Neutral Citation: [2015] IEHC 197

**THE HIGH COURT**

**2012, No. 11281P**

**BETWEEN/**

**FLORENCE CROWLEY**

**PLAINTIFF**

**AND**

**ZURICH LIFE ASSURANCE PLC, ANTHONY BRENNAN, KATE McNAMARA AND WILLIAM PRASIFKA PRACTISING AS THE FINANCIAL SERVICES OMBUDSMAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on 4th of March 2015**

1. In a case where the Financial Service Ombudsman has adjudicated on a complaint and has ruled that the service provider acted in accordance with the terms of the underlying contract or otherwise did not act unfairly, can the complainant then subsequently sue the service provider for breach of contract directly in the High Court where no appeal has been taken against the decision of the Financial Services Ombudsman? That, in essence, is the principal issue which arises in this application which has been brought by the financial service provider to have the proceedings struck out on the grounds that the matter is *res judicata.*

2. The issue arises in the following way: At some time in 2002 the plaintiff, Mr. Crowley, effected a Life and Serious Illness policy with the first defendant's predecessor, Eagle Star. This policy was subsequently taken over by Zurich Life Assurance plc ("Zurich"), but nothing turns on this. There is no dispute but that the plaintiff discharged all premium payments under the policy thereafter.

3. The policy became due on the happening of certain critical events, which were defined in the following terms by Appendix B. One of these events involved coronary catheter treatment (including angioplasty). This was defined as:

> "The undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. The procedure must be to correct at least 50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the necessity for the above operations is required."

4. By early 2010 it was clear the plaintiff needed surgical treatment for a serious heart condition. In April 2010 he underwent a coronary angiography. As a result of this procedure it became clear that surgery was necessary and he underwent an angioplasty stenting of the lower anterior descending artery ("the LAD artery"). It appears that three sequential lesions were stented. Although narrowing was found in a diagonal branch of the artery which was subtended by the stent this was left alone and not stented.

5. On 19th May 2010 Mr. Crowley completed a Serious Illness Claim Form in the wake of this surgery and this was submitted to Zurich. Medical details were supplied by Dr. John O'Connor, Mr. Crowley's general practitioner, and by his consultant cardiologist, Dr. David Mulcahy. The application was considered by Zurich with the assistance of their Chief Medical Officer. At all events, Zurich wrote to the plaintiff on 8th July 2010 declining the claim. That letter was in the following terms:

> "In order to be able to claim under this policy for coronary catheter treatment (including angioplasty) your surgery must satisfy the following definition:
>
> The undergoing of any interventional technique, on the advice of a cardiologist that has been appointed as Consultant Physician, that involves the use of transluminal coronary catheters. The procedure must be to correct at least 50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the necessity for the above operations is required.
>
> We received a medical report from your general practitioner which noted that you underwent stenting to the left anterior descending artery. In addition to this report the patient discharge letter you submitted with your claim also confirmed that you underwent this procedure and that the only stenting occurred in the left anterior descending artery. Your general practitioner also provided a summary of the specialist reports you have received in relation to your surgery which confirm the same. As you will note from the above, the procedure must be to correct the narrowing of two or more coronary arteries. The procedure you underwent was to correct narrowing to one artery and therefore in the circumstances we have no option but to decline this claim for serious illness benefit".

6. The plaintiff appealed this decision under Zurich's own internal appeal procedures. There was then further correspondence between Zurich and Mr. Mulcahy.

7. That appeal was, however, unsuccessful. In a letter dated 9th November 2010 Zurich stated:

> "Dr. Mulcahy replied to our Chief Medical Officer outlining the specific operation that you underwent and the locations treated. The information received from your specialist once again confirms that you had stenting only to the left anterior descending artery….. As the medical information received from your doctor confirms that you only received treatment to one coronary artery and therefore do not satisfy the criteria required for a valid serious illness claim. Therefore in this regard we have no option but to continue to decline this claim."

8. At that point Mr. Crowley then brought a complaint to the Financial Services Ombudsman. In a ruling delivered by the Financial Services Ombudsman on 27th January 2012 that complaint was not upheld. It is clear from the ruling of the Financial Services Ombudsman that a careful consideration was given to the terms of the policy and the medical evidence. The Financial Services

Ombudsman concluded Zurich's decision to refuse the claim was not unreasonable as:

> "Only one of the complainant's arteries showed narrowing, the LAD. The policy definition called for two or more arteries to be stented. This did not happen in this case. There is no objective evidence to show that the complainant's treating doctors did not insert a stent on one of the complainants other arteries (as opposed to a branch of the LAD) because there was a preferable course of treatment available or because such course of action may have placed his life in danger."

