THE HIGH COURT

[2021] IEHC 178

[Record No. 2019/383 MCA]

BETWEEN

ALDONA STULPINAITE

APPELLANT

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

MICHAEL WHELAN

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 12th day of March, 2021

Introduction

1. This is an appeal by the tenant pursuant to s.123 of the Residential Tenancies Act 2004 (as amended) against a Determination Order issued by the respondent on 5th December, 2019; in which it determined that the notice of termination which had been served by the landlord (the notice party to this appeal) was valid.

2. By a notice of termination dated 25th March, 2019 issued by Messrs Byrne Wallace, Solicitors, on behalf of the notice party, the appellant was given notice of termination of her tenancy in Flat 8, 34 Elgin Road, Ballsbridge, Dublin 4. She was told that her tenancy would terminate on 12th November, 2019. The stated reason for the termination, was that the landlord intended to sell his interest in the building in which the appellant's flat was contained, within three months of termination of the tenancy.

3. The appellant challenged the notice of termination by way of adjudication. The adjudicator upheld the notice of termination. The appellant appealed that to the Tenancy Tribunal, which again upheld the validity of the notice of termination. This is an appeal on a point of law against the findings made by the Tenancy Tribunal (hereinafter referred to as "*the Tribunal*").

4. The notice party did not give evidence before either the adjudicator or the Tribunal. Evidence of his intention to sell the property at the date of service of the notice of termination was given by his letting agent. A substantial volume of supporting documentation was also put before the Tribunal to establish that he had the requisite intention at the date of service of the notice of termination. In essence, the appellant appeals against the findings made by the Tribunal on the following grounds:-

   (a) Given the history of the matter between the tenants of the building and the landlord, the Tribunal ought of its own motion to have secured the attendance of the notice party before it to give oral evidence;

   (b) that by failing to take that step, the Tribunal effectively denied the appellant her right to cross-examine the notice party as to the existence of his stated intention;

(c) that there was no evidence before the Tribunal which would enable it to have reached the findings that it did in relation to the intention of the landlord at the relevant time;

(d) that the Tribunal incorrectly held that s.35A of the Act did not apply in the circumstances, and

(e) that the court should exercise its inherent jurisdiction to hold that s.35(a) should be applied to the circumstances of the case.

5. In response, the respondent and the notice party, though separately represented at the appeal hearing before this Court, made similar arguments to the effect that as this was an appeal on a point of law, the court could only overturn a finding of primary fact if there was no evidence before the decision maker capable of supporting that finding; that the appellant had not been denied a right to cross-examine the notice party, because such right did not arise due to the fact that the notice party had not given evidence before the Tribunal; that it was clear from the case law that tribunals of this sort are entitled to act on hearsay evidence and documentary evidence and to conduct hearings in an informal manner and that being the case, no criticism could be made of either the conduct of the hearing before the Tribunal, or its findings; that s.35A did not apply to the provisions of this case and finally, that the court had no inherent jurisdiction to apply statutory provisions to circumstances to which those statutory provisions did not apply in the first instance.

6. The notice of termination the subject matter of the Tribunal's determination in this case, was in fact the second notice of termination served by the notice party. In these circumstances, it is necessary to set out the background to the Tribunal's determination in a little detail.

Background

7. The appellant is a single lady. She is employed as a childminder. Her tenancy in Flat 8, 34 Elgin Road, Ballsbridge, Dublin 4, commenced on 2nd September, 2005. It was an oral tenancy from week to week. She was never given a rent book. Payment of rent was in a somewhat unusual manner, in that she was required to place the rent in a box, which was cemented into a wall on the property. The current rent being paid by the appellant is €155 per week.

8. By letter dated 23rd March, 2018, the notice party informed the appellant that he had instructed his letting agent to serve notice of termination on her on the grounds that he intended to carry out refurbishment works to the property. A notice of termination dated 28th March, 2018 issued from the notice party's letting agent to the appellant, informing her that her tenancy would terminate on 9th November, 2018. The letter stated that the tenancy was being terminated on the grounds that the landlord intended to carry out refurbishment works to the property. Those works were set out in the notice of termination.

