Neutral Citation: [2016] IEHC 560

THE HIGH COURT

Record No. 2015/112 MCA

BETWEEN

JANET RICHARDSON

APPELLANT

AND

FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

IRISH LIFE ASSURANCE PLC

NOTICE PARTY

JUDGMENT of Mr. Justice Hunt delivered on the 14th day of July, 2016

1. On or about 18th July, 1996, the appellant and her late husband, Patrick Richardson, applied to the notice party (hereinafter referred to as "*Irish Life*") for life insurance cover in respect of both of their lives. The proposal form completed by Mr. and Mrs. Richardson contained the following questions:-

> *"4. Have you in the last five years suffered from any medical condition, illness or injury requiring medical or psychiatric attention? (Colds, influenza and minor limb injuries need not be disclosed)*
>
> *5. Have you ever undergone or been advised to undergo any special investigations, blood or laboratory tests or ever had a surgical operation?"*

Each of the applicants answered "*no*" in respect of each of these questions.

2. Irish Life provided life cover from 1 August 1996 under a policy issued to Mr. and Mrs. Richardson on foot of acceptance of this proposal form. Unfortunately, Mr. Richardson died on 13th June, 2013, and in those sad circumstances, Mrs. Richardson applied to Irish Life for payment of the sum assured under the policy.

3. By letter dated 10th September, 2013, Irish Life wrote to Mrs. Richardson indicating that they had completed their investigations into the death claim submitted in respect of the late Mr. Richardson and informed her that they were not in a position to admit the claim. The reason given was that investigation of the claim revealed that the deceased had a medical history which he did not disclose to Irish Life in the proposal form. The points of refusal were set out as follows:-

> "• *On 28th September, 1991, Mr. Richardson was admitted to St. Brendan's Hospital for treatment of alcohol excess.*
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> • *On 7th June, 1994, Mr. Richardson was reviewed in the Mater Hospital (Chest Pain Clinic) for assessment of chest pain. It was noted at this review his cholesterol was elevated at 7.2, his sister had had a heart attack at 46, and he was a smoker. His AST, ALT and MCV were mildly elevated. Mr. Richardson was referred to a dietician for his cholesterol.*
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> • *On 27th April, 2003, Mr. Richardson's blood pressure was noted to be 150/100 and he had chest pains and mild exertion. He was treated with GTN spray. His liver function tests were noted to be abnormal."*

The letter also asserted that had the full medical details documented therein been disclosed to Irish Life before the policy was incepted on 1st August, 1996, as they should have been, Irish Life would not have been in a position to offer cover in respect of the late Mr. Richardson. The letter drew attention to the following policy condition (paragraph 9(a)):-

> *"Application - If any question contained in the Application form has not been fully, correctly and truly answered, or if any answer to any question in the Application form is misleading, or if there is any misrepresentation or non-disclosure concerning the health, habits or occupation of the Life or Lives assured, the Company shall be entitled to avoid the policy, and there upon all Premiums paid and all rights under the Policy shall be forfeited to the Company."*

Notwithstanding the foregoing, Irish Life indicated that they were prepared to refund payments made by Mr. and Mrs. Richardson from the outset of the policy. The following note appears in the margin of the page containing the relevant questions in the proposal form as part of instructions to the proposer for completion of the form:-

> *"Disclosure of Material Facts*
>
> *Please note carefully failure to disclose all material facts could render your contract void. A material fact is one which an insurer would regard as likely to influence the assessment and acceptance of a proposal for insurance and is not confined to matters raised in the questions on this form, or the answers to them. If you are in doubt as to whether certain facts are material, such facts should be disclosed. Any information not fully dealt with in the answers to the questions should be inserted in the section headed 'further medical evidence'."*

4. Mrs. Richardson instituted an appeal to Irish Life against this decision by letter dated 29th October, 2013. This appeal was rejected on 18th June, 2014, by way of a letter which essentially confirmed the basis of the previous decision to refuse cover, namely that there had been a material non-disclosure of facts which, if known, would have had the result that the policy would not have been issued. Having addressed the various points made by Mrs. Richardson in her appeal, the letter also advised her that if she remained dissatisfied with the outcome, she could refer the matter to the respondent (hereinafter referred to as "*the Ombudsman*") for further consideration.

5. Mrs. Richardson was obviously unhappy with Irish Life's decision and exercised her option to make a complaint to the Ombudsman. The Ombudsman commenced investigation of Mrs. Richardson's complaint and on 8th December, 2014 sent a formal summary of

complaint to Irish Life, raising certain questions and seeking documentary evidence relating to the complaint. The basis of Mrs. Richardson's complaint in relation to the decision of Irish Life may be summarised as follows:-

> (a) Although Mr. Richardson did attend with his general practitioner in September 1991, after "*a weekend of enjoyment which did involve drinking alcohol*", he did not require additional treatment and never sought or received any thereafter.
>
> (b) While the deceased did attend at the Mater Hospital in March 1994, with chest pains, he did so after receiving a kick to the chest from a horse. Mrs. Richardson advised that this was the sole source of his chest pain.
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> (c) Mr. Richardson did not disclose the above information because he would not have considered it relevant to the application, and Mrs. Richardson, therefore submitted that there was no question of the deceased having sought to mislead Irish Life.