9. While Mr. Crowley was understandably very disappointed with the outcome of this complaint, it is important to stress that no appeal was taken to this Court in the manner provided for by s.57CM of the Central Bank Act 1942 (as inserted by the Central Bank and Financial Services Authority Ireland Act 2004) ("the 1942 Act"). The plaintiff instead commenced the present originating proceedings in November 2012 claiming damages for, *inter alia*, breach of contract. Far reaching allegations are made in those proceedings against all the various defendants. I should also say that the plaintiff is a litigant in person who has represented himself at all stages of the proceedings.

10. I should pause here to say that the second defendant, Mr. Brennan, is the Chief Executive Officer of Zurich Life and the third defendant, Ms. McNamara, is a Claims Assessor employed by Zurich. In essence the claim against Zurich (and, by extension, its employees) is that they have been guilty of breach of contract in failing to honour the terms of the serious illness policy. There are also allegations of fraud and deception on the part of Zurich.

11. The fourth defendant, the Financial Services Ombudsman, then brought an application to have the claim against him struck out on the ground that no reasonable cause of action was disclosed. In his ruling on that day, Kearns P. struck out the proceedings as against the Ombudsman. In the course of that ruling Kearns P. said:

> "But the decision having been given and Mr. Crowley in fairness accepts that he is aware of the terms of the Act, he must have known he had a right of appeal to the High Court, but he did not exercise it. And it is still not clear to me why he did not exercise it. But today he says it is because he thought the internal review exhausted that option. But Mr. McDermott [counsel for the Ombudsman] points out that the letter sent at the time of the ultimate determination made clear to any person who brings a complaint, because it happens in every case, that they do have a right of appeal to the High Court. But for some reason, which as I say, I find very difficult to understand, Mr. Crowley had instead opted to bring a highly, if I may put it, risky case from his point of view because he has to undertake the burden of discharging proof of misfeasance in public office is an extremely high onus."

12. Kearns P. noted that there was no evidence in which a claim of misfeasance could be made out. The judge then observed:

> "Where a citizen feels a public body has not followed correct procedures the appropriate remedy is judicial review. That is not being sought. Where a citizen feels that the Ombudsman has got it wrong and also did not apply proper procedures as a result the remedy is an appeal. Neither of these have been followed in this case. So I am quite satisfied that the ground of objection to the maintenance of these proceedings against the Ombudsman is properly made out. Accordingly, I must grant the relief sought by the Ombudsman. No similar relief has, at least as yet, in any event been sought by the other defendants. So I am saying nothing *vis-à-vis* the legal proceedings against those other defendants."

13. It should be emphasised that the fact that Kearns P. concluded that the case against the Ombudsman should be struck out is not dispositive of the present application. It should be recalled that s. 57BO(1) of the 1942 Act provides that no action against the Ombudsman (other than an appeal) in relation to the performance of his duties will lie without the leave of this Court. This Court can grant leave only if bad faith can be shown. Since there was no evidence of this, it followed that it was for this reason and against this particular statutory background that Kearns P. concluded that the action against the Ombudsman was bound to fail.

14. At around the same time as the Ombudsman's application to strike out the proceedings had been determined, the other defendants also issued a motion before this Court in which they also sought to have the proceedings struck out on the ground that it disclosed no reasonable cause of action. Thus, Zurich also sought an order dismissing the proceedings on the grounds that they constituted an abuse of process. In this respect Zurich contented that Mr. Crowley was estopped from pursuing this claim for breach of contract (and other relief) in circumstances where the matter had already been determined by the Ombudsman and in respect of which decision no appeal had been taken to this Court in the manner provided for by s. 57CM of the 1942 Act.

15. Viewed thus, this appeal again raises a question of fundamental importance regarding the status of decisions of the Financial Services Ombudsman which has been considered in a series of High Court judgments. It must be recalled that the Financial Services Ombudsman ultimately *adjudicates* upon complaints in relation to financial service providers, so that his or her decisions are binding, subject only to the right of appeal to the High Court. In this respect, the Financial Services Ombudsman is quite unlike the Ombudsman established under the Ombudsman Act 1980, as the latter is given the power of suasion only and cannot make any binding adjudication.

16. Quite obviously, the Financial Services Ombudsman adjudicates by reference to the ordinary law of contract in the first instance, but he is not confined to that as the 1942 Act makes it clear that he has a wider jurisdiction to examine aspects of the fairness of any given financial services transaction.

17. Section 57BK(4) of the 1942 Act provides that the Financial Services Ombudsman is entitled:

> "to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required 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."

