Neutral Citation: [2015] IEHC 85

THE HIGH COURT

[Record No.2014/169 MCA]

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

BETWEEN

DEREK O'REGAN

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 2nd February, 2015

Introduction

1. This is an appeal against a decision by the respondent, made after the holding of an oral hearing, not to uphold the appellant's complaint against Zurich Life Assurance ("Zurich").

2. The appellant's case was that he at all times believed that a mortgage protection policy taken out by himself and his wife included serious illness cover. They discovered for the first time that it did not when, in 2011, he was diagnosed with rheumatoid arthritis and sought to make a claim against the policy.

3. Although the appeal is brought in the name of Mr. O'Regan only, it is accepted by the respondent that it is also brought on behalf of his wife since the mortgage and the insurance policy were in joint names. They are therefore referred to as "the appellants" or, where appropriate, by name.

Background

4. Between 2005 and 2011 the appellants applied to Zurich for a number of mortgage-related insurance policies. Most, but not all, of the policies were applied for through a Mr. Pat Crowley, a financial consultant with Zurich. The appellants say that the policies always included cover for serious illness. It is their case that they were particularly conscious of the necessity for such cover because of certain issues in the family's medical history.

5. In January 2011, Mr. O'Regan was diagnosed with rheumatoid arthritis in his ankle and knee joints, which rendered him unable to pursue his normal occupation as a plasterer.

6. In August 2011, the appellant applied to Zurich pursuant to what he believed to be the terms of the then current insurance policy (dating from 2009) due to the diagnosis of rheumatoid arthritis. Zurich refused the plaintiff's claim on the basis that the policy in force did not include serious illness cover. According to the appellants, this was the first time that they realised that their insurance policy did not contain serious illness cover. It transpired that the most recent previous policy, entered into in 2008, also did not cover serious illness.

7. In September 2011, the plaintiff appealed the decision of Zurich to the respondent. In the Financial Services Ombudsman complaint form dated 22nd September 2011, Mr. O'Regan summarised his complaint as follows:

> *"Our serious illness cover was taken out without our consent in 2008. We never got any paper work regarding this situation. We were insured since 2005 for serious illness why would we stop that premium? We just want fair play, what was owed to us."*

8. Mr. O'Regan wrote a number of letters outlining the various issues he had with Zurich's refusal of his claim. Mr. O'Regan and his wife had serious illness cover from 2005 to 2007 at €88 per month. In 2007 they re-mortgaged the family home, which involved the taking out of a new policy. Thereafter they paid €83.23 per month for the new policy, which included serious illness cover. According to the appellants, this policy lapsed temporarily and they "reinstated" it in 2008 for €80.70 per month. In 2009, they say, they were offered new terms which would bring the cost of the premium down if they excluded rare diseases. They claim they were told "everything else stays the same". They assumed they were paying for serious illness cover all along and say, therefore, that Zurich removed it without their consent.

9. In asserting that the new policy contained serious illness cover, reference is made by the plaintiffs as to the comparison of the price of the premium paid in the 2007 policy containing serious illness cover and the premium in the 2008 policy, a difference of around €3.

10. Mr. O'Regan emphasises the importance of serious illness cover to their family in light of the family's medical history of cancer and arthritis. Mr. O'Regan claims that Mr. Crowley knew that his brother had died of cancer in 2002 and, therefore, knew that he wanted this particular cover. He also says that any errors in relation to medical questions on the form are Mr. Crowley's fault, as he filled in the form after being given the relevant information. Mr. Crowley's evidence was that he was never made aware of the relevant medical history. He says that the serious illness cover was not included in 2008 or 2009 for reasons of affordability and that the appellants were fully informed as to what their choices were.

11. Zurich has at all times maintained that there was never an option of dropping "rare diseases", or any diseases, from the serious illness cover. A customer either opted for the cover or did not. Mr. Crowley's evidence was to the same effect, and he denied ever having made suggestions to the contrary.

12. The appellants say that Mr. Crowley did not explain the changes to their policy and that they never received a copy of the full documentation relating to the new policy. They therefore claim that they were deprived of information relating to the cover they had taken out, and denied the opportunity to identify any errors and change the policy.

