

## THE HIGH COURT

[2017 No. 1 M.C.A.]

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

BETWEEN

JOHN O'BRIEN

APPELLANT

AND

THE OFFICE OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

AND

IRISH LIFE ASSURANCE PLC

NOTICE PARTY

## JUDGMENT of Mr. Justice Noonan delivered on the 10th day of April, 2018

1. This is an appeal brought by the appellant (Mr. O'Brien) pursuant to the above entitled Act ("the Act") against a determination of the respondent ("the FSO") made on the 27th January, 2014. This appeal was instituted on the 7th January, 2017, almost three years after the date of the decision. One of the reliefs sought by Mr. O'Brien is for an order extending the time within which to bring these proceedings. The parties have agreed that this issue should be determined first and accordingly this judgment is solely concerned with Mr. O'Brien's application for an extension of time within which to bring the appeal.

**Background Facts**

2. Mr. O'Brien is a school teacher who retired in June, 2012 at the age of 44 on grounds of alleged ill health. Mr. O'Brien has a long history of having suffered from depression which is said to have led to his early retirement.

3. He is a member of the Teacher's Union of Ireland ("TUI") who took out a group permanent health insurance scheme with the notice party ("Irish Life") to which Mr. O'Brien subscribed. This policy provided for the payment of certain benefits to subscribers in the event of them being unable to pursue their occupation by virtue of ill health. In May of 2012, Mr. O'Brien made a claim to Irish Life for payment of these benefits. He submitted two medical reports from Dr. Madden of the Medmark practice and Dr. McLoughlin, a consultant psychiatrist, both of which supported the claim.

4. In response, Irish Life arranged to have Mr. O'Brien examined by two consultant psychiatrists, Dr. Corby and Dr. Devitt. Both of these psychiatrists concluded that Mr. O'Brien was not in fact disabled from pursuing his occupation as a teacher in their opinion and Irish Life accordingly declined the claim.

5. Mr. O'Brien was dissatisfied with this decision and decided to make a complaint to the FSO which he did on the 11th March, 2013. Mr. O'Brien did not request an oral hearing of his complaint nor was one offered by the FSO. Ultimately, the FSO issued a decision on the 27th January, 2014 dismissing Mr. O'Brien's complaint. As is standard practice in written determinations of the FSO, the last sentence of the written determination described as a "Finding" is in bold type and reads as follows:

"The above Finding is legally binding on the parties, subject only to an appeal to the High Court within 21 calendar days."

Section 57CL of the Act provides for the bringing of such appeal to the High Court by a party dissatisfied with the finding of the FSO. There is no dispute that Mr. O'Brien was at all material times aware of the 21 day time limit for bringing an appeal.

6. Mr. O'Brien did not have the benefit of legal representation before the FSO. However, it would appear from his own affidavit that on receipt of the Finding, he did consider the possibility of appealing. Thus, at para. 13 of his affidavit he avers:

"I was devastated when the Financial Services Ombudsman rejected my complaint. I accept that I was advised by the Financial Services Ombudsman that if I wished to appeal the decision that my only course of action was to appeal to the High Court within 21 days of the determination. At that stage I felt totally isolated and helpless. I sought advice from people around me who were not aware that I had made the application to the Financial Services Ombudsman. I was told that an appeal to the High Court costs at least €100,000 if I lost my case and I had no access to that kind of finance. I was also told that appeals to the High Court against the Financial Services Ombudsman are rarely if ever successful and that I would be left with a huge financial bill."

7. Thus Mr. O'Brien does not suggest that his illness precluded him from bringing the appeal. Rather he appears to have received advice from a third party, and based on that advice, he decided not to appeal.

8. Thereafter, on the 7th February, 2014, within the 21 day period for appealing, Mr. O'Brien wrote to the TUI seeking to invoke what he believed was an arbitration clause in the policy. In that regard it is accepted that the brokers who were promoting this policy, Cornmarket, incorrectly stated in the brochure relating to the policy that if a party was dissatisfied with a decision of the FSO, that party could go to arbitration with Irish Life. The affidavit sworn on behalf of Irish Life in this application indicates that Cornmarket wrote to Irish Life by email on the 17th February, 2014, presumably in response to a request from Mr. O'Brien asking Irish Life to go to arbitration. On the same date Irish Life emailed Cornmarket to say that they did not wish to proceed to arbitration. In fairness to the plaintiff, it would appear that he was not made aware that Irish Life had declined to go to arbitration as early as February, 2014. However, it does demonstrate that Mr. O'Brien was intent on pursuing the matter by whatever means he could at that juncture and had elected against bringing an appeal for the reasons identified.

9. Thereafter it would appear that in October 2014, Mr. O'Brien had a meeting with the TUI concerning the issue but nothing much seems to have happened arising from that meeting. In fact it was not until many months later that Mr. O'Brien, who had now instructed a solicitor, wrote through his solicitor on the 20th July, 2015 to the TUI seeking to have the TUI invoke the arbitration clause. Irish Life again declined to go to arbitration in correspondence dated the 25th August, 2015 of which Mr. O'Brien certainly was

aware.

10. Here again matters lay in abeyance for some six months until on the 4th February, 2016, Mr. O'Brien's solicitor wrote to the FSO asking him to reopen the case for the reasons set out in that letter and to hold an oral hearing into the matter. Of note, Mr. O'Brien's solicitor stated that if the FSO declined, he had instructions to appeal to the High Court. The FSO replied on the 23rd February, 2016 refusing to reopen the matter. Despite the fact that by February 2016 at the latest Mr. O'Brien had given instructions for an appeal to be brought to the High Court, that did not happen until January 2017.

