Neutral Citation: [2016] IEHC 6

THE HIGH COURT

Record No. 2013/414MCA

IN THE MATTER OF AN APPEAL PURSUANT TO PART VII(B) OF THE CENTRAL BANK ACT, 1942, AND CHAPTER 6 AND SECTION 57CL THEREOF (AS AMENDED AND INSERTED BY THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT, 2004)

Between:-

JOHN O'SHEA

Appellant

– AND –

THE FINANCIAL SERVICES OMBUDSMAN

Respondent

– AND –

AXA IRELAND LIMITED

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 11th January, 2016.

Part 1: Background Facts.

1. Mr O'Shea lives on the west coast of Achill. His house looks onto the Atlantic. It seems an idyllic existence. But in December 2009 the idyll was broken. A storm blew in and, Mr O'Shea claims,caused serious damage to his house. Mr O'Shea held off on lodging a claim in respect of this alleged storm-damage until May 2010. In July 2010, he also submitted a claim in respect of alleged subsidence. Both claims were declined by his home insurer (AXA). Mr O'Shea considers that his claims ought to have been honoured. In consequence, he made complaint to the Financial Services Ombudsman (FSO). On 26thNovember, 2013, the Ombudsman issued a finding (the "Finding") in respect of Mr O'Shea's complaint. The Finding found a breach of the Central Bank's Consumer Protection Code to have arisen in the course of AXA's dealings with Mr O'Shea. However, it rejected the real 'meat' of Mr O'Shea's complaint, namely that AXA had not honoured its contractual obligations to him. Mr O'Shea has appealed the Finding to this Court.

2. Mr O'Shea's contentions are essentially seven-fold. He contends that (1) the FSO erred in not conducting an oral hearing of his complaint; (2) the FSO reached the Finding on incomplete information; (3) the FSO proceeded by reference to the wrong policy documentation; (4) AXA was not forthcoming with information throughout the complaints process; (5) there are deficiencies in the structure of the Finding; (6) the FSO is guilty of bias. He also (7) makes certain contentions regarding the pace of the within proceedings before they came to hearing.

3. Items (6) and (7) can be swiftly dealt with. As to (6), Mr O'Shea's contention is that the FSO did not act on his allegation, made during the complaints process, that certain information was not being provided by AXA. The issue of incomplete information is considered later below. However, any failure by the FSO in this regard is not evidence of bias. Nor is there the faintest whiff of bias in anything else that the FSO did or did not do regarding Mr O'Shea's complaint. The court is entirely satisfied from the evidence before it that the FSO approached its investigation of Mr O'Shea's complaint competently, seriously and with complete impartiality. The FSO did not reach a conclusion that Mr O'Shea liked, it may not have approached matters as he wanted, but that is no evidence of bias, nor did any bias present.

4. As to (7), the court can understand Mr O'Shea's impatience. He would like to receive the insurance payment to which he believes he is entitled. A 79 year old man, he wants to be done with his claim, to fix up his house, go out in his currach, get back to his fishing, and live a life that seems pleasant and free. But whatever about the claim for storm damage, a claim for subsidence was always going to take time to gauge whether there was subsidence and what was the cause. The complaint to the FSO was always going to eat up some time if it were properly to be done. Court cases move a pace that is careful to seek fairness for all but which, as a result, can sometimes be slower than we all might wish. Notably, neither the FSO nor AXA has engaged in any procedural ploys that have engendered undue slowness. For this they are to be credited; and Mr O'Shea may in this respect count himself fortunate in his choice of opponents.

Part 2: No Oral Hearing.

i. Complaint made.

