THE COURT OF APPEAL

No. 2015 /457

Irvine J.
Hogan J.
Mahon J.

BETWEEN/

DAMIEN MURPHY

PLAINTIFF/APPELLANT

- AND –

CANADA LIFE ASSURANCE IRELAND LIMITED AND IRISH LIFE ASSURANCE PLC

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of May 2016

1. This is an appeal brought by the plaintiff against a decision of the High Court (Mr. Justice White) delivered *ex tempore* on 30th July 2015. In essence, the question presented in this appeal is whether, once a matter has been dealt with by the Financial Services Ombudsman ("FSO"), it is then open to a disappointed claimant to issue fresh proceedings in the High Court seeking damages as against the financial services provider for breach of contract.

2. This is precisely what happened in the present case, where the plaintiff had previously made an unsuccessful complaint to the FSO which was not appealed to the High Court. The plaintiff then commenced the present proceedings claiming damages for breach of contract. In the course of his ruling White J. concluded that the High Court proceedings should be struck out on the grounds that they disclosed no reasonable cause of action, essentially as the matter was by now *res judicata*. It is against that decision that the plaintiff appeals.

Background to the litigation

3. The plaintiff's previous occupation was that of a taxi driver. He was, however, involved in a road traffic accident in January 2010 when his vehicle was hit from behind by another vehicle while stationary at a traffic light.

4. Mr. Murphy had previously commenced an income protection policy with Canada Life on 22nd May 2002. After the accident in January 2010 he found himself unable to continue as a taxi driver due to the neck and back injuries sustained in this accident. Mr. Murphy then submitted a claim pursuant to this policy in June 2010. The company originally started making payments at the rate of €632 per month based on Mr. Murphy's 2009 earnings albeit that Mr. Murphy contended that he ought to have been paid approximately €800 per week. At all events, following an independent medical examination carried out on Mr. Murphy by a consultant occupational physician on 6th September 2011, Canada Life ceased making payments on the basis that Mr. Murphy no longer met the criteria of physical health as defined in the relevant policy.

5. Following the termination of the insurance policy Mr. Murphy then made a complaint to the FSO. By decision dated 11th June 2012 the FSO rejected the complaint. The FSO noted that under the terms of the policy it was necessary for the assured to demonstrate that he could simultaneously satisfy three or more of the ten particular medical conditions indicating disability. The conditions in question related to, for example, an inability to get up from a chair or to walk a distance of more than two hundred metres on flat ground without stopping, or walking up and down stairs. The FSO then noted that as part of its review of Mr. Murphy's claim Canada Life had arranged for him to attend an independent medical examination with a Dr. Robert Ryan, a specialist in occupational medicine on 6th September 2011. Dr. Ryan reported adversely so far as the claim was concerned on 9th September 2011. That report stated:-

> "It was difficult to get an understanding of the nature of this gentleman's complaints or the extent of his injuries. Physical examination was inconsistent in some regards … he does not express any motivation to return to employment, which he feels unfit to do.
>
> Specifically with regards to his eligibility for the physical health test, I do not believe that this gentleman meets the criteria as laid out. He is clearly capable of sitting in a chair for thirty minutes, capable of standing for ten minutes and walking down two hundred metres. He acknowledges his ability to lift 2kg. items, he was able to bend down in the surgery today to a kneeling position to pick up an item from the floor. He readily acknowledges that he is able to turn taps and able to reach behind his back to put on his coat. He does not suffer from fits or blackouts and his vision is satisfactory. The only task he expressed difficulty in carrying out was getting off a chair without using the arms or walking up or down stairs without holding on to a hand rail. I am not certain, however, that this represents physical disability, a lack of practice or indeed an apprehension that he might either fall on the stairs or be unable to stand up from his stated position. Therefore, while this gentleman's medical conditions are somewhat ill defined to me, I am satisfied that it does not meet the criteria of the policy."

6. Dr. Ryan added a supplementary report on the 21st December 2011 confirming that he had had a full opportunity for a complete medical examination and general assessment of Mr. Murphy's condition. The FSO duly concluded that "based on these two reports" it was "reasonably appropriate for Canada Life to conclude that the complainant no longer met the policy criteria of disability". The complaint was accordingly rejected. The decision of the FSO stated that this finding was "legally binding on the parties, subject only

to an appeal to the High Court within twenty one calendar days". No such appeal was taken by Mr. Murphy.

7. Mr. Murphy commenced the present proceedings against Canada Life on 3rd February 2015 in which he claimed damages for breach of contract. A statement of claim was delivered on 14th April 2015 and it is clear from that pleading that Mr. Murphy essentially traverses the same ground as in the complaint made concerning Canada Life to the Financial Services Ombudsman. It is, perhaps, not terribly surprising that Canada Life then duly issued a motion seeking to have the proceedings struck out as an abuse of process by reason of the fact that the plaintiff had already made a complaint in respect of the same matter to the FSO and that no appeal had been taken by him to the High Court against the decision of the FSO. In these circumstances the question arises as to whether or not the plaintiff should be entitled to proceed against Canada Life for damages for breach of contract, the adverse finding of the FSO in respect of the earlier complaint notwithstanding.