9. When the appellant did not vacate the premises, the notice party submitted the matter to adjudication under the provisions of the Residential Tenancies Act 2004 (as amended) (hereinafter referred to as "*the Act*"). A hearing was held before an adjudicator on 18th December, 2018, wherein the appellant challenged the validity of the notice of termination on the grounds that it was invalid, due to the fact that some of the works specified in the notice required planning permission and that had not been obtained by the notice party, as was required under the Act, in order for the notice of termination on ground of refurbishments to be valid. The adjudicator agreed with that assertion and the notice of termination was declared invalid. That resulted in a Determination Order being issued by the respondent in favour of the appellant on 21st February, 2019.

10. The notice party is the owner of two large properties in Ballsbridge, Dublin 4, being numbers 32 and 34 Elgin Road. Between the two properties he had approximately 30 tenants in 2018. As a result of the service of the first notice of termination (i.e. the one based on the intention to carry out refurbishments), approximately 25 of the tenants vacated the buildings. This is significant in light of an argument that was put forward by the appellant at the hearing before the Tribunal the subject matter of these proceedings.

11. On 25th February, 2019, an adjudication hearing was held in relation to an application brought by another tenant of the notice party, who had vacated his flat on foot of the notice of termination that had subsequently been found to be invalid. When he sought to be permitted to re-enter his flat, the notice party's letting agent had stated that the notice party still had the intention to carry out refurbishments to the property and in particular, to carry out those refurbishments which did not require planning permission. To that end, it was argued that the notice party had been advised by both the builder and his insurers, that they would require vacant possession of the property in order for the refurbishment works to be carried out.

12. It was alleged at the Tribunal hearing, the subject matter of these proceedings, that the notice party's letting agent had clearly stated at the adjudication hearing held on 25th February, 2019 that the notice party had the intention at that time to carry out refurbishments to the property. It will be seen that this is significant in light of subsequent assertions as to the intention of the notice party at relevant dates.

13. On 21st March, 2019, the notice party made a statutory declaration before Ms. Aisling Doyle, a practising solicitor, in relation to his intentions concerning the appellant's flat. He made a declaration in the following terms:-

> *"I, Michael Whelan, do solemnly and sincerely declare that I intend within a period of three months after the termination date, to enter into an enforceable agreement to transfer to another for full consideration, the whole of my interest in the dwelling or the property containing the dwelling and I make this solemn declaration conscientiously believing the same to be true and accurate and by virtue of the provisions of the Statutory Declarations Act, 1938."*

14. On 25th March, 2019 the notice party, through his solicitors, Messrs Byrne Wallace, served a notice of termination on the appellant; informing her that her tenancy in the flat would terminate on 12th November, 2019. The reason given was that the notice party intended to sell the property within three months of termination of the tenancy.

15. On 15th April, 2019, the appellant submitted an application seeking to challenge the validity of the notice of termination dated 25th March, 2019 and to have that dispute adjudicated upon pursuant to the Act. The appellant was represented in her application by Ms. Enid O'Dowd, a chartered accountant and member of Chartered Accountants Voluntary Assistance (CAVA). On 6th June, 2019 an adjudication hearing was held before an adjudicator, at which evidence was given on behalf of the landlord in relation to his intention to sell the property at the date of service of the notice of termination, by his letting agent, Mr. Ryan. In addition, an amount of documentation, which will be described in detail later in the judgment, was submitted which tended to show that the notice party had the requisite intention to sell the property as of 25th March, 2019.

16. Mr. Ryan's oral evidence to the adjudicator had been that he had been asked by the notice party to supply a valuation of the properties in mid to late January 2019. He further stated that at the end of January he was given permission to hold "*off-market*" viewings of the property, but no decision to sell had been taken by the notice party at that time. He stated that he had been conducting such off-market viewings of the properties since January 2019.

17. On 9th July, 2019, the adjudicator issued his report, in which he found that the notice of termination dated 25th March, 2019, was valid. On 19th July, 2019, the appellant appealed the adjudicator's decision to the Tribunal.

