**THE COURT OF APPEAL**

**2015, No. 288CA**

**Peart J.**
**Hogan J.**
**Murphy J.**

**IN THE MATTER OF S. 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 Mr. Justice Gerard Hogan delivered on the 7th day of June 2016**

1. Where the Financial Services Ombudsman holds an oral hearing in respect of a particular complaint and makes certain findings of fact, to what extent is the High Court bound by such findings where a subsequent appeal is taken from that decision to that Court pursuant to s. 57CL(1) of the Central Bank Act 1942 (as inserted by s. 16 of the Central Bank of Ireland and the Financial Services Authority of Ireland Act 2004)("the 1942 Act")? That is the central question which arises upon this appeal by the appellant, Mr. O'Regan, from the decision of the High Court (O'Malley J.) delivered on 2nd February 2015: see *O'Regan v. Financial Services Ombudsman* [2015] IEHC 85. The issue arises in the following fashion.

2. On various dates between 2004 and 2011 the appellant, Mr. Derek O'Regan and his wife, Ms. Sonia O'Regan, applied to Zurich Life ("Zurich") for a number of mortgage-related insurance policies. While Mr. O'Regan is the sole appellant, given that Ms. O'Regan was, as will be seen, also actively involved in these applications, I propose simply for reasons of convenience to refer to them both as "appellants."

3. 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. Mr. O'Regan was at the time a self-employed plasterer.

4. In January 2011, Mr. O'Regan was diagnosed with rheumatoid arthritis in his ankle and knee joints, which rendered him unable to pursue his occupation as a plasterer. Following this diagnosis Mr. O'Regan applied to Zurich in August 2011 pursuant to what he believed to be the terms of the then current insurance policy (which had dated from 2009). Zurich refused to pay out on this 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.

5. In September 2011, the plaintiff appealed the decision of Zurich to the respondent, the Financial Services Ombudsman ("FSO"). In the FSO 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."

6. 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.

7. The appellants maintain that in 2009 they were offered new terms by Zurich which would have had the effect of bringing the cost of the premium down if certain rare diseases were excluded. They insist that they were told "everything else stays the same". They accordingly assumed they were paying for serious illness cover all along and say, therefore, that Zurich removed it without their consent. One of the factors which, the appellants say, reassured them in this conclusion was the fact that the premium which was now to be paid for the "reinstated" policy was more or less the same as with the old policy.

8. The appellants further emphasised 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 maintained that any errors in relation to the medical questions on the form are Mr. Crowley's fault, as he filled in the form after being given the relevant information. To anticipate somewhat, Mr. Crowley's evidence at the hearing before the FSO in December 2013 was that he had never been made aware of the relevant medical history. Mr. Crowley's evidence was that the serious illness cover was not included in 2008 or 2009 for reasons of affordability and that the appellants were fully informed at the time as to what their choices were.

9. At all times, however, Zurich 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.

10. 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 claim, therefore, 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.

11. 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.

**The initial findings of the FSO**
12. Following an investigation carried out by way of correspondence with the parties, the FSO made a finding on 24th July, 2012 that the complaint was not substantiated. The appellants duly appealed this to the High Court pursuant to s. 57CL(1) of the 1942 Act.

13. By decision dated 5th March, 2013 the High Court (Feeney J.) found for the appellant on the ground that there ought to have been an oral hearing. Feeney J. then set aside the finding of the FSO and remitted the matter to the respondent. 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.

**The second hearing before the FSO**
14. In the wake of that decision an oral hearing was duly held on the 17th December 2013 and the respondent gave his decision on the 12th February 2014. The O'Regans were legally represented at that hearing and there is, very helpfully, a transcript of that evidence which was available both to the High Court and to this Court.

15. At that second hearing the case made by the O'Regans 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.

16. It is clear from the evidence that it was Ms. O'Regan who had most, if not all, of the dealings with Mr. Crowley. She gave evidence before the FSO 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 whether she knew 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.

17. Ms. 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".

18. Ms. 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.

19. 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. Ms. 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.

20. 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 said that they assumed that this figure meant that they had serious illness cover, minus the "rare diseases".

21. Both Mr. O'Regan and Ms. O'Regan 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.

22. For his part, Mr. Crowley said that the first policy he sold to the appellants was in 2005, and that he dealt with Ms. 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 Ms. 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".

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

**The findings of the FSO**
24. 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.

25. In October 2005 two policies were taken out through Mr. Crowley. One (12049871) was a mortgage protection policy taken out by Ms. 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.

26. In April 2007 the O'Regans applied for a mortgage protection policy through an independent broker. This policy never came into effect.

