lesions within the same coronary artery and thus the procedure was not to correct at least 50% diameter narrowing of two or more coronary arteries. The patient had a small branch of the same artery that was stented which itself had a narrowing and which we left alone as an appropriate clinical decision.
>
> Mr. Crowley did not have significant (greater than 50%) lesions of the other two main coronary arteries at the time he underwent stenting of his LAD."

The error applies in relation to the statement that Mr. Crowley "had a small branch of the same artery that was stented" which the judge takes to mean that in addition to the stenting of the LAD, the small branch was also stented. But that is not correct. The branch of the artery was left untreated. The reference in the sentence is to the artery that was stented not to a branch that was stented. Only one artery was stented and that was the LAD. The small diagonal branch of the LAD also had narrowing, but it was not treated, it was not stented and it was left alone by deliberate decision. It was Dr. Mulcahy's clinical decision. The judge's unfortunate misreading of this letter causes the errors that he makes at paragraphs 34 and 35.

14. The branch of the LAD (left anterior descending) artery is itself an artery, a coronary artery. There is no doubt about that. Doctors Mahon and Mulcahy had expressly confirmed it. There was no difficulty about securing confirmation as to the status of the branch of the LAD. The error about Dr Mulcahy's letter was compounded when the court declared that Mr. Crowley could not get evidence that the branch was itself a coronary artery.

15. The nature and extent of the treatment that Mr. Crowley received is also confirmed by the correspondence. Mr. Crowley implicitly and explicitly acknowledged the medical information in his correspondence with Zurich. Mr. Crowley submitted his claim in an application form dated 19th May 2010. He said that the treatment he had was "angiogram and stent plus medication to continue aggressive control of risk factors". He provided the names and addresses of his doctors. Zurich replied by letter of 8th July 2010 from Ms. Kate McNamara, a claims assessor, one of the defendants in this action. She said that the company had no option but to decline the claim because the procedure that Mr. Crowley underwent was to correct narrowing to one artery, whereas under the policy, the procedure had to be to correct the narrowing of two or more arteries. She cited the report of Mr. Crowley's General Practitioner and the Patient Discharge Letter that the applicant had submitted. Mr. Crowley appealed this refusal of his claim in a letter of 17th September 2010 to Mr. Paul Murphy, Operations Manager of Zurich. He described to Mr. Murphy how, as he understood it, he had six narrowings in his heart of at least 50% diameter in two or more coronary arteries which he said were quite clearly identified by his angiogram. He continued as follows:

> "These narrowings meet the requirements as set down in your policy document. Due to the severity and urgent nature of the narrowings, the Consultant Cardiologist carried out the operation himself. On the day in question, he stented three of the narrowings in one major artery by using one long stent and in the process pinched another artery due to the length of the stent. He then took the decision not to stent the remaining arteries as it could put my life at great risk at that time."

16. Mr. Crowley argued that he met the criteria to warrant insertion of two transluminal coronary catheters, but because the consultant decided not to insert the second stent and to treat him instead with "aggressive drug treatment", the policy would not pay out. He said that because of the decision by the cardiologist "I am being penalised." He said that the decision was unfair and asked for it to be reversed. He summed up his position at the end of the letter as follows:

> "I believe in fairness in all things but in my opinion there is nothing fair about this decision. I was secure in the knowledge that I had myself covered in the event of this happening and you can only imagine the overwhelming sense of unfairness I feel at your decision. In summary, a policyholder who has 2 narrowings corrected by 2 stents in 2 coronary arteries is paid but a policyholder, such as myself, who has 3 narrowings corrected by one long stent and is left with 3 unstented narrowings is not paid? How can you decide, using reasonable expectation, that one case is more serious or life-threatening than the other?"

