THE COURT OF APPEAL

Appeal Number: 2021/47

Costello J.
Collins J.
Binchy J.

Neutral Citation Number [2022] IECA 214

IN THE MATTER OF AN APPEAL UNDER SECTION 64(6) OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN ACT 2017

BETWEEN/

UTMOST PANEUROPE DAC

APPELLANT/
RESPONDENT

- AND -

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT/
APPELLANT

- AND -

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NOTICE PARTY

RULING OF THE COURT (COSTS AND CONSEQUENTIAL ORDERS)

1. On 30th March last the Court gave judgment in the above entitled proceedings (under neutral citation [2022] IECA 77). This was a judgment on a statutory appeal brought pursuant to s.64(6) of the Financial Services and Pensions Ombudsman Act 2017, which provides for an appeal from a decision of the High Court on a point of law only. The

judgment of the Court was given by Binchy J, Costello and Collins JJ concurring. In this ruling, for convenience, the Court adopts the same terms as defined in the principal judgment.

2. In the High Court, Simons J., on the application of the respondent ("Utmost") had set aside a decision (the "Decision") of the appellant (the "FSPO") made pursuant to s.60 of the Act of 2017 whereby the FSPO upheld a complaint (the "Complaint") made by the Notice Party against Utmost and directed Utmost to admit a claim (the "Claim") for payment of benefit to the Notice Party pursuant to a group income protection voluntary scheme insurance scheme (the "Scheme"), which the Notice Party had originally entered into with Friends First, but which was subsequently taken over by Utmost.

3. Section 64 (6) of the Act of 2017 provides for an appeal to this Court on a point of law only. The FSPO proposed a number of questions of law for adjudication by this Court and, following a hearing on 3rd February 2021, which convened specifically for the purpose of receiving the submissions of the parties as to the points of law suggested by the FSPO, the trial judge handed down a judgment on 10th February 2021 whereby he granted leave to appeal on the three questions of law which are considered and answered in the principal judgment. Thereafter, on 10th March 2021, the FSPO filed its notice of appeal, formulated around the questions certified by the trial judge. In part 4 of its notice of appeal, the FSPO sought an Order allowing the appeal and setting aside the judgment of the High Court, as well as an Order affirming the Decision.

The answers to the questions certified

4. The questions certified were formulated in general and abstract terms, reflecting concerns of the FSPO as to the implications of the decision of the High Court relating to the statutory remit of the FSPO and factors to be taken into account by the FSPO when considering complaints, as well as the circumstances in which a court may intervene to set

aside a decision of the FSPO. Arguably the questions were far broader in scope than was necessary to determine any issues arising out of the decision of the trial judge and might perhaps have been more narrowly drawn. In any case however, it is fair to say that the questions were more reflective of general concerns of the FSPO arising out of the decision of the trial judge, relating to the powers and jurisdiction of the FSPO, than they are a reflection of the case advanced by Utmost in its appeal to the High Court from the Decision. This has some relevance to the question of costs now under consideration as do the reliefs sought by the FSPO in his notice of appeal.

5. This is because in his submissions on the issue of costs, the FSPO has contended that he has been successful on two of the three questions certified for appeal, and says that the Order of the Court as to the costs of this appeal should reflect that success. More specifically, he submits that the Court should order that Utmost recover 50% only of its costs incurred in the appeal. In this regard, the FSPO relies upon the principles regarding the division of costs in proceedings where both parties have enjoyed a measure of success, as enunciated by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 and *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. In the latter case, Murray J. held (at para. 37):

> "The court has, however, the power under section 168(2)(a) [of the Legal Services Regulation Act 2015] to make an order in [a party's] favour to the extent that it was "partially successful" in the proceedings, just as it has the power to make an order on the same basis in favour of HIA. That power extends to awarding "costs relating to the successful element" of the proceedings. The difference between the two provisions is important: the party who prevails has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order

for costs in respect of the successful aspect of its claim if, having regard *inter alia* to the criteria specified in s.169(2), it is appropriate to award them."

6. In considering the submissions of the FSPO as to costs in these proceedings, it is important to bear in mind the relief claimed by Utmost in these proceedings, the grounds upon which that relief was claimed and the degree of success enjoyed in the proceedings by Utmost. The relief sought by Utmost in its notice of motion of 6th September 2019 was simple – Utmost sought an order setting aside the Decision. It obtained that relief in the High Court, and it has maintained that success on this appeal.