5. In the course of the Finding, it is stated, at 5, that:

> *"Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict. I am also satisfied that the submissions and evidence submitted are sufficient to enable a Finding to be made in this complaint without the necessity for holding an oral hearing."*

6. Mr O'Shea contends that there are great differences of fact arising between him and AXA, that these merited an oral hearing, and that, by virtue of the FSO's conclusion as to the absence of need for an oral hearing, he has been deprived of that basic fairness of procedures to which he is constitutionally entitled. Thus he avers in his affidavit evidence:

> *"The facts are there are huge areas of conflict in submissions made to the FSO: I did not receive copies of reports of Hibco Ltd and Irish Drilling Ltd., Axa's nominated subcontractors; I did not receive a certified copy of [a] transcript of [a] tape of [a] telephone conversation with…Axa on 9th December 2010; there is a big conflict of fact between Axa's assessors and my submissions; there is a big conflict of fact between Axa's assessors and my submissions; there is a big conflict of fact between my copper roof expert and Axa's engineers and assessors; there is a big conflict of fact in evidence I submitted to [the] FSO and Axa's evidence; there is [a] big conflict of fact in the Policy Documents relative to my claim and Axa's Policy Document – Axa claimed three different Policy Documents whereas I pleaded a different Policy Document."*

ii. A Possible Fault-Line between the FSO and court regimes?

7. The FSO offers a free, expeditious and informal means of resolving complaints. To achieve this, it compromises on some of the rigours of a court process. Specifically, the FSO may lawfully and for good reason decide that an oral hearing may not be necessary in any one case. If such hearings were to become standard it could be that a process intended to be accessible and swift would soon become cumbersome and slow. However – and here comes the possible fault-line – if a complainant appeals to the High Court from a FSO finding, the courts have for some time held that what the complainant-turned-appellant gets is a limited form of review, not a full appeal in which the High Court looks at a case 'from scratch' and makes up its own mind as to matters. This means that a

complainant-turned-appellant like Mr O'Shea can be declined an oral hearing by the FSO, get only a limited form of hearing on appeal, and be left with the not unjustified sense that he has never properly been heard and that the principle of *audi alteram partem* ('listen to the other side') – a *'Grundnorm'* of our legal system – has been more honoured in the breach than the observance.Most of us could likely accept losing the substance of a case (bearing the costs of that loss is another matter) if we felt that we had been fully heard; but the popular legitimacy and practical usefulness of a court-administered system of appeals will necessarily be diminished if people are consistently sent away with the sense that the nuances of their case have not properly been considered at first instance and that that, on appeal, they cannot fully be heard.

8. To the extent that the above-described 'fault-line' arises, it arises because the courts have for some time, and with some reason, grafted onto the wording of s.57CL of the Central Bank Act 1942 (the provision that allows Mr O'Shea to bring the within appeal) a conception of what s.57CL contemplates for which there is limited if any justification in the plain wording of the Act of 1942. The courts have done this from a post-*Henry Denny* sense of deference to the FSO as an expert body – and it is undoubtedly the case that the 'life-raft' offered to financial service-users by the statute-based FSO scheme falls to be construed in the context of the wider sea of statute and common-law in which that life-raft floats. However, caution is required ifour unelected courts, either in any one case or generally, are not improperly to discount the separate, and possibly higher, deference which – absent unconstitutionality – they must show to the plain wording of statute enacted by democratically elected lawmakers. Due deference to regulatory expertise cannot be the mother of undue invention when it comes to the express wording of statute – and no reading of *Henry Denny* or like-binding precedent requires such invention. Inherent in the approach adopted by the courts to s.57CL appeals to this time is a risk that financial service users earning lower or middling incomes may find themselves coerced by circumstance into a complaint-and-appeal process which, to borrow from Sholem Aleichem, could prove, with only limited exaggeration, to be 'a comedy for the rich and a tragedy for the poor'. This is because the rich can generally side-step the FSO if they wish and litigate from the outset. But the poor and those on middling incomes are driven to some extent, if not entirely, by financial circumstance, to turn to the FSO in the first instance – and they get a highly professional and competent service in return. However, if they are refused an oral hearing by the FSO, they can get 'short shrift' on appeal, potentially denied that meaningful access to the courts which the rich man can generally obtain from the start if he wishes, and which s.57CL, unadorned by gilded precedent, appears expressly to mandate. If vulnerable financial service users – and this includes people on not insubstantial incomes – are not to be 'short-changed' in terms of getting, as is their right, the most comprehensive consideration of their complaints, including where appropriate a full hearing, it is not inconceivable that due deference and judicial dicta may yet have to yield a more literal meaning to the unvarnished wording of lawful statute.