17. Ms. McNamara replied by letter dated 20th September 2010. She repeated the conclusion that Mr. Crowley's treatment did not meet the criteria for a valid claim. However, she said that they had requested some further information from Mr. Crowley's specialist, Dr. David Mulcahy. She invited him to submit any further medical evidence in support of his claim. When they received the report and copies of any reports that Mr. Crowley had, she said "we shall be happy to take a further look at this appeal". The next letter is dated 9th November 2010 following receipt of information from Dr. Mulcahy. Ms. McNamara said that the information "once again confirms that you had stenting only to the Left Anterior Descending artery". She informed Mr. Crowley that:

> "All the medical information received from your doctors confirms that you only received treatment to one coronary artery and therefore do not satisfy the criteria required for a valid Serious Illness Claim. Therefore in this regard we have no option but to continue to decline this claim."

18. The position therefore is as follows. The treatment that Mr. Crowley had was to correct narrowing of one coronary artery. He also had narrowing of other coronary arteries, but Dr. Mulcahy did not treat them by angioplasty or otherwise than by prescribing medication. The diagonal branch that Dr. Mulcahy refers to is a coronary artery and it had narrowing, but Dr. Mulcahy did not treat it. The procedure that Dr. Mulcahy performed was to treat narrowing of the LAD artery only. The policy required that the treatment be performed to treat narrowing of two or more coronary arteries, but that did not happen in this case; it may well be that Mr. Crowley's condition would have justified angioplasty treatment of another coronary artery or other coronary arteries, including perhaps the descending branch of the LAD. However, if that did not actually happen, the policy criteria were not met. The medical evidence is clear and all to the same effect. It comes from the plaintiff's General Practitioner, Dr. O'Connor; Dr. Dan O'Gorman, the cardiologist who supervised the angiogram and referred Mr. Crowley to Dr. David Mulcahy for interventional treatment; Dr. Mulcahy himself and also Dr. Mahon, another cardiologist. It is clear from these reports and letters that Mr. Crowley's condition did not come within the

definition in his policy that would have entitled him to recover benefit.

19. The result of this review of the medical information and other facts relating to Mr. Crowley's claim to recover under his policy is that the misunderstanding of Dr. Mulcahy's report by the trial judge did not undermine his overall conclusion that there were no special features about the case that might have averted the application of the principle of res judicata. In respect of the other points considered, the trial judge was clearly correct and there was ample basis for the decision. The matter that remains for consideration is the res judicata principle which the judge held to apply.

Res Judicata

The Legislation
20. The Financial Service Ombudsman (FSO) was established by s. 57BC of the Central Bank Act 1942 as amended. The scope of the FSO's jurisdiction goes beyond the confines of the law of contract and includes considerations of equity and conscience. Section 57CI (2) of the Act provides for the basis upon which a complaint may be substantiated. Grounds include unlawful conduct; unreasonableness, even if it is in accordance with established practice, underlying motive; reliance on an irrelevant consideration; mistake of fact or law and any explanation given or it was otherwise improper.

21. The procedural appeal mechanism of the FSO is governed by Chapter 6 of the Act. Section 57CL provides that a dissatisfied party has the general right of appeal of the High Court from the FSO itself. Such an appeal must be may only be made within the time period allowed for within the rules of the High Court or where otherwise extended. A complainant, under the Rules of the Superior Courts, has 21 days in which to make an appeal of this nature. The course of such proceedings is provided for in s. 57CM as follows:

> "(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:
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> (a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;
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> (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.
>
> (4) 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)."

The Authorities
22. One of the key cases surrounding the issue of *res judicata* in the context of statutory frameworks such as the FSO is *Thrasyvoulou v. Secretary of State for the Environment* [1990] 2 AC 273, in which Lord Bridge commented at p. 289"

> "In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

23. In *Ashborne Holdings Ltd. v. An Bord Pleanála* [2003] IESC 18, the late Hardiman J. acknowledged Lord Bridge's remarks, noting that he had "no difficulty" with the proposition. The issue did not arise for consideration in those proceedings. The passage from *Thrasyvoulou* was cited with approval by Kelly J. in *Murray v. Pensions Ombudsman* [2007] IEHC 27 when he said in a case concerning the Pensions Ombudsman:

> "[a party] who is aggrieved with the determination of the trustees' may at his option, avail himself of the services of the Ombudsman or bring proceedings in an appropriate court for declaratory or other relief. He may not do the latter when in receipt of an adverse determination from the Ombudsman. That is so because the determination of the Ombudsman is res judicata of the dispute in question subject only to the right of appeal".