27. 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.

28. 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.

29. 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.

30. 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 rather 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.

31. The FSO 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. He noted, however, 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.

32. So far as documentary evidence was concerned, the FSO 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 Mr. Crowley and he had not said that he was taking them off serious illness cover.

33. 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.

34. 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 Ms. 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…
>
> …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."

35. 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.

36. 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.

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

38. The FSO 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. The FSO 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 Ms. 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.

44. 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.

45. Mr. Crowley's evidence was that Ms. 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.

46. The FSO 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.

47. 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.

48. The FSO 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.

49. The FSO ultimately concluded 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.

**The findings of the High Court**

50. In her judgment O'Malley J. first articulated the appropriate test for review which ought to apply, namely, that set out by Finnegan P. 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.*"

51. O'Malley J. then continued:

> "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. 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. "

52. The judge went on to state that the applicable test for review of findings of fact made by the FSO was that set out by McCarthy J. for the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210 dealing with the jurisdiction of that court dealing with an appeal from the High Court, an issue to which I will later return. O'Malley J. then added:

> "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."

53. The judge then concluded:

> "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.

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.

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.

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."

**The jurisdiction of the High Court in relation to appeals from the Financial Services Ombudsman**

54. The appellants have appealed this decision to this Court pursuant to s. 57CL(1) of the 1942 Act. Section 57CL(1) of the 1942 Act provides that:

> "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."

55. This appellate jurisdiction is further supplemented by the provisions contained in s. 57CL of the 1942 Act, which provide in relevant part as follows:-

> "(2) The High Court is to hear and determine an appeal made under s. 57CL and may make such orders as it thinks appropriate in light of its determination.
>
> (3) 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:-
>
> (a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;
>
> (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."

56. It is true that, as counsel for the appellants, Ms. Callinan S.C., stressed in her submissions, s. 57CL(1) does not specify the form of the appeal from the FSO to the High Court. It is equally true that in other parts of the sub-section the Oireachtas confined the scope of the an appeal on a point of law: thus, for example, the right of appeal to this Court is confined to an appeal on a point of law: see s. 57CL(5) of the 1942 Act (as amended and adapted). There is thus the obvious inference that the right of appeal thereby conferred from the FSO to the High Court is, to some degree at least, broader than that on a pure point of law.

57. Ms. Callinan S.C. also stressed that the 1942 Act was quintessentially intended as an item of consumer protection, so that the test for review articulated by the Supreme Court in *Orange Telecommunications plc v. Director of Telecommunication Regulation (No.2)* [2000] 4 I.R. 159 had no application to the present case, formulated as that test was in the context of major commercial litigation. Beyond noting that the Supreme Court has recently re-affirmed the *Orange* test (albeit perhaps with some reservations) in the not entirely dissimilar field of data protection legislation (see *Nowak v. Data Protection Commissioner* [2016] IESC 18), it is unnecessary to express any view on this wider question.

58. It is sufficient for present purposes to state that such restrictions on the scope of appeal in respect of an appeal brought from the FSO following an oral hearing to the High Court pursuant to s. 57CL of the 1942 Act as exist in a case of this kind are inherent in the nature of the appeal process. In those cases where the fact finder hears the oral evidence and the appeal is based on a transcript of that evidence, the scope of review is impliedly limited by the requirement "that the oral hearing…is to be transposed into written form for the purposes of the appeal": see *Northern Bank Finance Corporation v. Charlton* [1979] I.R. 149, 188, per Henchy J.

59. In this regard it may be observed that although the "old" version of Article 34.4.3 of the Constitution (*i.e.,* the version which obtained prior to the establishment of the Court of Appeal on 28th October 2014) simply referred to the right of appeal from the High Court to the Supreme Court without specifying the form or scope of that right, the Supreme Court had frequently re-stated the limitations attaching to the appeal process in a case of this kind. That point was forcefully made by Henchy J. in *Northern Bank Finance* when he said that although the transcripts constituted a "formidably voluminous record" of what had taken place in the High Court, this process had its own limits ([1979] I.R. 149, 189):

> "Nevertheless, comprehensive as it is, it is necessarily an imperfect record of the oral hearing because what was adduced *viva voce* in the sight and hearing of the trial judge has had to be concerted into a written transcript. It cannot recapture the mood of the trial, the demeanour of witnesses, the essential nuance of particular responses, and many other features of the trial which, although they may have been crucially determinative in the judicial ascertainment of the facts, may have become blurred or lost when the oral evidence was reduced to writing. Herein lies the source of this Court's restricted jurisdiction in regard to matters of fact. It cannot put itself in the position of the trial judge. He had had opportunities of judicial assessment which are denied to this Court."

