Neutral Citation: [2014] IEHC 620

THE HIGH COURT

Record No. 2012/119 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 57 OF THE CENTRAL BANK ACT 1942 (AS INSERTED BY S.16 OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004)

Between/

CONOR O'DONOGHUE

Appellant

AND

THE FINANCIAL SERVICES OMBUDSMAN

Respondent

And

RSA GROUP AND BANK OF IRELAND

Notice Parties

Judgment of Ms Justice Iseult O'Malley delivered the 19th November, 2014

Introduction

1. This is an appeal against two decisions of the respondent in which the latter partly upheld complaints by the appellant but found against him on the main aspect of those complaints. The issues raised by the case concern findings of fact made by the respondent in the absence of an oral hearing.

2. In 2005 the appellant, who lives in Limerick, purchased a second house in that city as an investment. As his home was insured through Bank of Ireland Insurance Services ("the bank"), he went to them in relation to the second house and was sold an insurance policy. The underwriter transpired to be Royal & Sun Alliance ("RSA"), with the bank acting as intermediary.

3. On the 2nd November, 2005 this house was broken into and damaged. The appellant's claim under the insurance policy was not finally dealt with until, in May 2006, the appellant was informed that RSA were voiding the policy on the grounds of misrepresentation. The reason given was that certain declarations purportedly made by the appellant in the proposal form were considered to be false. The bank then issued a refund of the premium paid by the appellant. The appellant has always maintained that he gave the correct information to the bank at the time he sought the insurance.

The inception of the policy

4. The appellant says that when he approached the bank in April 2005 to discuss taking out an insurance policy he told the bank that he worked night shifts and also that he would not be able to occupy the house until an SSIA account matured. He did not have any intention of letting it, but he says that the bank recommended a policy that would allow him to rent it out if he so wished. He was told that this would be more acceptable to the insurer as the house was unoccupied and he worked nights. A "tenanted property premium" was payable for such a policy and the applicant agreed to this.

5. The appellant says that he was asked to, and did, sign blank documentation that was to be completed later with the details of what had been agreed.

6. The Home Cover Proposal Form, which is dated the 8th April, 2005, states at the top that the questions on it relate to the facts considered material to underwriting the insurance and explains

> *"A material fact is one which might affect the company's decision to give you insurance…Failure to [disclose a material fact] may invalidate your insurance."*

7. In Section A it is noted that cover is required from the 7th April, 2005. The house is described as "tenanted property". Section B gives the number of bedrooms as three and the number of tenants as one.

8. Section C of the proposal form states that the property is not left unoccupied for more than two months a year; is regularly occupied at night and is

> *"occupied solely by you or your family for residential purposes only and not used for business purposes other than for keeping up to six paying guests, or for the provision of a child minding service for up to 2 children."*

9. A declaration that "the above statements" were true and complete bears the signature of the appellant. The signature is undated.

10. On the 7th April, 2005 Bank of Ireland wrote to the appellant giving him a quotation and inviting him to sign the attached proposal form. On the 8th April, 2005 Bank of Ireland Insurance Services wrote to the appellant to confirm that

> *"your home is now insured with us based on the cover that you requested when you filled out your application".*

11. The appellant paid the sum of €315 to Bank of Ireland Home Insurance by way of cheque dated the 14th April, 2005. He also appears to have signed a direct debit form.

12. According to bank records, a check was made on the occupancy of the house with the local Bank of Ireland branch, and it was

told that on the 8th April 2005 that the appellant had confirmed that the house was tenanted by a professional person. The appellant has always denied giving any such information and it is common case that the house was never in fact occupied during the relevant time.

The claim
13. On the 17th November, 2005 the appellant wrote to Bank of Ireland Insurance Services to notify them that damage had been caused to the house and that the Gardaí had been informed. This was acknowledged by an undated letter, marked by the appellant as having been received on the 1st December, 2005, which requested him to contact the office at his earliest convenience.

14. The claim was dealt with at a pace which was subsequently found to be inadequate by the respondent. Ultimately, by letter dated the 2nd May, 2006, Royal Sun Alliance informed the appellant that they would not deal with it. It was stated that he had made false declarations about "the Home" to the following effect:

- that it was not left unoccupied for more than two months a year
- that it was regularly occupied at night, and
- that it was "*occupied solely by you or your family for residential purposes only*".

15. The falsity of the declarations was said to lie in the fact that the property had been under renovation and unoccupied since inception date, and that there was no evidence that the premises was furnished for full habitation. The policy was therefore declared to be void and of no effect *ab initio*.