Whether the doctrine of *res judicata* applies to decisions of the FSO which have not been appealed to the High Court?
8. In my view, it is perfectly clear, both as a matter of principle, statute and authority that, broadly speaking, a claimant cannot advance a complaint to the FSO and then, should that claim prove unsuccessful, re-litigate the same matter before the High Court under the guise of separate proceedings. There is a clear public interest in the finality of litigation, coupled with a requirement that a litigant should advance the entirety of a claim and not endeavour to litigate matters in a piecemeal basis. The potential for the abuse of the litigious process by repeated applications is manifest.

9. These principles are reflected in the doctrine of *res judicata*, so that a matter which has been finally judicially decided cannot generally be re-opened. The principles of *res judicata* serves not only to protect these important public interests, but also to safeguard the legitimate interests of litigants to ensure that they are not harassed by the unnecessarily burdensome litigant who endeavours to re-open matters which have already been judicially determined.

10. The doctrine does not apply simply to judicial findings, but also to administrative determinations which, in the nature of things, are final. In this context it is perfectly clear that determinations of the FSO enjoy this binding character and status. Section 57CI(9) of the Central Bank Act 1942 ("the 1942 Act") (as inserted by s. 9 of the Central Bank and Financial Services Authority of Ireland Act 2004) expressly provides to this effect by stating that:

> "Subject to the outcome of any appeal against a finding of the Financial Services Ombudsman in respect of a complaint, the *finding is binding upon the complainant, the regulated financial service provider concerned and every other person who is a party to the complaint."* (italics supplied)

11. As the italicised words make clear, the Oireachtas intended that adjudications by the FSO would have a binding character, subject only to an appeal. It would be quite inconsistent with that legislative intent if these statutory provisions could be effectively circumvented by issuing new High Court proceedings which attempted in effect to re-litigate the same matters that were already determined by the FSO in the course of the adjudication upon the earlier complaint.

12. This principle has, in any event, already been established by authority, albeit at High Court level: see *Murray v. Trustees and Administrators of the Irish Airlines Superannuation Scheme* [2007] IEHC 27, [2007] 2 I.L.R.M. 196, *O'Hara v. ACC Bank plc* [2011] IEHC 367 and *Crowley v. Zurich Life Assurance* [2015] IEHC 197. All three decisions are unanimously of the view that a disappointed litigant cannot re-litigate a matter which has been the subject of an adverse decision from either the Pensions Ombudsman (in the case of *Murray*) or the FSO (in the cases of *O'Hara* and *Crowley*) by reason of the principle of *res judicata*. As Kelly J. said on this very point in *Murray*:

> "In my view it would be contrary to the policy of the legislature as gleaned from the relevant statutory provisions that it should be open to a party to avail himself of the statutory machinery but when dissatisfied with the result seek, not merely to exercise the statutory right of appeal, but also to commence in this court proceedings of a substantive nature which seek to, in effect, set aside the determination of the Ombudsman.
>
> A party, such as Mr. Murray, who is aggrieved with the determination of the trustees' may, at his option, avail himself of the services of the Ombudsman or bring proceedings in an appropriate court for declaratory or other relief. He may not do the latter when in receipt of an adverse determination from the Ombudsman. That is so because the determination of the Ombudsman is *res judicata* of the dispute in question, subject only to the right of appeal."

13. It may well be that the rule is not an absolute one and is subject to exceptions, but it is unnecessary to consider any possible exceptions so far as this case is concerned.

14. In my view, just as in *Murray*, this is a case which plainly calls for the application of the principle of *res judicata*. I can quite appreciate that the plaintiff was disappointed with the decision of the FSO. But if so, his remedy was to appeal that decision to the High Court pursuant to s. 57CL(1) of the 1942 Act. What, I fear, he cannot do is not to appeal that decision but later endeavour to re-litigate the matter in separate proceedings seeking damages against the financial services provider for breach of contract.

15. This, however, is precisely what the plaintiff has sought to achieve in the present proceedings by commencing these proceedings. As Kelly J. pointed out in *Murray*, this would be entirely inconsistent with the statutory scheme, the binding character of the FSO determination and the general effect of s. 57CI(9) of the 1942 Act. It follows, therefore, that I consider that White J. was entirely correct in his conclusion that these proceedings were barred by the doctrine of *res judicata* and are, for this reason, doomed to fail.

Conclusions
16. In the light of the foregoing analysis of the legal issues raised in this appeal, I am of opinion that the High Court was entirely correct to strike out these proceedings as disclosing no reasonable cause of action. In these circumstances, I consider that this Court has no option but to dismiss this appeal.