60. Similar sentiments regarding the different roles of a fact finder and an appellate court were expressed by O'Donnell J. in *Schuit v. Mylotte* [2010] IESC 56.

61. The limitations on appellate review identified by Henchy J. in Northern Bank Finance have since been consistently applied by the

Supreme Court, of which the decision of McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 is simply the best known example. In that case McCarthy J. explained ([1992] 1 I.R. 210, 217):

> "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."

62. McCarthy J. went on to hold that if "the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings." McCarthy J. also stated that ([1992] 1 I.R. 210, 218) this emphasised:

> "the importance of a clear statement….by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows."

63. The other major decision is that of *Doyle v. Banville* [2012] IESC 25, a decision which, to some extent, illustrates the limitations of *Hay v. O'Grady*. *Doyle v. Banville* was a case involving a serious motor accident which turned on key and minute findings of fact. In his judgment, Clarke J. first noted the context in which *Hay v. O'Grady* had been decided:

> "It does need to be recalled that the context in which the issues which came to be decided in *Hay v. O'Grady* were before the Supreme Court was the then recent abolition of jury trials in most personal injury actions brought about by s.1 of the Courts Act, 1988. There was a well established jurisprudence as to the circumstances in which it was possible for an appellate court to review and, if appropriate, overturn, what amounted to factual decisions by juries. This Court, in *Hay v. O'Grady*, was concerned with whether there had been any change to that position brought about by the move to trial by judge sitting alone. As noted by McCarthy J. the established jurisprudence in respect of jury trials was that issues of fact and the inferences to be drawn from the facts as found should not be disturbed by this Court if there was evidence to support such findings and inferences. The position, in respect of a trial by a judge alone, deriving from *Hay v. O'Grady* is somewhat different in that it is clear that this Court may, at least in certain circumstances, be in a position to review an inference of fact drawn by a trial judge (at least where such inference does not depend on oral evidence or recollection of fact and where the trial judge had an opportunity to assess the relevant witness(es)). It is also important to note that McCarthy J. emphasised the importance of a clear statement by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

64. Clarke J. then continued:

> "In addition it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. Where a jury decides facts, an appellate court will only have the submissions and evidence of the parties, the judge's direction and the answers given by the jury to the questions submitted to them, to go on. Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial, or in writing after a period. *To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred.* The obligation of the trial judge, as identified by McCarthy J. in *Hay v. O'Grady*, to set out conclusions of fact in clear terms needs to be seen against that background.
>
> 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 of the court 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.
>
> In addition there may be cases where the court has nothing more to go on but the demeanour of the witnesses and where there will be little more to be said than that the court found one set of witnesses as being more credible than another. However where, as in a case such as this, there are factors surrounding the accident in question on which the parties lay emphasis for their argument as to which of two competing accounts should be accepted, then the court must, of course, address at least the broad drift of the argument on both sides so that the parties may know why the court came to its conclusions."
>
> Sometimes the points made may concern reasons why a particular witness or witnesses are not to be treated as credible either because of an assertion that the witness is not being truthful or simply because it is said that the witness is mistaken. In many cases, and this again is one, there may be expert engineering evidence tendered which may, to a greater or lesser extent, dependant on the facts of the case, prove to be of assistance in attempting to reconstruct the circumstances in which the accident occurred. Sometimes there may be significant forensic findings which, when coupled with expert engineering evidence, [may] lead to a clear picture from which the court can readily ascertain the likely sequence of events leading to the accident in question. On other occasions, and this case falls into this bracket, it is more likely that the expert evidence has to be seen in conjunction with eye witness accounts and may, in that context, be of some assistance to the court in assessing the likelihood of such eyewitness accounts being correct. The extent to which the trial court is influenced by the credibility of eye witness accounts, forensic evidence or expert engineering evidence is largely a matter for the trial judge in the assessment of that evidence. The trial judge should, however, address the main arguments put forward by the competing parties as to how the relevant accident actually occurred by reference to such evidence of the categories to which I have referred as the parties choose to place reliance on.
>
> Finally, before moving on to the specific issues which arise in this appeal, 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." (emphasis supplied)

65. In my judgment, the same principles apply, *mutatis mutandis*, to the scope of an appeal from the FSO to the High Court in a case

of this kind following an oral hearing. In other words, provided that there is credible testimony to support the FSO's findings of primary fact and such are clearly stated, the scope of review by the High Court of such findings is distinctly limited and is generally governed by the principles articulated by the Supreme Court in *Hay v. O'Grady* and *Doyle v. Banville*.