16. On the 13th June, 2006 Bank of Ireland Insurance Services wrote to the appellant referring to the cancelled policy and refunding the sum of €373.87.

17. Thereafter the appellant spent a considerable period of time attempting to get information relevant to his case from the loss adjusters and utilising the internal complaints procedures of the bank.

18. In its "final response" to the appellant, dated the 13th June 2011, the bank stated its position as follows:

> *"According to our records, on 7 April 2005 further to your enquiry, a Home Insurance Quotation for Delmege Park along with a Proposal Form was issued to you. This proposal was processed based upon the responses obtained from you. All staff responsible for processing home insurance proposals are very clear on the importance of recording the correct information.*
>
> *I note the property description is "Tenanted Property" further details confirm that the property would be occupied by one tenant. On 8 April 2005 you confirmed to the branch that:*
>
> - *The tenant was a professional and;*
> - *He was residing at the property."*

The complaint to the respondent
19. In 2011 the appellant made a complaint to the respondent against both RSA and the bank. He stated that he would like the complaint to be resolved by mutual consent if that was possible but that he was ready to engage in an oral hearing.

20. In the course of processing the complaint the respondent decided to treat the complaints against the two companies separately and gave separate decisions in relation to them. During the process, the appellant wrote to the respondent several times, amplifying his own case and commenting on those of the notice parties.

21. In summary, the appellant said that RSA had, through the Bank of Ireland, sold him an insurance policy that he could not use. He said that he had explained that he was considering purchasing the house but that he would not be living in it until his SSIA account matured and he could furnish it and that he had assured the bank that it was not his intention to rent the house. He maintained that he had signed the proposal document before the details were filled in, in the expectation that it would be completed in accordance with the discussion he had had with the bank employee. It was, in his view, the bank that had introduced the purported tenancy into the matter, resulting in his being furnished with a policy which was later voided on the ground of non-occupancy. He specifically alleged that the bank was guilty of

> *"a deliberate fraudulent deception"*

and had

> *"acted dishonestly and unlawfully in manufacturing 'tenancy details'".*

22. The appellant also complained that both Bank of Ireland and RSA had ignored their advertised procedures in relation to the processing of his claim.

23. The bank stood over its "final response" and maintained that the proposal, including the reference to the house being tenanted, was based on information provided by the appellant. It said that the staff member who had dealt with the appellant did not specifically recall the transaction, due to the passage of time but that she was clear on the importance of recording the correct information.

24. The respondent posed, *inter alia*, the following questions to the bank:

> *"Did the policy provide cover for the property in the event that a tenant was occupying the property? If not, then why was the policy deemed suitable?"*

The bank responded that

> *"In the event that the Complainant submitted a valid claim and property was occupied at the time of the reported loss cover would have been provided in accordance with the terms and conditions of the policy."*

25. RSA's response to the complaint was that the

> *"primary issue in this case and the reason for cancellation of the policy is that the property was not in fact occupied by either the insured, his family or a tenant and if this had been declared to us we would have considered it a material fact which would have significantly altered our consideration of the risk…*
>
> *…where the property was disclosed as being a tenanted property this was within our acceptance criteria. If however the property was disclosed as being unoccupied this would have been referred specifically to RSA by the Bank and we would have offered Fire only cover with different rates and an increased policy excess applying."*

The respondent's decisions

26. The two findings of the respondent were made on the 16th March 2012.

Complaint against RSA

27. The respondent summarised the complaints against RSA as being that it

> (1) took five months to decline the claim during which time further damage was caused to the property,
>
> (2) failed to inform the complainant that it was the underwriter of the policy,
>
> (3) failed to follow its own procedure for assessing a claim,
>
> (4) failed to keep the complainant informed of the progress of the claim, and
>
> (5) accepted the risk when the complainant had informed it that the premises would be neither tenanted or occupied by him.

28. The respondent stated that having reviewed and considered the submissions made by the parties, he was satisfied that there was no conflict of fact such as would require the holding of an oral hearing.