iii. No request for an oral hearing.
9. The FSO noted in submission that at no stage during the FSO's investigation process did Mr O'Shea or AXA request an oral hearing. Though acknowledging that such a request is not a prerequisite to an oral hearing, the FSO contends that *"the failure to seek one* [i.e. such a hearing] *supports the view of the Ombudsman was not necessary."* In truth, it does nothing of the sort. Whatever about AXA which is, to borrow a colloquialism, 'big enough to look after itself', Mr O'Shea is a 79-year old gentleman; he was making a first-time complaint to the FSO, coming fresh to the process involved, un-advised by a solicitor, and doubtless uncertain as to what he could and could not do as he navigated through an unfamiliar sea of requirements and documents. To suggest on appeal that his failure to seek an oral hearing of the FSO is actually an implicit acknowledgement that the FSO was correct to deny him such a hearing, is a highly technical argument that sits ill with the informal process that the FSO operates and, having regard to the foregoing factors, is neither persuasive nor accepted by the court.

iv. Conclusion as to need for oral hearing.
10. The court has been referred to a wide array of cases (including binding Supreme Court precedent such as *Davy v. Financial Services Ombudsman* [2010] 3 I.R. 324) concerning the wide discretion afforded the FSO when it comes to providing an oral hearing or not. However, the Supreme Court in Davy expressly refers, at 364, to the courts *"directing an oral hearing in the interests of fairness where there is a conflict of material fact".*

11. The court considers that the interests of fairness demand an oral hearing in the within case. This is because there are very significant differences of fact between what is alleged by Mr O'Shea and AXA respectively. This is not a case concerning merely the interpretation to be afforded a particular clause in a particular contract. It is a case involving reasonable divergences of opinion between competent professionals on a wide array of matters, and it is not clear from the Finding that all of those conflicts of opinion have been considered. For example, the FSO states the policy documentation that applies without, on the face of its Finding, exploring the not baseless contentions made by Mr O'Shea that the matter was being decided by reference to the wrong policy documentation.

12. It defies belief too that the FSO was able to identify the salient facts arising from the mass of expert and other evidence before it, and to address them comprehensively, without hearing any oral argument. Numerous times this Court has read documents in advance of hearings and found that, at hearing, the parties have sought to emphasise a point in the text of those documents or to raise a perceived issue arising therefrom, or have afforded the court some insight that was not apparent from the face of those documents and would never have been identified without the benefit of a hearing and the consequent access by the court to the particular knowledge that parties inevitably bring to their own affairs. There will be simple cases in which the FSO will not be required to conduct an oral hearing; a case of the complexity and sophistication now presenting is not one.

13. For the reasons mentioned above, the court will order that this matter be remitted to the FSO for oral hearing on the divergences of fact identified by Mr O'Shea in the text quoted above, save in one regard: his not possessing the transcript of the telephone conversation to which reference has been made above has now been cured and never in any event represented a divergence of fact.

Part 3: Non-Receipt of Information.
14. In a letter of 26th August, 2013, AXA advised the FSO that *"There are no individual reports* [from Hibco and Irish Drilling Ltd.]". When Mr O'Shea saw this letter he was, to put matters mildly, somewhat surprised. This is because in a letter to him from AXA on 24th September, 2012, AXA had advised him that there were such reports and that while the results had been shared with him, the reports would not be shared. Yet here was AXA telling the FSO that there were no such reports. Mr O'Shea can be forgiven whatever vexation he feels in this regard. However, the court sees only human error in what occurred and nothing more calculated. Moreover, it appears from AXA's affidavit evidence that all of the relevant information has in any event been provided to Mr O'Shea.It is not always an answer to a request for documentation in one form that it has been supplied in another. However, in this case, Mr O'Shea appears to have been provided with all relevant information, ina form, it is true, that was other than what he sought, but still in a form that was sufficient for his purposes.