13. Zurich's position throughout has been reiterated that the in-force policy did not include serious illness cover because it was not applied for on the form that the appellants completed. Zurich also asserted that a letter was sent to the appellants on 27th January, 2009, enclosing a policy certificate, policy document and disclosure notes. They say they are satisfied that the policy operated in accordance with its terms and conditions, that the details of the policies were correct and in accordance with the signed application forms and confirmed in the various documents issued to them.

First finding of Financial Services Ombudsman
14. Following an investigation carried out by way of correspondence with the parties, the respondent made a finding on 24th July, 2012 that the complaint was not substantiated.

15. On the 25th February, 2013 this finding was appealed to the High Court. On the 5th March, 2013 the High Court (Feeney J.) remitted the matter to the respondent on the basis that there should have been an oral hearing. The basis for the ruling was that, having reviewed the correspondence and submissions, Feeney J. was satisfied that there was a clear conflict between the parties as to what information the appellant and his wife had given Mr. Crowley regarding health issues in their family, and what information he had given them about serious illness cover. Mr. Crowley had said that he was never made aware of the history of cancer and had not made a recommendation that any benefit should be removed. His account of events focussed on the appellant's need to reduce their premium and he was "satisfied" that they were aware that they were not applying for serious illness cover. The insurance company relied on Mr. Crowley's account. There was also an issue as to whether the appellant had received the documentation about the policy. Feeney J. held that in the circumstances the nature and extent of the conflict of evidence was such that an oral hearing would have been necessary.

16. An oral hearing was duly held on the 17th December, 2013 and the respondent gave his decision on the 12th February, 2014.

Test applicable to this appeal
17. The respondent submits, in the normal way, that the applicable test is that set out in *Ulster Bank v Financial Services Ombudsman & Ors* [2006] IEHC 323:

> *"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."*

18. In *Governey v Financial Services Ombudsman* [2013] IEHC 403, at para 5.7, Hedigan J stated that:

> *"The Court must not consider complaints about process or merits in isolation but must consider the adjudicative process as a whole. The Court must decide whether there has been a serious and significant error or series of such errors which vitiate the decision. The Court must adopt a deferential stance to the office of the FSO bearing in mind that it is exercising its expert and specialist knowledge in the financial services industry. It is the assessor of evidence and the determiner of facts. This Court can only intervene if it comes to the conclusion that on findings of fact he had no relevant evidence before him upon which he could reasonably conclude as he did. This Court does not sit as a court of appeal on the facts. It may not assess the evidence and interpose its own judgment for that of the expert body charged by the Oireachtas with doing so. This Court has neither the jurisdiction nor the competence to do so."*

19. It is clear, however, from the case-law that the deference to be shown to the respondent is confined to his area of expertise and specialist knowledge. It does not extend to questions of law, such as the legal meaning of a document. Nor does it apply where the issue is one of fair procedures or the propriety of the adjudicative process – see *Hyde v. FSO* [2011] IEHC 422 and *Lyons and Murray v. FSO* [2011] IEHC 454.

20. An appeal against a finding of the respondent is a statutory appeal. Unlike many such appeals it is not confined to a point of law. The appeal in this case is against a finding made after an oral hearing, conducted because of a conflict on the facts which could not otherwise be determined. The appeal was not a *de novo* hearing, but a review of the respondent's findings, so it is perhaps necessary to spell out the approach taken by the court to the respondent's assessment of the evidence.

21. In my view, where the respondent has made a finding on foot of an oral hearing, the court should continue to defer to the respondent's views on evidence relating to matters within his area of expertise. Where, however, the conflict of evidence relates to factual, non-technical matters, such as whether or not particular facts were communicated or particular assurances were given, it seems to me to be appropriate for the court to consider the case in accordance with the principles set out by the Supreme Court in *Hay v. O'Grady* [1992] I.R. 210 dealing with the jurisdiction of that court dealing with an appeal from the High Court. The principles are listed in the judgment of McCarthy J. at p. 217 as follows:

> *(1) "An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*
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> *(2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them.*
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> *(3) Inferences of fact are drawn in most trials; it said that an appellate court is in as good a position as the trial court to draw inferences of fact (see the judgment of Holmes L.J. in 'Gairloch', SS Aberdeen Glendine Steamship Co. v. Macken [1899] 2 I.R. 1, cited by O'Higgins C.J. in The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at p.339). I do not accept that this is necessarily so. It may be that the demeanour of a witness in giving evidence will, in itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends on oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.*

(4) A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference…If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trail judge…was erroneous, the order will be varied accordingly.