29. In determining whether or not RSA was entitled to decline the appellant's insurance claim, the respondent referred to the fact that the proposal form contained a signed declaration that the "home" was not left unoccupied for more than two months a year; was regularly occupied at night and was occupied solely by the appellant or his family for residential use only. The proposal form contained a clear warning that the facts set out in it were considered to be material to underwriting the insurance. The respondent said that he could not see why, if the appellant did not intend to occupy the property, he signed the form. He noted that the appellant had stated that he had enquired

> *"…as to the possibility of insuring [the property] under conditions of eventual full occupancy but with an initial division of my time between both houses [his home and the property] including absences from both houses at night…"*

30. The respondent found that this statement conflicted directly with the appellant's written declaration on the proposal form. He went on:

> *"If the Complainant did not intend to occupy the house at night then I cannot see why he would have signed a declaration to the opposite effect….*
>
> *…the Complainant states that he informed Bank of Ireland Insurance Services that he would not be living in the house and he states that he 'specified that I would not be renting the house nor even living in it myself until SSIA finance became available.' However, in the proposal form, to which the Complainant signed his name, he declared that the property would be occupied regularly at night and not unoccupied for more than 2 months."*

31. The respondent continued:

> *"While I appreciate that the Complainant was concerned by the fact that he did not inform the Provider that the property would be tenanted, the question turned on whether the property was occupied or not. The Proposal form indicated that the property would be either occupied by a tenant or by the policy holder and/or his family. However, the property was not occupied under either grouping.*
>
> *If the Complainant did not intend to either rent the property out or live in the property I cannot see why he would declare that the property would be occupied in the Proposal Form. The Complainant may have told the staff member from Bank of Ireland Insurance Services that he did not intend to occupy the house or rent it out, but he cannot avoid the fact that his written declaration said that the property would be occupied and it was on this basis that the Provider underwrote the policy. The Provider's only information regarding the property came from the Proposal Form. If the information in the Proposal Form was incorrect then the Complainant should not have signed it."*

32. This part of the complaint was therefore not accepted.

33. The respondent found in favour of the appellant on the issue of delay in handling the claim and failure to keep him informed of its progress. He did not accept that the further damage was attributable to the delay. He further did not accept that the complainant was unaware that RSA was the underwriter.

34. RSA was directed to pay the sum of €400 by way of compensation for the handling of the claim.

Complaint against Bank of Ireland Insurance Services

35. The respondent summarised the complainant's case against the bank as being that it

> (1) sold the policy in question when it was not suitable to the complainant's needs,
>
> (2) sold the policy on the basis that it was a tenanted property when it was not,
>
> (3) failed to inform him as to who was underwriting the policy,
>
> (4) failed to follow its procedures for making a claim and
>
> (5) mis-handled his claim.

36. The respondent stated that having reviewed and considered the submissions of the parties, he was satisfied that the submissions and evidence did not disclose a conflict of fact such as would require the holding of an oral hearing.

37. He considered that the question of the suitability of the policy must revolve around the belief of the provider as to the purpose of the policy. He referred to the appellant's assertion that he had stated that he would not be living in the premises until such time as his SSIA matured and that the house would not be rented out, but found that this was not confirmed by the proposal form signed by the appellant. The respondent went on to make similar comments as those quoted at paragraphs 30 and 31.

38. In the circumstances Mr Comerford took the view on this issue that it was entirely feasible that the bank had been under the impression that the property would be occupied – the appellant was in the best position to know his own plans and he had signed a form declaring that the premises would be occupied by himself, his family or a tenant.

> *"If the property was not to be occupied by him, his family or a tenant then the Complainant should not have signed the proposal form. On the basis of the Complainant's declarations in the Proposal Form I am satisfied that the policy was suitable for the Complainant's declared needs at the time he incepted the policy."*

39. This portion of the complaint was therefore not upheld.

40. In relation to the tenancy issue, the respondent noted that the appellant maintained that he had never told the provider that the house was tenanted and that the word "tenant" had been added to a form that he had signed in blank. He also noted that the provider's records indicated that the branch had been contacted "to clarify the tenancy details" and that it had been confirmed "that the property was occupied by a professional".

41. The respondent stated that he was satisfied that the provider was incorrect to record that the property had a sitting tenant. However, this did not alter his finding that the policy required occupation and the appellant had declared that it would be occupied.

> *"The policy was sold on the basis of the Complainant's declaration that the property would be occupied and therefore the error regarding the presence of a tenant had no impact on the sale of the policy".*

42. This part of the complaint was not upheld.

43. As with the complaint against RSA, the respondent found that the appellant had been aware that that company was the underwriter.

44. The respondent again found in the appellant's favour in relation to the handling of the claim and directed payment of the sum of €250 by way of compensation.

Submissions

45. The appellant represented himself in these proceedings, as he had during the respondent's investigation. His main point continues to be his assertion that he had informed the bank that the house would be unoccupied, that he had never said that he would let it and that the bank fabricated the tenancy details. He relies on the documentation and correspondence submitted to the respondent in support of his position.