18. These powers are enhanced by the terms of s. 57CI(2) of the 1942 Act which provide that:

> "(2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
>
> (a) the conduct complained of was contrary to law;
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> (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;

(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;

(e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

(g) the conduct complained of was otherwise improper."

19. In *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 I commented thus on the scope of these powers:

> "The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the courts. It is clear from the terms of s. 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of *et aequo et bono* which go beyond the traditional limitations of the law of contract."

20. If, however, the Financial Service Ombudsman has adjudicated on a complaint and has ruled that the service provider acted in accordance with the terms of the underlying contract and generally did not act unreasonably or unfairly having regard to the provisions of s. 57CI(2) of the 1942 Act, is the matter *res judicata*? It is clear from the judgment of Charleton J. in *O'Hara v. ACC Bank plc* [2011] IEHC 367 that the Financial Services Ombudsman's adjudication will generally create an issue estoppel which will preclude the matter being re-litigated again. In *O'Hara,* Charleton J. held, following a comprehensive reviews of the authorities on the topic of issue estoppel and *res judicata*, that an adjudication by the Financial Services Ombudsman was, in principle, binding so as to bar any subsequent collateral legal proceedings raising a claim in contract:

> "To all intents and purposes, it is clear that the allegations made in the complaint before the Financial Services Ombudsman are the same as those which are sought to be litigated in these proceedings. The nature of the jurisdiction conferred on the Financial Services Ombudsman by the Oireachtas cannot be ignored. It would be contrary to the statutory scheme and it would also be unfair for parties to a complaint before the Financial Services Ombudsman to be later subjected to very similar litigation. The legislation has made any determination by the Financial Services Ombudsman subject only to an appeal. Absent a special reason of sufficient impact to nullify any potential abuse of process, it would be wrong for this Court to say that complaint could be re-litigated all over again."

21. In effect, this is what Mr. Crowley seeks to do in these proceedings. The present claim – namely, that Zurich wrongly repudiated the plaintiff's serious illness claim - is, in essence, the same as the claim which was previously considered and adjudicated by the Financial Services Ombudsman.

22. It is also important to stress again that there was no appeal against the decision of the Financial Services Ombudsman, so that the findings of the Financial Services Ombudsman in this case are final. This is, in any event, made clear by s. 57C(9) of the 1942 Act which expressly provides that adjudications by the Ombudsman have a binding character, subject only to the right of appeal to this Court.

23. In view of this and applying the reasoning of Charleton J. in *O'Hara,* this Court cannot, as it were, seek to go behind those findings by generally re-opening the plaintiff's contractual claim unless there are altogether special circumstances which would it make it unfair to hold the parties to the earlier issue estoppel. In other words, this Court would be obliged to hold that the present proceedings should be struck out as an abuse of process by reason of the earlier issue estoppel created by the finality which attaches to the Ombudsman's determination in the absence of an appeal, unless there are special circumstances which would make this, objectively speaking, unfair?

24. During the course of the hearing, three possible sets of special circumstances were identified. First, the plaintiff, as a litigant in person, failed to understand that he could appeal the Ombudsman's decision. Second, Zurich employed an incorrect version of the policy at an earlier stage of the deliberations. Third, the medical conclusions were manifestly flawed and were possibly based in part on the wrong version of the policy. These contentions can all be examined in turn.

**The plaintiff's explanation for the failure to appeal the decision of the Financial Services Ombudsman**

25. It is acknowledged that, in the wake of the initial adverse decision, the plaintiff requested an internal review of that decision by the Financial Services Ombudsman. While that request was acceded to, the ultimate result did not change. Mr. Crowley maintained that he had assumed that, having requested such an appeal, no appeal then lay to this Court. Yet it is clear from the relevant documentation that the plaintiff was informed in express terms of the existence of such an appeal, *even in the wake of the internal review*. I respectfully agree with the view of Kearns P. which he expressed at an earlier stage of these proceedings when, dealing with the application taken by the Financial Services Ombudsman to be struck out of the proceedings, he said he could not understand why the plaintiff did not avail of this opportunity if he (*i.e.,* Mr. Crowley) was, in fact, dissatisfied with the outcome and he wished to take matters further

26. In these circumstances, I cannot accept that, viewed objectively, a satisfactory explanation for the failure to lodge an appeal has been advanced by the plaintiff. I must therefore reject his contention that in this respect he can advance a justification for not treating the Financial Services Ombudsman's decision as a *res judicata*.

**The contention that Zurich used a wrong version of the relevant insurance policy**

27. The second contention is that Zurich used a wrong version of the relevant insurance policy in its earlier dealings with the plaintiff's general practitioner and consultants. As we have already noted, both the plaintiff's claim – and the Financial Services Ombudman's actual decision – rested entirely on the actual terms of the serious illness policy.