18. By letter dated 20th August, 2019, the Tribunal Section of the respondent wrote to both the appellant and the notice party, informing them of the date and venue for the hearing before the Tribunal. The letter also enclosed an important document. It was a three page typed document setting out in simple and straightforward terms the procedures that would be adopted by the Tribunal. In particular, the following was set out at para. 6:-

> *"6. The Tribunal may summon/ask witnesses to appear before it. If you want a witness to be subpoenaed to appear on your behalf, you must ask the RTB at least ten days before the scheduled hearing date. Witnesses are entitled to the same immunities and privileges as if before the High Court. The Tribunal may direct that a witness be reimbursed all or part of his/her reasonable expenses in attending before the Tribunal – and, if so, usually to be paid after such attendance and giving of evidence."*

19. The appeal was heard by the Tribunal on 11th September, 2019 at 14:30 hours. At that hearing, the appellant was represented by Ms. O'Dowd of CAVA and Ms. Bearnaí Mac Seiridh. The notice party was represented by a solicitor, Mr. James Roche of Byrne Wallace and by his letting agent, Mr. Ryan.

20. In essence, the appellant made the same argument as had been put forward on her behalf before the adjudicator, which was to the effect that having regard to the previous notice of termination that had been served and to the statements made by Mr. Ryan as to the landlord's intention as of 25th February, 2019, the landlord had not established that he had a *bona fide* intention to sell the property at the time that he served the notice of termination on 25th March, 2019. It was further submitted that in light of the absence of any direct evidence of an intention to sell from either the landlord, or his sales agent, and having regard to the fact that the letting agent expressly stated that he could not give evidence in relation to the sale of the property, as he had not been involved in that aspect, other than to the limited extent outlined in his evidence; it was submitted that there was insufficient evidence before the Tribunal on which it could hold that the landlord had the requisite intention at the date of service of the notice of termination.

21. There was also extensive argument at the Tribunal hearing in relation to the applicability of s.35A of the Act. However, as this section did not loom large in the appeal before this Court, it is unnecessary to set out the arguments that were put before the Tribunal in this regard.

22. On behalf of the notice party, evidence was given by Mr. Ryan along the lines of that which he had previously given before the adjudicator. A substantial volume of documentation was also submitted to the Tribunal which tended to show that the property had in fact been put up for sale. This documentation included copies of advertisements that had been placed in the property sections of various newspapers advertising the properties for sale, together with various emails in relation to the progress of the sale process down to the date of the Tribunal hearing. In particular, the landlord relied on an email sent by Ms. Susan Slevin of DNG on 28th August, 2019, detailing the steps that had been taken to sell the property and outlining various offers that had been received, culminating in an offer of €5.5m which had been accepted by the notice party, at which stage the properties had gone "*sale agreed*". That subsequently fell through when the purchaser withdrew from the sale. That email was fresh evidence which had not been before the adjudicator.

23. On 1st October, 2019 the Tribunal issued its report, in which it accepted the evidence that had been tendered on behalf of the notice party and it held that the notice of termination dated 25th March, 2019 was valid. A Determination Order to that effect was made by the respondent on 5th December, 2019. By originating notice of motion dated 20th December, 2019, the appellant lodged an appeal on a point of law against the findings of the Tribunal pursuant to s.123 of the Act.

The evidence before the Tribunal

24. As can be seen, the key issue for determination by the Tribunal was whether the stated intention of the notice party was in fact *bona fide* held by him at the time when he served the notice of termination on 25th March, 2019. On behalf of the appellant it was argued that having regard to the landlord's earlier reliance on the notice of termination purportedly based on his intention to do refurbishments, together with his stated intention to carry out those refurbishments, as made by his letting agent at the

adjudication hearing held on 25th February, 2019, it was reasonable to infer that his stated intention to sell the property as of 25th March, 2019, was not *bona fide*.

25. To counter that assertion, Mr. Ryan had given evidence in relation to the instructions that he had received and the steps that he had taken preparatory to the properties being placed on the market for sale. In addition, a substantial volume of documentation was placed before the Tribunal. It is necessary to look at this documentation in some detail.

26. The first relevant document was a string of emails that had been put into evidence on behalf of the appellant. She had found the emails in her flat. It commenced with an email sent at 14:52 hours on 18th February, 2019 from a partner in DNG to Mr. Ryan, thanking him for dropping in the keys of the various flats in the two buildings and requesting Mr. Ryan to confirm which of the flats were still occupied, so that DNG would not go into them. In a response sent at 15:15 hours, Mr. Ryan identified the two flats in No. 32 Elgin Road and the three flats in No. 34 Elgin Road that were still occupied. He told the selling agent to feel free to knock on the doors of any of the occupied flats, as the tenants may allow them in to take photographs and measurements.

