



Material non-disclosure and Insurance

O'Donoghue v. Office of The Financial Services and Pensions Ombudsman [2018] IEHC 581

February 2019

The High Court in [*O'Donoghue v. Office of The Financial Services and Pensions Ombudsman*](#) [2018] IEHC 581 examined findings of the Office of the Financial Services Ombudsman (“FSPO”) in relation to the voiding of an insurance policy where it was claimed material information had not been provided. This case shows how the court will view such findings and also that awards can still be made by the FSPO even where it is held that disclosures were not made.

Background

In 2011, Mr. O'Donoghue made a complaint to the FSPO against Bank of Ireland Insurance Services (“BIIS”), and RSA Insurance (“RSA”), an insurance intermediary and insurance company.

The FSPO addressed the complaints separately and issued its findings in 2012. Those findings were the subject of an appeal to the High Court. O'Malley J. allowed the appeal and sent the complaints back to the FSPO for further review – see [*O'Donoghue v The Financial Services Ombudsman*](#) [2014] IEHC 620. The complaints were then re-adjudicated and an oral hearing was conducted in relation to the complaint against BIIS. There was more correspondence between the parties and additional items of evidence were requested by the FSPO. The FSPO then issued its findings in relation to both the RSA and

For further information on any of the issues discussed in this article please contact:



[Rachel Turner](#)

Senior Associate Litigation

DD: + 353 (0)1 673 1845

rachel.turner@dilloneustace.ie

BIIS complaints in 2017. Those findings were the subject of the appeal before the High Court. The main ground of appeal was that the FSPO was wrong in making a finding of fact that the insurance policy was correctly voided.

Facts

In approximately 2005, Mr. O'Donoghue purchased a residential apartment as an investment property. He contacted BIIS to take out an insurance policy for the property. The underwriter of the insurance policy was RSA with BIIS acting as intermediary.

In November 2005, the property was broken into. Mr. O'Donoghue made a claim under the policy, but, in May 2006, RSA informed him that they were voiding the policy for misrepresentation and refunded the premium paid.

The form filled in when purchasing the insurance policy outlined that the questions on that form related to facts considered material to giving insurance and that if there was any doubt as to whether a fact was material it should be disclosed. The form defined a "*material fact*" as "*one which might affect the company's decision to give you insurance and the premium we might charge*".

The form described the property as a tenanted property that was "*not left unoccupied for more than 2 months a year*" and was regularly occupied at night. A declaration that the information in the form was correct was signed by Mr. Donoghue.

Mr. O'Donoghue accepted that the house was vacant but argued that he contracted to buy a policy for an unoccupied house. He claimed that the insurance premium for the insurance policy was calculated on the basis of a vacant property and that he informed BIIS that the house would be unoccupied. He alleged that the form was fabricated to add details of the tenancy and that the form was filled in with inaccurate details after he signed it and handed it over to BIIS. He further alleged that RSA relied on falsified documentation.

FSPO finding in relation to the complaint against RSA

The FSPO did not uphold the main complaint of Mr. O'Donoghue, namely that RSA had wrongfully voided the policy, and rejected his argument that he had purchased insurance for a vacant property. It found that there was a delay in making a decision on Mr. O'Donoghue's claim and a failure in customer service. Compensation of €2,000 was awarded for this.

FSPO finding in regard to BIIS

The FSPO upheld in part the complaint of Mr. O'Donoghue against BIIS and directed a payment of €15,000 on account of the finding that the policy sold was not suitable, and that Mr. O'Donoghue had not been given correct information as regards the claims process.

However, the FSPO rejected the evidence and argument of Mr. O'Donoghue that he had filled in a blank form and that the details regarding the tenancy were added later and did not reflect the instructions he had given.

The arguments on appeal

Mr. O'Donoghue appealed against the finding of the FSPO that the insurance policy was not wrongfully avoided. Mr. O'Donoghue claimed that the FSPO's finding of fact was wrong, and that the documentation was false, "*poisoned*" or had been wrongly altered.

Conclusion

Baker J. concluded that having regard to the fact that the appeal may be characterised as an appeal of the findings of fact on which the determination of the FSPO were made, that Mr. O'Donoghue argued that the declaration he signed was altered or added to, and that the FSPO failed to properly have regard to the calculations of the premium, Mr. O'Donoghue did not meet the "*high threshold*" described by Twomey J. in *Stowe v Financial Service Ombudsman* [2016] IEHC 199 and of showing a "*serious and significant*" error in the findings in accordance with the test in *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323.

Baker J. concluded that the FSPO had credible and sufficient evidence to come to her decision. She was satisfied that the FSPO identified the factual basis of her decision and the reasons and evidence which led her to draw the inference that it was not possible or credible that the two notice parties had somehow collectively produced a false document.

The court also held that Mr. O'Donoghue accepted that there was not an insurance product that would cover the losses he suffered available on the market. While he relied to a large extent on the fact that he paid a premium amount calculated for an unoccupied property, Baker J. commented that it was difficult to see how this would assist him having regard to his concession that a suitable insurance product was not available on the market.

Comment

This case considers the circumstances in which insurance policies can be avoided. It also highlights the need to assess the suitability of policies being sold and the importance of providing an insured with correct information on the claims process, maintaining contact with an insured throughout the investigative process and ensuring that claims are dealt with as speedily as possible.

DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2019 Dillon Eustace. All rights reserved.