28. The version which was used by Zurich when it wrote to the plaintiff's cardiologist, Dr. Mulcahy on 20th September 2010 was as follows:

> "Coronary Artery Disease requiring Surgery: 'The undergoing of one of the following operations on the advice of a Consultant Cardiologist:

(a) Open-heart surgery to correct narrowing or blockage of one or more coronary arteries with bypass grafts.

(b) Any interventional technique involving the use of transluminal coronary catheters to correct significant stenosis (at least 50% diameter narrowing) of two or more coronary arteries.

Angiographic evidence to support the necessity for the above operations is required."

29. In the course of the hearing it became clear that the policy which was in force so far as the plaintiff was concerned was phrased slightly differently. It was in the following terms:

"Benefit is payable if the insured had coronary cathether treatment including angioplasty which is defined as:

'The undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. The procedure must be correct to at least 50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the procedure will be required."

30. In view of the fact that the wording of the earlier policy – which was the one which, it was ultimately agreed, governed Mr. Crowley's claim – was phrased in slightly different language from the later one, I suggested to Zurich during the course of the hearing that it would arrange for a new report to be commissioned from Dr. Mulcahy and which clarified whether the plaintiff had undergone "a procedure that involved the stenting of two or more coronary arteries as required in the following definition."

31. This was duly done and Dr. Mulcahy issued a further report on 7th January 2014 based on the terms of the policy which was in force in respect of the plaintiff's claim. Dr. Mulcahy explained:

"…the procedure was carried out on three sequential lesions within the same coronary artery and thus the procedure was not to correct at least a 50% diameter narrowing of two or more coronary arteries. The patient had a small branch of the same artery that was stented which itself had a narrowing and which we left alone as an appropriate clinical decision.

Mr. Crowley did not have significant (greater than 50%) lesions of either of the other two main coronary arteries at the time he underwent stenting of his LAD."

32. It is thus clear from this report of Dr.Mulcahy that he did not consider that the slightly different version of the policy made any real difference to his conclusion that the procedure performed did not come within the terms of the policy.

33. Accordingly, while it was most unfortunate that the exact and precise wording of the policy had not been supplied to Dr. Mulcahy in the first instance, nevertheless, in view of his subsequent conclusion, I am not persuaded that an injustice was done to the plaintiff on this account. In these circumstances, this development does not justify any departure from the *res judicata* rule.

**The contention that the medical conclusions were flawed**

34. So far as the third argument is concerned, the contention here is that the medical conclusions were flawed in that, as Dr. Mulcahy's subsequent report made clear, one branch of the same artery was also stented. The plaintiff then contended that a branch of the artery should itself be regarded as a coronary artery in its own right. I again adjourned the proceedings to give the plaintiff the opportunity to adduce medical evidence which corroborated this claim.

35. The plaintiff subsequently informed me that he had approached a variety of consultant cardiologists for this purpose, but they either declined on the ground that they were not insured to give advice of this kind or for other similar reasons. In the end, the plaintiff was unable to supply any further medical evidence to support this contention.

36. Since the plaintiff has been unable – for whatever reason – to obtain medical evidence which demonstrates that the branch of a coronary artery should be regarded as an artery in its own right, I am driven to the conclusion that the plaintiff cannot demonstrate the existence of special circumstances which would defeat the application of the *res judicata* rule on this account either.

**Conclusions**

37. In summary, therefore, I find myself obliged to hold that the plaintiff's claim is barred by the doctrine of *res judicata*. There are, objectively, no exceptional grounds which would justify me re-opening or in some way going behind the decision of the Financial Services Ombudsman.

38. It is impossible not to have considerable sympathy for the plight of the plaintiff. He purchased life insurance cover to cater for the contingency of serious illness. It transpired that he did in fact have a serious illness, but that the extent of the surgical treatment did not fall within the specific terms of the policy. He is now doubly disadvantaged in that his capacity to earn has been greatly diminished by reason of this serious illness, yet the contingency against which he sought insurance to cover himself has proved to be unexpectedly unavailing.

39. I must nevertheless apply the law as I find it to be. It gives me no pleasure at all to hold that his claim is barred by *res judicata* and I cannot properly find that it comes within any of the recognised exceptions to that doctrine. I would request Zurich to give as sympathetic a re-consideration of the underlying merits of this claim if this were considered feasible. But beyond that I find myself nonetheless obliged to dismiss the present case on the ground that it is bound to fail having regard to the fact that the unappealed decision of the Financial Services Ombudsman creates a res judicata which is fatal to the plaintiff's claim.