27. The second relevant document was a letter from CAVA to Messrs Byrne Wallace dated 29th March, 2019, in which Ms. O'Dowd appeared to accept that the properties were in fact being put up for sale, as she stated as follows: -

> *"Would the agent appointed for the sale consider approaching Dublin City Council re purchasing the properties, which have 25 vacant units between them, to be offered to appropriate people on the housing list. Coincidentally the Minister for Housing Eoghan Murphy is TD for Dublin Bay South in which the properties are located.*
>
> *Given the history of this case, unless I receive written confirmation that the remaining tenants will be included in the sale as it were, my instructions from the tenants are to lodge complaints with the RTB. As I have to meet a deadline to do this, I would appreciate a speedy reply."*

28. The third document was submitted by the landlord; it was a formal property services agreement drawn up between him and DNG in relation to the sale of the properties, dated 4th April, 2019. He also relied on a letter from Messrs Byrne Wallace dated 10th April, 2019, in response to the letter from Ms. O'Dowd dated 29th March, 2019; in which they confirmed that the notice party had given the sales agent instructions to place the properties on the open market for sale. The landlord also submitted a number of advertisements that had been carried in the property sections of the Irish Times and Sunday Business Post, advertising the properties for sale.

29. The landlord also relied on an email sent by an unidentified prospective purchaser on 3rd June, 2019 at 18:57 hours to Mary Doran of DNG inquiring whether her client had accepted an offer that had been made on the two properties of €5m. He went on to state that if the Elgin Road properties were sale agreed then he would cross them off his list. In response thereto, Ms. Doran advised him that the offer to her client was then standing

at €5.3m. This was followed by a further email from Ms. Doran on 26th June, 2019 at 10:13 hours informing the recipient that the properties were "*sale agreed*".

30. By letter dated 15th July, 2019, Messrs Byrne Wallace informed Ms. O'Dowd that the properties had gone sale agreed, with completion conditional upon vacant possession. The letter stated that the possibility of the tenants remaining in situ as part of the sale had not come to pass.

31. The notice party also relied upon the email from Ms. Susan Slevin of DNG dated 28th August, 2019, wherein she gave a history of the steps taken to sell the properties to that date. She stated that a "*for sale*" sign had been erected on the properties on 1st April, 2019. The properties had been advertised online on myhome.ie; daft.ie; rightmove.ie and on the DNG website. The properties had been extensively advertised in the property supplements of the Irish Times. The first viewing of the properties had been held on 13th April, 2019. There had been sixteen individual viewers of the properties, up to the date of her email. Ms. Slevin went on to outline that six offers had been made on the properties: a first bid made on 5th April, 2019 of €4.7m; a second bid on 30th April, 2019 of €4.75m; a third bid on 30th April, 2019 of €4.85m; a fourth bid on 21st May, 2019 of €5m; a further bid on 29th May, 2019 of €5.3m and a final bid made on 12th June, 2019 of €5.5m, which had been accepted by the notice party. She stated that the property had gone "*sale agreed*" on 1st July, 2019. However, the highest bidder at €5.5m had withdrawn their offer on 7th August, 2019. The property went back to the open market on 18th August, 2019. She stated that in the ten days thereafter, up to the date of her email, the property had been viewed twice by a new viewer, who had expressed an interest, but had not made any offer as of that date.

32. The final document on which the notice party relied, was the statutory declaration made by him on 23rd March, 2019.

33. In addition to the foregoing documents, the Tribunal also had before it an article which had appeared in the Irish Times on 24th June, 2019, under the heading *"Ballsbridge houses for sale with an asking price of €2.750,000 each*" written by Ms. Kitty Holland. This article had been submitted on behalf of the tenant. In the article it was stated that the properties were for sale. It was clear that this information had come from some of the remaining tenants in the buildings. Thus, it was reasonably clear from the content of that article, that the tenants accepted that the properties were for sale at that time.

Submissions on behalf of the appellant

34. It was submitted on behalf of the appellant that given the history of the steps taken by the notice party to terminate the various tenancies and in particular, his initial reliance upon the refurbishment ground for the first notice of termination; his stated intention given through his letting agent to continue with the works that did not require planning permission and the contradiction between that stated intention as of 25th February, 2019 and the evidence given by Mr. Ryan to the Tribunal that he had been told to conduct "*off market"* viewings as of late January 2019 and as per the email dated 18th February, 2019, his actions in furnishing keys to DNG to enable photographs and measurements to

be taken of the various properties; the appellant and the other tenants who challenged the notice of termination had raised a *prima facie* case that the notice party did not hold the *bona fide* intention to sell the properties at the date of service of the second notice of termination on 25th March, 2019.