6. The complaint was duly investigated by the Ombudsman and a finding issued on 11th March, 2015, whereby Mrs. Richardson's complaint was not upheld. The Ombudsman concluded, in my view correctly, that the case did not involve conflicts of fact such as to require the holding of an oral hearing into the matter. In essence, the Ombudsman held that, having regard to the history disclosed by the medical records of the late Mr. Richardson, he ought to have answered "*yes*" instead of "*no*" to questions 4 and 5 set out above. The finding referred to the proposal form declaration and the relevant terms and conditions of the policy, and found that the failure to answer those questions correctly amounted to a breach of the proposer's duty to make full disclosure which was neither insignificant nor immaterial in the light of the medical history. Consequently, Irish Life was entitled to treat the policy effected on foot of the proposal as being void *ab initio*. Mrs. Richardson appealed against this finding by notice of motion dated 1st April, 2015.

7. The grounds of Mrs. Richardson's appeal are set out at paras. 29 to 31 inclusive of her grounding affidavit of 1st April, 2015. These may be summarised as being that the refusal to indemnify was groundless and illogical, on the basis that her husband did not mislead or untruthfully withhold any medical information in his proposal, that the incidents alluded to in the medical history were trivial, and that they did not result in any particular diagnosis or further follow up treatment. In addition, Mrs. Richardson made a helpful written submission and a very polite and clear oral presentation at the hearing of this matter. Mr. Paul McDermott, S.C., appeared on behalf of the Ombudsman and Mr. Brian Conroy appeared on behalf of Irish Life. It should be recorded that their treatment of Mrs. Richardson as a self represented litigant was as helpful and considerate as it could be consistent with the proper discharge of their duties to their respective clients and to the Court. In essence, they both submitted that there was no serious or reviewable error on the part of the Ombudsman, and that Irish Life had acted within its legal rights in refusing to provide indemnity under the policy in the circumstances.

8. The general purpose of the system of complaints to the Ombudsman is to keep the process out of the courts, so far as is possible. Therefore, in reviewing decisions of the Ombudsman in this field, it is not for the Court to agree or disagree with a finding so long as it is reasonably based on the available evidence. Accompanying this approach is a degree of curial deference to the Ombudsman on matters of expertise within the financial field, although the need for such deference may be less pressing in cases where the alleged error is one of law, rather than an error arising from a finding on a matter within the relevant expertise of the Ombudsman. Consequently, it appears that my task does not involve a wholesale reconsideration of the matter before the Ombudsman, but rather an appraisal as to whether, on an examination of the adjudicative process as a whole, the finding in question was vitiated by a serious and significant error, or a series of such errors.

9. There is no question but that the process of investigation in this case was carried out in a proper and appropriate manner. Furthermore, as the basic and relevant facts are not in issue, it cannot be said that the Ombudsman was in error in fact finding, or in drawing inferences from those facts. Therefore, it appears to me that the issue on this appeal is confined to assessing whether the Ombudsman committed a serious error by finding that Irish Life was entitled to repudiate the policy, in circumstances where there was no suggestion that the answers to the questions on the proposal form were deliberately dishonest or deceitful, and where the issues underlying the repudiation could be regarded as relatively trivial in nature, as well as significantly distant in time from the death giving rise to the claim on the policy.

10. Consequently, my review is limited to the application by the Ombudsman of the relevant principles of contract or insurance law to the facts set out above. The precise legal test applied by the Ombudsman in finding that Irish Life was entitled to repudiate the policy was not expressly set out in the body of the finding, although this is not essential, as it may be assumed that the law relating to disclosure in insurance contracts is a matter falling squarely within the specialist knowledge and expertise of the Ombudsman.

11. It is well established that the test of materiality for the purpose of non-disclosure in insurance law is that "*every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk": see Chariot Inns v. Assicurazioni Generali* [1981] I.R. 199. A policy may be avoided if the insurer proves that there has been misrepresentation or concealment of a material fact. If it is proved that the fact in question is material in this objective sense, the subjective state of mind of the actual insurer is irrelevant. It also seems that the subjective intentions of the proposer are also irrelevant. Accordingly, it is not generally possible or necessary to examine what the insurer would, in fact, have done had he possessed the information not disclosed. Therefore, the test of materiality appears to be purely objective, and a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance and if so, at what premium and on what conditions.