(5) These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows."

22. In *Schuit v Mylotte* [2010] IESC 56 O'Donnell J. observed that

"The test in Hay v O'Grady is derived from the fact that an appellate Court which does not hear the evidence must give considerable deference to a trial Court's assessment of the cogency and credibility of evidence given to it. This follows from the different functions of a trial court and appeal court. As a result, the question for a court on appeal is essentially a matter of logic: was there evidence, whatever its apparent credibility or cogency, upon which the trial judge could come to the conclusion he or she did."

23. In *Doyle v Banville* [2012] IESC 25 Clarke J. stressed the necessity for the trial judge to engage with the key elements of the case made by both sides and to explain why one side is preferred to the other. He continued:

"In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.

…it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this court to seek to second guess the trial judge's view."

The analogy with appeals from High Court witness actions is not perfect. It is of course the case that an oral hearing before the respondent is an inherently more flexible procedure than a High Court action. Part VIIB of the Central Bank Act, 1942 (as amended by the Central Bank and Financial Services Authority of Ireland Act, 2004) and in particular section 57BB(c) of the Act, requires the respondent to deal with complaints in an expeditious and informal manner. Section 57BK(1) of the Act requires him 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."* For example, the respondent must have due regard to the rules of evidence but is not bound by them. This court must bear that distinction in mind when reviewing his decision.

Oral hearing and second finding of the Financial Services Ombudsman

24. The oral hearing took place on the 17th December, 2013 and the transcript was available as an exhibit before this Court.

25. The appellants were legally represented at the oral hearing. The case made by them was that they had taken out a number of policies with Zurich Life Assurance plc, through Mr Pat Crowley, beginning in 2004. It is common case that in the early years their policies included mortgage protection, life assurance and serious illness cover and they said that they had believed that this was continued at all relevant times. In 2011, Mr. O'Regan was diagnosed with rheumatoid arthritis and made a claim on the policy. At that point he was informed that there was no serious illness cover.

26. Having regard to the principles of law discussed above, the evidence will be dealt with mainly by reference to the summary given in the respondent's written decision.

27. It is clear from the evidence that it was Mrs. O'Regan who had most, if not all, of the dealings with Mr. Crowley. She gave evidence in relation to the inception of the most recent policy, in January 2009. She said that at the end of 2008 Mr. Crowley rang her and asked her did she know that the previous insurance policy was about to lapse. She said she did, but that she was pregnant and they were both out of work. She told him that they were paying interest only on the mortgage at that point. Mr. Crowley responded that in those circumstances they should not be paying for full mortgage cover. He said that he would see if he could "take it down" for them.

28. Mrs. O'Regan said that she went to see Mr. Crowley, who had an application form ready for her. She signed it, took it home for her husband to sign and brought it straight back to Mr. Crowley. As far as she knew, the only thing that was changing was that the payments would come down, because they did not need full cover for the mortgage while paying interest only. She believed, arising from her conversation with Mr. Crowley, that "everything else stays the same".

29. Mrs. O'Regan's counsel asked her to explain the fact that the policy entered into in the previous year did not have serious illness cover. She said that the family had been under financial pressure at that stage also and she had told Mr. Crowley that they could not afford the policy. He had said to her that he could try and bring it down, that there were "diseases that you would never hear of or you might never, ever get". She said that there was nothing said about serious illness cover. She believed that Mr. Crowley knew that they needed it because of her husband's family history - his brother had died of cancer and there was arthritis in the family. She was adamant that Mr. Crowley knew this.

30. When asked about the January 2009 policy, both of the appellants said that they had never received any accompanying documentation explaining what cover was in place.