24. Charleton J. in *O'Hara v. ACC Bank PLC* [2011] IEHC 367, when dealing with a similar question arising from the FSO noted:

> "To all intents and purposes, it is clear that the allegations made in the complaint before the Financial Services Ombudsman are the same as those which are sought to be litigated in these proceedings. The nature of the jurisdiction conferred on the Financial Services Ombudsman by the Oireachtas cannot be ignored. It would be contrary to the statutory scheme and it would also be unfair for parties to a complaint before the Financial Services Ombudsman to be later subjected to very similar litigation. The legislation has made any determination by the Financial Services Ombudsman subject only to an appeal. Absent a special reason of sufficient impact to nullify any potential abuse of process, it would be wrong for this Court to say that complaint could be re-litigated all over again."

25. It is not in doubt that *res judicata* does not prevent a party from bringing an action in which he seeks to set aside a judgment previously obtained on the ground that it was done fraudulently. Zürich's submissions acknowledge this jurisdiction, but point out the narrow and specific nature of this exceptional power. Citing *Jonesco v. Beard* [1930] AC 298, they argue that a very specific case would have to be made and the party seeking to set aside the judgment carries a heavy onus. In *LP v. MP (Appeal)* [2002] 1 I.R. 219, Murray J. said at page 228:

> "Accordingly at common law, the grounds upon which a final order may be impugned are limited in the first instance to correcting, so to speak, the final judgment to ensure that it accurately reflected the adjudication and intention of the court which made it and in the exercise of a wider and more fundamental jurisdiction to setting aside an order on the grounds that it had been obtained by fraud."

26. In this case, Zürich makes the submission that Mr. Crowley's original pleadings did not particularise or set out exactly any allegation of fraud. In the amended statement of claim of 1st July 2013, he expressly withdrew any allegation of fraud. In the result, this issue simply does not arise.

27. It is not necessary in this judgment to consider whether there is a general jurisdiction such as is mentioned by Charleton J. - over and above the wholly exceptional ground of fraud in securing the judgment - whereby the impact of *res judicata* may be averted. It would appear that Charleton J. placed primary reliance on the judgment of Hardiman J. in *Carroll v. Ryan* [2003] 1 I.R. 309 in which he discusses the rule in Henderson v. Henderson [1843] 3 Hare 100 and its application.

28. Mention should also be made of *Murphy v. Canada Life Assurance Ireland* [2016] IECA 128 in which Hogan J., now speaking for the Court of Appeal, cited Murray and the above statement of Kelly J. as the declarative statement of the law in this area, but he did caution that the rule in Murray may not be absolute.

29. It is relevant to note that in the instant case Hogan J. adopted the approach proposed by Charleton J in *O'Hara v. ACC Bank PLC.*

Conclusion

30. The High Court held that Mr. Crowley had invoked the jurisdiction of the FSO in dealing with the claim; that the Ombudsman had adjudicated upon the matter in a formal and final manner subject to appeal to the High Court under the statutory scheme provided for that purpose; that Mr. Crowley had not availed himself of the option of appealing and that the matter was in the circumstances the subject of *res judicata*. There were no excusing or extenuating circumstances that might have taken the case out of the rule of *res judicata* and so the claim had to fail.

31. In my judgment, the decision of the High Court that the proceedings now brought by Mr. Crowley against these Zürich defendants constitute an attempt to re-litigate a matter that is already the subject of a definitive and final determination is correct. There is no basis for setting aside the judgment and permitting these actions to proceed. Notwithstanding the complications mentioned above, they did not operate to the disadvantage of the plaintiff, Mr. Crowley, and cannot furnish a basis for his appeal.

32. I would, accordingly, dismiss the appeal. Mr. Crowley's associated motion must also fail.

33. I should mention by way of final comment that joining the second and third defendants in the proceedings was entirely unjustified on any basis in circumstances where Mr. Crowley's complaint was against the first defendant.