12. Reference was also made in this context to the decision of Clarke J. (then a High Court judge) in *Coleman v. New Ireland Assurance plc trading as Bank of Ireland Life*, in a judgment delivered on 12th June, 2009. In that case, Clarke J. expressed the law in this area as follows:-

> *"The requirement that a proposer for a policy of insurance must make full disclosure is more than well settled. Thus, an insurer can avoid a policy of insurance where either:-*
>
> *A. The insured fails to disclose a material fact; or*
>
> *B. The proposer makes a positive misrepresentation in the course of the negotiations.*
>
> *Furthermore, an insurer may be entitled to avoid a contract of insurance where there has been a breach by the proposer of a term of the contract of insurance warranting that a certain set of facts is the case. Whether, and to what extent, there has been any such warranty is a matter of construction of both the insurance policy itself together with connected documents such as any proposal form."*

13. Clarke J. then referred to the decision of the Supreme Court in *Keating v. New Ireland Insurance Company* [1990] 2 I.R. 383 and stated as follows:-

> *"So far as a failure to disclose is concerned it seems clear, therefore, that a party can only be subject to having his or her policy of insurance voided by an insurance company if there is a failure to disclose a material fact of which the proposer was aware (or perhaps in certain circumstances might not have been aware by virtue of wilful ignorance)."*

14. Clarke J. then further stated as follows:-

> *"Secondly, insofar as the answers to questions raised in a proposal form is concerned, a party will only be exposed to the risk of the contract of insurance being voided where the party fails to answer such questions to the best of the party's ability and truthfully. This would be so even where an answer is inaccurate as a result of ignorance or even, in the words of McCarthy J. [in Keating], the 'obtuseness which may be sometimes due to a mental block on matters affecting ones health'.*
>
> *It should be noted that there is nothing in the terms of the proposal form in this case which would cause a deviation from those general principles. The declaration with which the proposal form ends (in para. A), declares that the proposer has disclosed all relevant facts and that all statements made on the application form are true and complete 'to the best of my knowledge'*
>
> *It is clear, therefore, that any material non-disclosure or any materially inaccurate answer to a question on the proposal form are to be judged by reference to the knowledge of the proposer, and whether answers given were to the best of the proposer's ability and truthful."*

15. At first glance, the similarity of the factual situation and the eventual outcome of *Coleman* appear to lend support to the position of Mrs. Richardson. On reflection however, I do not analyse this decision as modifying the general principles of insurance law set out above. It seems to me that the proper interpretation of the decision of Clarke J. is that the wording of the proposal form requiring answers to be given to the best of the knowledge of the proposer permitted a subjective examination of the proposer's state of mind at the time when she responded to the questions in issue in that case. Without going into the details of *Coleman*, it is clear that the plaintiff had failed to disclose facts that would have been objectively relevant to a prudent insurer assessing the risk in that case. However, Clarke J. concluded that as he was satisfied as a fact that the plaintiff had put the entire incident which was not disclosed out of her mind, on the basis that it did not appear to have been significant and her symptoms had not recurred, he was therefore satisfied that as of the date of the proposal the plaintiff had answered the questions raised truthfully and to the best of her knowledge as it then was. As it was not a case of wilful ignorance or deliberate or culpable forgetfulness, Clarke J. concluded that the insurer was not entitled to void the policy on the basis of material non-disclosure.

16. That case is not an authority for the proposition that the subjective attitude of the proposer in disclosing information is always relevant when assessing the materiality of an undisclosed fact. The subjective state of mind of the proposer was relevant in that case because of the manner in which the proposal form was drafted, which limited the obligation on the proposer to answer the questions posed to the best of her ability. I accept that the non-disclosure by Mr. Richardson was not wilful, deliberate or culpable, but the wording of the proposal form in this case is not qualified in the same manner as it was in *Coleman*. As noted above, a material fact was carefully and correctly defined in the proposal form and the obligation placed on the proposer was to answer questions in the form "*fully, correctly and truly*". This obligation is not qualified by reference to it being discharged according to the best of the proposer's knowledge and had it been so, I might well have taken a different view as to the outcome of this case. There is no reason to think that the late Mr. Richardson told deliberate untruths in filling out his proposal form, and in the circumstances he could have been forgiven for omitting the incidents referred to in his medical history. Nonetheless, the fact remains that the questions on the form, which were not ambiguous or open-ended, were not answered fully and/or correctly. As I am satisfied that the material not disclosed would have operated on the mind of a reasonably prudent insurer assessing the risk in this case, I am, therefore, compelled to the view that the finding of the Ombudsman was correct and not tainted by any serious error as to the applicable law.

17. Accordingly, as there is no legal basis upon which Mrs. Richardson's appeal can succeed, it must be dismissed. I do so with considerable regret, due to natural sympathy for her on the loss of her husband and on the rejection of her claim. Regrettably this sentiment cannot affect the outcome of the litigation.