31. Mrs. O'Regan said that Mr. Crowley filled in the answers to the health questions on all the application forms, having been given the relevant information. Mr. O'Regan's evidence was that he first met Mr. Crowley in 2005 and gave him his family's medical background at that time. He met him again in 2011 when he confronted him over the lack of cover.

32. The last policy that did, undoubtedly, have serious illness cover had cost them €83.23 per month. The latest policy was €80 per month. The appellants assumed that this figure meant that they had serious illness cover, minus the "rare diseases".

33. Both of the appellants accepted that there had been a period of several months in 2007 up to February 2008 when they had allowed a policy to lapse for non-payment. They also accepted that they had both signed the application forms in 2008 and 2009 without reading them – this, they said, was because they trusted Mr. Crowley.

34. Mr. Crowley said that the first policy he sold to the appellants was in 2005, and that he dealt with Mrs. O'Regan only. He never met Mr. O'Regan until 2011. He said that he went through all of the questions on the application form with Mrs. O'Regan each time and entered the information she gave him. He advised them as to their options each time – for example, whether it was more cost effective to reinstate a lapsed policy, by paying the back premiums, or to take out a new one. He said that it would not have been possible to give them a quotation without advising as to what was covered. He maintained that he was never told about Mr. O'Regan's brother, and never said that it was possible to reduce the premium for serious illness cover by dropping "rare diseases".

35. Mr. Paul Murphy, Zurich's Operations Manager, gave evidence relating to the automated system for sending out policy documentation.

The respondent's finding
36. In his written decision, the respondent referred to the case made by each side and made a series of findings in relation to the evidence. Below is a summary of the evidence as set out by him, with his findings of fact on each issue.

37. **The previous policies**

> In October 2005 two policies were taken out through Mr. Crowley. One (12049871) was a mortgage protection policy taken out by Mrs. O'Regan on her own life (to cover a re-mortgage of the house, which was in her sole name at that stage). The other (12071126) was a term protection policy for life and serious illness cover for both Mr. and Mrs. O'Regan. These policies lapsed for non-payment of premium in March and April 2007.
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> In April 2007 the O'Regans applied for a mortgage protection policy through an independent broker. This policy never came into effect.
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> In July 2007 the O'Regans applied through the same independent broker for a guaranteed term protection policy (12904448) for life and serious illness cover on both of their lives. This policy lapsed in September 2007.
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> In March 2008 the O'Regans applied through Mr. Crowley for two separate policies. One (13416652) was a term protection policy for life cover on both of their lives. The other (13416367) was a mortgage protection policy for life cover only on both of their lives, to protect an outstanding mortgage. These policies lapsed in December 2008.
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> In February 2009 the O'Regans applied through Mr. Crowley for a term protection policy (13947298). The document signed by both of them requested life cover only.

38. Having reviewed the history of these policies, the respondent found that in March 2008 and in February 2009 the appellants were not reinstating old policies but taking out new ones. Reinstatement would have involved the payment of back premiums. In each application form they specified the cover they wished to put in place.

39. **Discussions concerning the cover required**

> The respondent noted the evidence of the O'Regans that their understanding of Mr. Crowley's advice was that cover was only being removed for very rare diseases, in order to bring down the cost of the cover, and that Mr Crowley wrongfully removed serious illness cover without their knowledge or consent.
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> He noted Mr. Crowley's evidence that it was not possible to remove some illnesses or diseases and retain cover for others, under a guaranteed term protection policy. Mr. Crowley had said that he did not discuss diseases, just serious illness, and that the policy with life cover only was chosen by the O'Regans in order to reduce the premium.
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> The respondent then referred to the documentary evidence. He noted that the application form for the guaranteed term protection policy in February 2008 detailed the provision for life cover. The section below that, entitled "Serious Illness Sum Insured" had a line drawn through it. The other application signed at the same time also detailed the provision for life cover. The percentage of serious illness cover required was marked as "none". It was noted that it was accepted that Mr. Crowley had filled in the forms but that his evidence was that he asked the questions and filled in the answers provided to him. Both of the O'Regans had said that they signed the forms without reading them, because they trusted him and he had not said that he was taking them off serious illness cover.
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> Each of the application forms contained a "Declarations" section. In each, it was confirmed that the policy being applied for did not replace an existing policy. There was also a declaration that the customer had read the entire form and was satisfied that all answers were true and complete.