Part 4: Applicable policy documentation.
15. Mr O'Shea is entitled to have his case decided by reference to the policy that he concluded with AXA (which appears to have acquired his previous insurer or the relevant 'book of business' at some point). Indeed his case cannot be decided by reference to any

other document. As the court understands Mr O'Shea's contentions, it is that if there were any revisions to his originally executed policy, he never received them and was never told of them, so he cannot be bound by them. AXA's response is that when Mr O'Shea renewed his policy each year, he was caught by the terms and conditions applicable to that year. The court has not seen any clause that gives AXA a right to vary terms and conditions without notice to the policyholder. Indeed such a provision, were it there, would almost certainly present a difficulty under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, as amended.

16. Although this was not touched upon at the hearing, the court notes in passing that, while Mr O'Shea – a so-called 'lay litigant' – may not have realised this, an expert body like the FSO doubtless appreciated that what was being alleged by him, if true, could have involved breach by AXA of multiple obligations under the Central Bank's *Consumer Protection Code* (2006) – the version of that Code applicable to the within dispute –including the obligation: under General Principle 6 (Chapter 1) to make full disclosure of all relevant information; under Common Rule 21 (Chapter 2) to provide Mr O'Shea in advance of renewal (or before expiry of any the cooling-off period) with the terms and conditions applicable to his home insurance product for the year to come; and possibly also under Common Rule 49 (Chapter 2) to have a comprehensive file containing the documentation provided to Mr O'Shea. (In passing, the court accepts the point touched upon by counsel for AXA at the hearing that in terms of providing documents to Mr O'Shea, AXA cannot reasonably be expected to track delivery to, and obtain an acknowledgement of receipt from, each customer. However, AXA should be able to point to a process whereby all documents are typically sent to the policyholder address on record, so making it probable that, all else being equal, the relevant policy documents were sent to and received by Mr O'Shea).

17. There is a lot to the foregoing. So much so that, surprisingly, this dimension of Mr O'Shea's complaint appears to have gone unexplored by the FSO which, in its Finding, accepts the applicability of 2007 policy documentation to Mr O'Shea's claim without engaging, so at least it seems from the face of the Finding, in any meaningful exploration of the issues that Mr O'Shea raised in this regard, and never touching upon the potential that breaches under the Consumer Protection Code occurred. These latter breaches may not have been expressly touched upon by Mr O'Shea, a so-called 'lay litigant', but he expressly raised the issues that patently yielded the possibility of contravention.

18. The court does not consider that Mr O'Shea's complaints as to the applicable contractual documentation are fully met by the FSO's stating in its Finding that even if it had decided his case by reference to the contract for which he contends, it would not have changed matters. That said, in the grand scheme of things, not a lot may ultimately ride on this aspect of matters: it may yield a direction for further (minor) payments to Mr O'Shea in respect of any (if any) breaches of the Consumer Protection Code 2006, but may not disturb the end-result as regards the core of the dispute arising, viz. the non-payment of the monies claimed. Even so,basic fairness of procedure requires that a dispute be resolved by reference to the documentation that does apply, not by reference to similar documentation that may or may not apply. One does not get the sense from the FSO's finding that it fully and properly assessed what was the governing documentation. As this case is in any event being remitted to the FSO, the court would respectfully suggest that the above represent an aspect of matters to which the FSO might wish to give more detailed attention in any further Finding that issues.

Part 5: AXA was not forthcoming with information?

19. To the extent that the FSO found (and it did find) a want of compliance by AXA with the Consumer Protection Code (2006) in terms of the provision of information to Mr O'Shea, it has addressed this in the Finding and gone so far as to require AXA to pay Mr O'Shea €150 in this regard. Mr O'Shea stated at the hearing of the within application that this amount was an insult in the circumstances arising. However, this fine is for breach of a regulatory code, it has nothing to do with the 'meat' of the dispute (the insurance claims arising) and its scale is not gauged by reference to those claims. Though the fine imposed is small, it is nonetheless a censure by a State body of AXA for its transgression of the Consumer Protection Code (2006). Moreover, the effect of such censure is likely more significant than Mr O'Shea may perceive it to be. Imposition of such a sanction on a regulated body typically prompts some consideration within the relevant department of that body and/or by its Compliance team and/or by the board-level Risk and Compliance Committee as to why the fine, however trivial, was imposed and what individual or general behaviour modifications, if any, require to be effected so as to minimise the risk of repeated transgression.