7. In his grounding affidavit sworn on behalf of Utmost, Mr. Nuvoloni, head of legal and compliance at Utmost, sets out Utmost's grounds of appeal to the High Court from the Decision. No reliance was placed by Utmost on the Consumer Protection Code (the "Code") in these grounds of appeal. That is of relevance to question No.1, certified by the trial judge, which was: "Is the Ombudsman, when determining the reasonableness of the conduct of a financial services provider, required to have regard to any applicable code of conduct published by the Central Bank?" While reference was made to the Code by counsel for the appellant in her submissions to the High Court, it does not appear to be accurate to say that Utmost was placing significant reliance upon the Code in its submissions to the trial judge; it simply referred to clause 7.6 of the Code (which had been referred to by the FSPO in the Decision), and to its obligation to verify the Claim.

8. It is more accurate to say that the reason that question 1 featured at all in this appeal is because of concerns that the FSPO had arising out of the emphasis placed by the trial judge on the Code. However, the comments of the trial judge in this regard did not arise out of the case made by Utmost. Moreover, and significantly, before this Court the FSPO did not really contest the relevance of the Code to claims of this kind – rather his concern was that the decision of the trial judge was open to the interpretation that the FSPO must

refer to the Code in all decisions on claims of this kind, irrespective of the extent of which the Code is relevant in any given case. In these circumstances, it seems to the Court that even if it is correct to characterise the answer to question 1 as meaning that the FSPO was predominantly successful on this issue (as he maintains in his submissions on costs) his concerns in the matter were overstated and could not possibly form any basis upon which to deprive Utmost to an order for costs to which it is otherwise entitled by reason of its success in the proceedings.

9. The FSPO also contends that it was successful on the issue raised by question 2. This question was in the following terms: Does the Ombudsman have jurisdiction, in the absence of any finding on his part that there has been a breach of contract, to direct a financial services provider to admit a claim under a policy of insurance and to pay the benefit to the insured. This question arose from a conclusion of the trial judge that the FSPO did not have jurisdiction to direct Utmost to admit the claim for income protection in the absence of a finding that, as a matter of contract law, the Notice Party was entitled to recover under the Scheme. This question is addressed from para. 103 and onwards in the principal judgment, and at para. 105 of the judgment Binchy J held that "of its very nature, an investigation conducted by the FSPO is of an altogether different character to legal proceedings, and the powers conferred upon the FSPO are not circumscribed by the requirement that the FSPO should make a determination as to legal rights, before directing a remedy." This conclusion was consistent with the stance taken by the FSPO to question 2, which was opposed by Utmost. That being so, the FSPO has prevailed on this appeal with its submissions on Question 2.

10. However, in para. 106, it was made clear that the FSPO does not enjoy a *carte blanche* when directing remedies, and at para. 107 of the principal judgment, the court held that the remedy directed by the FSPO must bear some logical relationship to the conduct of

the financial services provider with which the FSPO has found fault. It is not open to the FSPO to impose remedies which bear no relationship to the conduct giving rise to the complaint, and in the context of these proceedings, the making of an order by the FSPO to direct a financial services provider to admit a claim under a policy of insurance and to pay benefit to the insured, in the absence of a finding of a breach of contract on the part of the service provider, is one that requires the most careful consideration, taking account of a range of factors identified in the principal judgment. These include the proportionality of the remedy, the impact of that remedy upon the financial service provider, including the likely cost of compliance with the remedy directed and the nature of the conduct of the financial services provider in its dealings with the complainant. In this case, there was no analysis of any kind on the part of the FSPO such as to justify the making of the order by the FSPO directing Utmost to admit the claim of the Notice Party.

11. At para. 108 of the principal judgment Binchy J. held:

"In this particular case the remedy directed by the FSPO for the mischief identified (accepting for present purposes that the finding of mischief was correct) was, on any analysis, disproportionate and unconnected to that mischief. It was not in dispute that the appellant suffered from an excluded illness, but the FSPO concluded that Utmost over emphasised that illness in considering eligibility for benefit, to the exclusion of another, covered illness, rheumatoid arthritis. It is very difficult to see how the remedy directed (payment of the benefit) logically flows from the conduct with which the FSPO found fault, not least in circumstances where the Notice Party suffers from an excluded illness."

12. While therefore the FSPO has succeeded in its submissions on the high-level question posed as to its jurisdiction, para.108 of the principal judgment makes it clear that the circumstances of this case did not merit the exercise of that jurisdiction in this instance. It follows that while the FSPO was successful, in the abstract, in the arguments that it

advanced as to the interpretation of s.60(4) of the Act of 2017, it was not successful as regards the application of its powers to the facts of the instant proceedings. Success at that level belonged to Utmost, and it follows that Utmost is entitled to recover its costs incurred in addressing this question also.