66. In passing I might observe that I use the word "generally" advisedly, because I agree with O'Malley J. there may be cases where the FSO might not consider itself bound by the strict rules of evidence given that it is mandated by s. 57BK(1) of the 1942 Act to act in an informal fashion. In a suitable case that very informality might be a factor which would weigh with the High Court in considering how to deal with a finding of fact made by the FSO, even though, of course, such informality could not permit a body such as the FSO "to act in such a way as to imperil a fair hearing or a fair result": see *Kiely v. Minister for Social Welfare* (No.2) [1977] I.R. 267, 281, per Henchy J.

67. To that extent, therefore, I agree with the conclusions of O'Malley J. on this point, save for one important reservation. I do not think, with respect, that it could be appropriate to say that findings of primary fact made by the FSO should be entitled to any particular deference, even if made in respect of factual matters which are within his particular area of expertise. If this approach were to be adopted, it would mean that even though the actual experience of the FSO in relation to oral hearings is at this stage quite limited – it is understood that the first such hearings commenced sometime between 2012 to 2103 following a series of High Court decisions (including the decision of Feeney J. in the present case) to the effect that the extent of the factual controversy was so great that it could only be resolved by means of an oral hearing – and even though the person conducting the hearing might not necessarily have the experience of a trained lawyer in the finding of fact and the handling of evidence generally, it would mean that the FSO would enjoy a degree of deference in relation to fact finding which the High Court would not itself enjoy vis-à-vis a review by this Court. It is only fair to record that counsel for the FSO, Mr. McDermott S.C., expressed disclaimed any suggestion that findings of primary fact made by the FSO should enjoy some enhanced degree of deference over and above the traditional *Hay v. O'Grady* standard.

68. The question of the appropriate inferences to be drawn from such findings of primary fact is, however, another matter. It may be that in certain cases the High Court would defer to the expertise of the FSO so far as such inferences were concerned if they related to the latter's area of expertise. It is, however, unnecessary to express any view on this issue for the purposes of this appeal.

**Are the findings of the FSO supported by credible evidence?**

69. This brings us directly to the fundamental question at issue in this appeal: are the findings of fact made by the FSO supported by credible evidence such that the High Court was bound to uphold those findings by analogy with standard Hay v. O'Grady principles? There seems little doubt but that the O'Regans understood that they enjoyed serious illness cover at the time of the claim in 2011. Mr. O'Regan expressly gave evidence to this effect to the FSO and he carefully explained the process of liaison between his wife, Sonia, himself and Mr. Crowley in this regard. I am perfectly sure that Mr. O'Regan gave perfectly honest and truthful evidence and no one has suggested the contrary.

70. The difficultly so far as the appellants are concerned is that Mr. Crowley was equally emphatic in both his examination in chief and cross-examination before the FSO that he had fully explained the position to Ms. O'Regan and that she was fully aware of the position with regard to the serious illness cover. Likewise so far as the notification of the policy documentation issue is concerned, the FSO had the evidence of Mr. Paul Murphy, the Operations Manager at Zurich. Mr. Murphy gave evidence of the automated procedure at FSO with regard to the issue of notifications.

71. The FSO was accordingly called upon to perform one of the most difficult tasks facing a fact finder, namely, to adjudicate upon a conflict of evidence between the witnesses, all of whom are striving to tell the truth. The FSO was, of course, the person who saw and heard the witnesses and echoing the comments of Henchy J. in Northern Bank Finance and McCarthy J. in *Hay v. O'Grady*, this was a distinct advantage which was denied to both the High Court and to this Court.

**Conclusions**

72. The FSO reached certain findings of fact which were adverse to the appellants. Specifically, he concluded that he preferred Mr. Crowley's version of events and gave a clear reason for that conclusion, ruling that it was most unlikely that the latter had told Ms. O'Regan that the cost of the cover could be reduced by excluding "rare diseases" from the serious illness cover, as the application forms and policies provided by Zurich simply did not provide for such an option. This was underscored by the fact that the O'Regans acknowledged that they simply had not read the application forms.

73. It gives me no pleasure at all to say that these were findings of fact which, applying *Hay v. O'Grady* principles, the FSO was fully entitled to reach on the evidence before him. Like O'Malley J., one cannot but be touched by the series of hardships and vicissitudes which have befallen the O'Regans. I am nonetheless bound to say that the High Court was perfectly correct to hold the FSO was entitled to reach the findings of fact which he did. These findings of fact compelled the FSO to arrive at a conclusion which was adverse to the O'Regans and I cannot say that he was in error in making that decision.

74. In these circumstances I believe that this Court is left with no option but to dismiss the appeal.