Part 6: Alleged Deficiencies in the Structure of the Finding.

20. Tied into his assertion of bias, which the court has rejected above, Mr O'Shea complains that the FSO's Finding did not make adequate reference to a particular report (the 'Barbery Report') and that undue reliance was placed on AXA's case and contentions, as opposed to his. A few points might be made in this regard:

- first, if the FSO declines to grant an oral hearing, there will inevitably arise a heightened pressure on the FSO to address in detail in its eventual finding the various issues that have been put in issue before the FSO. Absent an oral hearing, a detailed finding is the only way that the FSO can show that it has been exposed to and addressed the issues perceived by the parties (and perhaps, most especially, the complainant) to arise. Thus efficiency at the investigation stage may yield inefficiency at the finding stage.

- second, and this Court as the author of judgments is sensitive to this, findings – like judgments – have to be kept to a manageable size. A decision-maker has to determine what in truth requires to be decided, what evidence is relevant to that decision, how much of that evidence should be expressly mentioned in the decision, and how much, if anything, that has been furnished in evidence and/or argued is irrelevant, redundant or moot, the constant aim being to produce a final decision that is crisp and concise, yet comprehensive. By way of example, in the within 'appeal' this Court has been provided with many hundreds of pages of documents to consider. This judgment will end up being somewhere under 20 pages in length. For parties to expect of the FSO (or a court) that,in the necessary concision that the process of writing a finding (or judgment) entails, every last aspect of every document will be examined in every detail within that finding (or judgment) is an unreal expectation. *"Litigation",* as Justice Frankfurter noted in *Indianapolis v. Chase Nat'l Bank* 314 U.S. 63 (1941), 69, "is the pursuit of practical ends, not a game of chess". The 'end' to which the FSO (or a judge) aims when writing a finding (or judgment) is the production of a decision that seeks dispassionately and succinctly to determine the critical issues arising, identify the relevant rules or law, apply those rules or law to the facts presenting, and arrive at a clear conclusion that seems to the FSO (or judge) not just to be mandated by those rules or law but to accord also with the tenets of constitutional justice. Subject to the deficiencies that the court has identified elsewhere in this judgment, it does not consider any further deficiency to arise in the Finding in this regard.

- third, on a related note, the court would note that: the number of pages afforded to the argument of each side is not *per se* evidence of a deficiency in the structure of a finding (or judgment). The fact that limited emphasis is placed on a document when it is clear that consideration has been given to the overall issue arising need not yield the conclusion that a finding (or judgment) is fatally flawed. The fact that the documentation proffered by one side is preferred to another or receives greater emphasis in a finding (or judgment) does not necessarily suggest that the said finding (or judgment) must fall. Indeed, although it is not the case here, it is possible to conceive that a case could arise where the arguments proffered by one side are so absurd and/or offensive that the FSO

(or a judge) might, having read and/or heard them, consider that the most appropriate and/or polite way to deal with them is to focus on the opposing arguments when drafting its end-finding (or judgment).

21. For the reasons stated above, the court does not accept Mr O'Shea's contentions as to the above-mentioned deficiencies that he perceives to arise in the structure of the Finding.

Part 7: Conclusion.
22. For the reasons stated above, the court will set aside the FSO's Finding of 26th November, 2013, and remit this matter to the FSO for oral hearing. The court would respectfully suggest that the FSO may also wish to include in any further Finding that issues a more fulsome analysis as to which policy documentation governed the relationship between Mr O'Shea and AXA at the time of the damage in respect of which claim was made, and thereafter.