40. The respondent was satisfied that the O'Regans had signed the forms, thereby confirming the terms of the declaration and the content of the form. He accepted that a discussion had taken place between Mrs. O'Regan and Mr. Pat Crowley in relation to cover for illnesses. However he considered it most unlikely that Mr. Crowley had led them to believe that they could reduce the cost of the policy by removing "rare diseases" from cover while leaving serious illness cover in place. The application forms and policy documents did not reflect such an option and the company had confirmed that it did not provide it. He referred to the O'Regans evidence as to their trust in Mr. Crowley and said

> *"Irrespective of this, there was an onus on the Complainants to ensure that they understood the nature of the cover that they were applying for and to ensure that the cover they wanted to put in place was reflected in the application forms with which they were provided on 12 February 2008, which the Second Complainant took away for her husband to sign, and which were very clear in stating that no serious illness cover was to apply to these policies…*
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> *…in circumstances where the Complainants have acknowledged that they did not read the contents of the Application Forms they had signed in February 2008, it is very difficult for the Complainants to establish now that the Provider acted without their knowledge or consent in putting in place a policy with no serious illness cover, or failed to provide them with accurate information about the type of cover which was put in place."*

41. **The policy documentation**

The respondent then considered the conflict of evidence relating to the provision of documentation in both 2008 and 2009. The O'Regans said that in 2008 they received the policy booklets in an envelope with a handwritten address, with no covering letters, policy schedules or certificates. They said that in 2009 they received no policy documentation at all.

Zurich provided copies of the documentation which it said had been issued at the relevant times. The company's operations manager also gave evidence about the process by which documentation was sent out to customers. Specific reference was made to evidence that when a policy certificate was produced, a covering letter would also issue. Staff in the assembly area would place these in an envelope with the policy booklet and the disclosure notes in such a way that the typed address on the top of the letter would appear in the envelope window. Without the covering letter, the person in the assembly area would not have an address to post the envelope to.

42. The respondent found that having regard to this evidence he was reasonably satisfied that the policy documentation had been sent in the normal way.

43. **Content of the policy documents**

The respondent then considered the content of the policy documentation. In relation to each of the 2008 policies, the certificates made no mention of serious illness cover. The booklets, in the sections dealing with serious illness, stated that the section did not apply unless a "serious illness sum insured" was shown on the certificate.

The cover letter in each case informed the customer that if the policy was not to their satisfaction they could cancel it within 30 days and have any payment refunded.

44. The respondent found that it was clear from the application form and policy certificates issued in February 2008 that serious illness cover was not provided by either of the two policies. He further found that a "cooling off" period had been provided.

45. **The level of premium payable**

It was noted that the O'Regans attached significance to the fact that they were paying a premium for the 2008 policies that was only slightly lower than that previously paid by them, and that they said that they had therefore assumed that serious illness cover was in place. Zurich had said that this comparison was being made between the two 2008 policies combined, neither of which carried serious illness cover, and a single earlier policy that had carried such cover.

46. The respondent found that the comparison was inappropriate, as it was not comparing like with like, and that it was not a reliable way to assess or confirm the nature of cover in place.

47. **The 2009 policy**

The respondent noted that the 2008 policies had lapsed for non-payment of premium in December 2008, and that at that time the O'Regans were not working, were expecting another child and had changed their mortgage structure to interest only. The policy recommended to them by Mr. Crowley was a guaranteed term protection policy on a dual life basis with life cover of €200,000 on each life assured.

Mr. Crowley had explained this at the hearing as being necessary because they were paying interest only on the mortgage loan and the capital sum was therefore not decreasing.

Serious illness was not covered by the policy. The company said that this was because it was not asked for. The O'Regans said that they were unaware that it was not covered and that Mr. Crowley had not explained this "massive change" to their policy.