46. In a supplemental affidavit the appellant complained of the fact that the respondent had not held an oral hearing.

47. Counsel for the respondent opened his submissions by stating that nobody was disbelieving the appellant and that the findings of the respondent did not mean that he was not believed. Rather, it was a situation where the respondent had to make a decision on the evidence, and that the appellant had not established that the documents were created after the event.

48. The respondent submits that the appellant is seeking to challenge the findings on the merits. It is also contended that he cannot at this stage raise the issue of an oral hearing, not having done so before. The respondent relies on the, by now extensive, body of authority dealing with the proper approach to appeals of this nature.

The applicable legal test

49. There is no dispute as to the test to be applied by the Court in the case. The lead authority is the judgment of Finnegan P. in *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323, which adopted the formulation set out by Keane C.J. in *Orange v Director of Telecommunications Regulation* [2000] 4 I.R. 159, has been consistently followed in cases against this respondent.

> *"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 series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the defendant."*

50. The court will also adopt a deferential attitude to the respondent's exercise of his expert and specialist knowledge of the financial services industry. However, it should be noted that such deference stops at the limits of the respondent's expertise. It does not arise where what is at issue is the application of legal principles, or where there is a clear error of fact underpinning the respondent's reasoning.

51. In *Davy v Financial Services Ombudsman* [2010] 3 IR 324 the Supreme Court held that it would be appropriate to consider directing such a hearing where there was a conflict of material fact. It is well established that the respondent has a discretion in this regard but it is also clear that the obligation to hold an oral hearing, where appropriate, does not depend on a request being made by the complainant.

Discussion and conclusions
52. In the view of the court there are two difficulties with the decisions of the respondent in this case.

53. The first is that the findings as to the significance of the appellant's signature on the declaration do not deal with the case made by the appellant. He says that when he signed the document it was blank and he expected it to be filled in as agreed between himself and the bank employee. It should be noted that the bank did not deny that the details were filled in subsequently – rather, it simply stated that the details were filled in based on the information he provided.

54. However, the findings of the respondent proceed on the implicit basis that it was established as a fact that the appellant signed the document in full awareness of its contents. Despite the avowals of counsel in the hearing before this court, it must be assumed that the respondent did not believe the appellant's version. It is hard to see how a positive finding that he signed a declaration with the details filled in could be based on anything other than disbelief of that version. However, no reason is given for rejecting this central part of the appellant's case.

55. This is particularly difficult to understand given the acceptance by the respondent that the appellant did not tell the bank that he had a tenant, and that the bank incorrectly entered those details on the proposal form and incorrectly informed RSA that there was a sitting tenant. There is no indication given in either of the findings as to why this part of the appellant's account should have been accepted, but not his assertion that he did not knowingly sign a form containing the incorrect details.

56. It seems to me that in these circumstances there was a direct conflict on the factual accounts given by the different parties, which could not be resolved purely by reference to the documents in the case, and that the credibility of the appellant was squarely in issue. Accepting that the respondent has a broad discretion as to when he should hold an oral hearing, the fact that he did not appears to have produced a situation where conflicts of fact were resolved in different ways with no apparent reason for the differences. It is true that the appellant did not ask for a hearing. He stated that he would prefer instead that the matter be resolved by agreement. However, given that he was not legally represented and given the respondent's own obligations to consider an oral hearing in cases of material conflict, the appellant's failure to ask for one cannot be conclusive. In the circumstances I consider that the respondent erred in not holding an oral hearing.

57. The second issue arises from the interpretation put by the respondent on the proposal form itself, as set out in paragraph 31 above. The declarations contained in it did not warrant that the house would be occupied by a tenant or by the appellant and his family. There were, as a matter of fact, two separate and contradictory declarations – one to the effect that the house was occupied by one tenant, the other stating that it would be occupied solely by the appellant and his family for residential purposes. The submission made by RSA to the respondent, that its primary concern was occupancy, cannot take away from the fact that each of the declarations is covered by the provision relating to materiality.

58. Furthermore, it is noted that there does not seem to be any dispute about the assertion by the appellant that he paid an extra premium to allow for the possibility of letting the house. If an increased premium is payable, that suggests that the insurance company sees a material difference between tenancy and personal occupancy.

59. That being so, even if one assumed that the appellant had read the completed document and signed it knowingly, it is difficult to understand why neither the bank nor RSA raised any query as to why he made contradictory declarations. It is arguable, having regard to the obligations of the providers of financial services in relation to the sale of suitable products, that he should have been asked about this and cautioned that he was at risk of the policy being voided if he did not clarify his intentions.

60. In these circumstances I consider that the decisions of the respondent were vitiated by serious and significant errors and I will allow the appeal.