### **The Time for Appealing**

11. Section 57CL(3) of the Act, provides in relation to appeals to the High Court as follows:

"An appeal under this section must be made—

- (a) within such period and in such manner as is prescribed by rules of court of the High Court, or
- (b) within such further period as that Court may allow."

12. The relevant rules referenced by the section are to be found in O.84C r.1(5) which provides:

"Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued -

- (a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or
- (b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

13. The effect of these provisions was summarised by McMahon J. in *Little v. FSO* [2011] IEHC 137 where he said (at p.2):

"3. Summarising the position, therefore, an appellant must bring his/her appeal:

- (a) within 21 days of being notified of the decision; or
- (b) such further period as the court may allow where the court is satisfied that there is good and sufficient reason for extending that period, provided that any such extension of time will not result in an injustice to any other person concerned in the matter; or
- (c) 'within such further period as [the] Court may allow' as permitted under s. 57CL(3)(b) of the Act of 1942.

4. With regard to (c), I am of the view that the discretion given there to the court is not an arbitrary one and will in the vast majority of cases be accommodated within (b) - i.e. the discretion under the Rules where the court requires 'a good and sufficient reason' to be offered by the appellant. However, I am not satisfied that the provisions in the Rules inevitably exhaust all the circumstances where the court may extend time under this statutory provision if it is moved to do so. This is clearly evident from the wording of O. 84C, r. 1(5) of the Rules as well as the terms of s. 57CL(3)(b) of the Act of 1942."

### **Discussion**

14. The parties agree that the delay that has occurred in this case is unprecedented. Therefore for the court to grant an extension of time after such an extraordinary delay, the case would have to be truly exceptional if not indeed unique. The delay that occurred in *Little* was about six months, in itself a significant period, but the decisive factor that led the court in that case to extend the time was not only that there was no prejudice to any party but it was conceded by the FSO that there was a patent error on the face of the finding. It is therefore easy to understand how the court could have come to the conclusion that the interests of justice required an extension of time to be granted.

15. Nothing of that kind arises in the present case. The primary complaint made by Mr. O'Brien here is that the FSO, faced with conflicting medical opinions from his doctors and those of Irish Life, ought to have convened an oral hearing to resolve that conflict. Furthermore he complains that the FSO appears to have decided the matter to an extent on the basis that Mr. O'Brien did not qualify for the benefit because he was not a member of the scheme for the requisite period, and Irish Life had in fact not decided his claim on that basis.

16. Although these issues were canvassed before me in terms of whether or not these constituted arguable grounds for the purposes of an extension of time, I am prepared to accept solely for the purposes of this application that they are, at a minimum, arguable.

17. The authorities in which this section of the Act have been considered, including *Little*, appear to recognise that the well known principles enunciated by the Supreme Court in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170 are applicable. In that case, the Supreme Court held that the onus was on an appellant seeking an extension of time to show that:

- (i) A *bona fide* intention to appeal was formed within the relevant time period;
- (ii) There existed something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule is not sufficient and
- (iii) that an arguable ground of appeal exists.

18. It must also be borne in mind that the authorities also establish that even where these criteria are not satisfied, the court always retains an overall discretion to extend the time where the interests of justice so require – see *Brewer v. Commissioners for Public Works* [2003] 3 I.R. 539.

19. As I have already noted however, for that residual discretion to be exercised where a delay of the enormity that has occurred here arises, the case would have to be truly exceptional.

20. In considering this issue, one must not lose sight of the legislative framework within which the extension of time provision appears. The FSO complaints procedure is designed to provide claimants with an alternative to litigation which, unlike litigation, is free, private and generally more expeditious. A complainant is required to opt between pursuing a complaint before the FSO or litigating the issue. Section 57BB provides for the objects of that part of the Act and in relation to complaints to the FSO provides that the objects include:

“(c) to enable such complaints to be dealt with in an informal and expeditious manner;”

21. To extend the time in a case involving a delay of the magnitude that has occurred here would be entirely inconsistent with those objects.

22. Although counsel for Mr. O'Brien laid emphasis on the suggestion, albeit disputed, that no prejudice accrued to any party by virtue of the extension being granted, it seems to me that before that point is even reached, the onus is on Mr. O'Brien to advance a good and sufficient reason for his failure to appeal within the statutory time limit. No reason to my mind has been so advanced and there is certainly no cogent evidence before the court which supports the proposition that his depressive illness precluded him from appealing. On the contrary, all the evidence points to the fact that Mr. O'Brien made a positive decision not to appeal at the relevant time because he was advised that it was unlikely to succeed and would be extremely costly. He accordingly falls at the first *Eire Continental* hurdle.

23. Even if it could be said that the absence of legal representation and the effects of his illness had some bearing on his failure to appeal, that could no longer be a relevant consideration after July 2015 at the latest when he clearly did have legal advice and yet still took another eighteen months to appeal. Moreover, in February 2016 Mr. O'Brien's solicitors said they did have instructions to appeal and yet nothing happened for a further eleven months. In relation to this period alone if no other, not only has no good and sufficient reason been advanced for the failure to appeal but no reason of any colour has been put forward.

24. Although it was suggested that the delay was attributable to a misguided attempt to pursue arbitration based on a misunderstanding engendered by the misleading Cornmarket brochure, that error cannot be laid at the door of either the FSO or Irish Life but in any event, it was clear by August 2015 at the very latest that arbitration was not an option. In my view therefore, this case does not present any exceptional features of the kind that would be required to justify an extension of time.

25. For all these reasons therefore, I am satisfied that the appellant has demonstrated no grounds upon which the court would be entitled to grant the extension of time sought in these proceedings which I must accordingly dismiss.