The respondent noted that page 2 of the 2009 application form referred to the fact that there was life cover of €200,000 in respect of each of the complainants but €0 in respect of "additional benefits or options". There was a declaration section, signed by Mr. and Mrs. O'Regan, by virtue of which they declared that they had read the entire application form and were satisfied that the answers and statements made in it were true and complete. They acknowledged at the hearing that they had not read it.

48. **Mr. Crowley's state of knowledge**

The O'Regans had emphasised the significance to them of serious illness cover in light of the family's medical history of cancer and arthritis and especially in light of the tragic death of Mr. O'Regan's brother in 2002. They stated that Mr. Crowley was aware of this. Mr. O'Regan said that he had told him in 2005 when he first met him.

Mr. Crowley's evidence was that Mrs. O'Regan had always been his point of contact and that he had not met Mr. O'Regan until September 2011, when the complaint was made. He said that at no stage prior to that had he been made aware of the history of cancer in Mr. O'Regan's family.

The respondent noted that the application form signed by the O'Regans in 2005 had asked whether any close family member had suffered from any of a list of specified illnesses, including cancer. This had been answered "No". The declaration section of the form was the same as those referred to above.

It was also noted that the application forms signed in February and March 2007 did give the answer "Yes" to that question, with the additional information as to the death of Mr. O'Regan's brother. However, this application had not been made through Mr. Crowley. The next time the O'Regans dealt with Mr. Crowley, in February 2008, the answer to the question was again "No". Zurich said that Mr. Crowley would not have had access to forms transmitted through an independent broker.

49. The respondent found that the documentary evidence did not support the contention that Mr. Crowley had been made aware of the family history of cancer as early as 2005.

50. **Respondent's conclusion**

> The respondent found that the documentary and oral evidence before him did not support the complaint that the provider had wrongfully removed serious illness cover from their insurance cover without their knowledge or consent. The complaint was accordingly not upheld.

Appeal to the High Court

51. Mr. O'Regan, who is now without legal representation, continues to maintain that he and his wife were misled in relation to the extent of the cover they were getting. In general, he makes the case that they should have been believed by the respondent. He also raises a new issue – he says that the paperwork has been "doctored" since the original complaint was made, in that, firstly, the medical definitions in the cover requirements for serious illness have been altered without medical reason. Secondly, it is said that there are some inconsistencies in the copy documents put before the respondent, especially before the first decision.

52. The respondent points to the fact that there was no clear pattern established before the 2009 policy – earlier policies were sometimes entered into with Mr. Crowley, sometimes with an independent broker; some covered serious illness, some did not.

53. With regard to the allegation of "doctoring", it is submitted that this argument was not made at the oral hearing by the appellants' legal representatives. In any event, it is submitted that there is an explanation for the inconsistencies and that by the time of the oral hearing, every party was using the same, comprehensive set of complete documents. The change in the medical definition would, it is further submitted, be relevant only if it was accepted that there was cover for serious illness in place.

Discussion and conclusions

54. It is impossible not to feel the greatest sympathy for the misfortunes that have befallen the appellants. The illness that has beset Mr. O'Regan has left him unable, despite his best efforts, to work. He and his wife have the added misfortune that one of their young children has been diagnosed with a related illness.

55. It should probably be noted that the appellants must be considered to have told the truth to Zurich in relation to Mr. O'Regan's brother in 2007. The fact that this application was made through an independent broker does not change the fact that the application was being made to Zurich. There would be no conceivable reason why the appellants might be thought to have attempted to conceal the relevant information in subsequent years.

56. However, this does not dispose of the central problems in the appellants' case. Firstly, there was evidence which the respondent found to be credible, that the discussion between Mr. Crowley and Mrs. O'Regan was about affordability of premiums rather than the need for serious illness cover, and, secondly, the admission by both appellants that they never read the documents before signing them.

57. Looking at the case, as I must, by reference to the content of the written decision, the transcript of the hearing and the legal principles discussed above, I am constrained to find that there is no serious or significant error in the respondent's approach to the case, the handling of the oral hearing, the assessment of the case or the drawing of inferences from the evidence. It is not, therefore, possible as a matter of law for this court to disagree with his conclusions.