13. As to Question 3, Utmost was successful with its arguments that the High Court was entitled to draw inferences from documentation different to those drawn by the Ombudsman. This is accepted by the FSPO, although it is submitted by the FSPO that for the purposes of costs, this question was peripheral to the other two questions.

14. Having considered the submissions of the parties, for the foregoing reasons notwithstanding that the FSPO has enjoyed a measure of success as regards the answers to the questions posed on this appeal at a high level, at a practical level, Utmost has been entirely successful in what must be regarded as the central issue on this appeal *i.e.* in maintaining the order of the High Court setting aside the Decision, which was the principal relief it sought and obtained in these proceedings. It has been entirely successful on this issue, and it has not been suggested that Utmost raised issues unnecessarily in pursuit of the relief it sought , or by its conduct unnecessarily prolonged the proceedings or in any other way caused the FSPO unnecessary expense in the proceedings. This is not, therefore, an appropriate case for this Court to exercise its jurisdiction to depart from the normal rule that the party who has prevailed is entitled to an order for payment of all of its costs by the unsuccessful party. Accordingly, Utmost is entitled to recover from the FSPO all of its costs incurred in connection with this appeal.

15. The parties have also addressed in their submissions the question as to whether it is necessary to remit any matters to the FSPO for further consideration. These submissions were made in order to address a point made at para. 111 of the principal judgment, that the FSPO in making his decision on the Complaint dealt with just one of four elements of the

Complaint. Furthermore, the trial judge, having set aside the direction of the FSPO, had ordered that the Complaint should be remitted to the office of the FSPO for reconsideration having regard to the principal judgment delivered by the trial judge.

16. The three elements of the Complaint that were not specifically addressed by the FSPO were:

1. That Utmost wrongly declined the initial claim of the Notice Party:
2. That Utmost wrongly declined the complaint of the Notice Party on appeal and
3. That the policy provided to the Notice Party was not suitable for her requirements.

17. While the FSPO has submitted that these matters should be remitted to the FSPO for fresh consideration, the Court agrees with the submissions of Utmost that this is unnecessary and would serve no useful purpose. Having thoroughly examined the Complaint, the only adverse conclusion that the FSPO made as regards the manner in which the Complaint was processed by Utmost, was that Utmost had, in considering the claim of the Notice Party for payment of benefit under the Scheme, over-emphasised one medical condition from which the Notice Party suffered (which condition was expressly excluded from benefit at the time the Notice Party was admitted to the Scheme) and had not accorded sufficient consideration to another condition - rheumatoid arthritis – in respect of which the Notice Party would have been entitled to cover under the terms of the Scheme if she demonstrated that she suffered from that condition , and that it was that condition that prevented her from working. That conclusion, however, was based on an interpretation of correspondence which both the trial judge, and this Court on appeal, considered to be unsustainable, and it is for that reason that the Decision was set aside by the trial judge. Since the FSPO found no other fault with the handling of the Claim by

Utmost, it would, in the Court's view, be entirely superfluous to refer the Complaint back to the FSPO in order to determine whether or not Utmost had wrongly declined the claim.

18. As to the claim of the Notice Party that she had been provided with insurance that was unsuitable for her needs, that is not a matter which in the circumstances of this case could give rise to any ground of complaint against Utmost, because the Scheme was initially provided and operated by Friends First and it was only much later that the obligations of Friends First under the Scheme were taken over by Utmost. Any complaint regarding the suitability of the Scheme for the Notice Party could only arise at the time the Notice Party applied for or was offered membership of the Scheme and could therefore only be a complaint as against the original service provider, Friends First. The Court expresses no view whatever as to whether there is any basis for such a complaint or whether such a complaint may be pursued at this stage. For the foregoing reasons, there is therefore no necessity to refer the Complaint to the FSPO for further consideration. As to the answers to the questions themselves, the answers are manifest from the judgment itself, and it is undesirable to attempt to include the answers to the questions in the order to be made by this Court.

19. Accordingly, the court makes the following orders:

1. An Order affirming the Order of the High Court setting aside the Decision and direction of the FSPO of 15th July 2019 in its entirety;
2. An Order affirming the Order of the High Court awarding the costs of the proceedings in the High Court, including all reserved costs and the costs of two sets of written legal submissions and an overnight transcript to Utmost; and
3. An order directing payment of all costs incurred by Utmost in connection with this appeal by this FSPO. In default of agreement the costs to be adjudicated by a legal costs adjudicator.