35. While it was accepted that the appellant had not requested a subpoena to issue so as to ensure the attendance of the notice party to give evidence before the Tribunal, it was submitted that having regard to the very clear dispute between the parties as to the *bona fides* of his stated intention, it was incumbent upon the Tribunal to exercise the power it had under s.105(3) of the Act to summon the notice party to appear before it to give evidence. It was submitted that in failing to take that step, the Tribunal had effectively denied the appellant her right to cross-examine the notice party.

36. It was submitted that in failing to ensure the attendance of the landlord before the Tribunal in the circumstances of this case and instead to rely on the statutory declaration made by the notice party, the hearsay evidence of Mr. Ryan as to the notice party's intention and the documentary evidence, which was also hearsay evidence, the Tribunal had effectively acted in an unfair manner towards the appellant.

37. It was submitted that the right to cross-examine an opposing party, was a fundamental right which was guaranteed to parties coming before both courts and statutory and other tribunals. It was submitted that while the Tribunal was entitled to adopt informal procedures in relation to its dispute resolution processes under the Act, it was always obliged to ensure that its procedures were carried out fairly and in accordance with the dictates of constitutional and natural justice: see *Kiely v. Minister for Social Welfare (No.2)* [1997] I.R. 267; *Doyle v. Private Residential Tenancies Board* [2015] IEHC 724.

38. Mr. Fitzgerald SC on behalf of the appellant, further submitted that once there was a *prima facie* case that the landlord did not have the requisite intention, the Tribunal could not act on hearsay and documentary evidence in the manner in which it had done in this case. In the circumstances, it was submitted that there was no admissible evidence before the Tribunal, which would enable it to make to the finding of fact that the landlord had the requisite intention at the date of service of the notice of termination. That being the case, that constituted an error of law on the part of the Tribunal, which would enable this Court to intervene even within the restricted scope of an appeal on a point of law: see *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48 and *Marwaha v. Residential Tenancies Board* [2016] IEHC 308.

39. The appellant further submitted that the Tribunal had given undue weight to the statutory declaration made by the notice party in advance of service of the notice of termination. It was submitted that the Tribunal had regarded that as something akin to conclusive evidence of intention held by the landlord at the relevant time and they seemed reluctant to accept any evidence that would go behind the assertions made in the statutory declaration. It was submitted that in giving this degree of deference to the statutory declaration, the Tribunal had erred in law.

40. Finally, although very much a subsidiary argument at the appeal before this Court, it was submitted that the Tribunal had erred in law in failing to hold that the provisions of s.35A applied in the circumstances of this case. That provision, which is known colloquially as the "*Tyrrelstown Amendment*", effectively provides that a landlord may not sell ten or more units within a stipulated six-month period, save in certain circumstances that are outlined in the statute. It was submitted on behalf of the appellant that, while there were only five tenancies extant as of 25th March, 2019, the court could have regard to the fact that there had been as many as thirty tenants in the two properties prior to the time that the landlord served the invalid notice of termination based on his intention to carry out refurbishments. It was submitted that in these circumstances s.35A applied and the notice of termination was therefore invalid.

41. In the alternative, it was submitted that even if the circumstances did not strictly come within the terms of s.35A of the Act, the court should nevertheless exercise its inherent jurisdiction to hold that in all the circumstances of the case, the provisions of that section should apply and the Tribunal report and the Determination Order should be overturned.

Submissions on behalf of the respondent and the notice party

42. It is not a discourtesy to the arguments submitted by Mr. McDowell SC on behalf of the respondent and Ms. Ní Dhúgáin BL on behalf of the notice party, that I take their submissions together; it is solely done due to the fact that there was an overlap between the submissions made by them, both of which sought to uphold the validity of the Tribunal report and the Determination Order made by the respondent.

43. It was submitted on behalf of the respondent and the notice party that as this was an appeal on a point of law as provided for in s.123 of the Act, the court could only set aside a primary finding of fact made by the Tribunal, if the court was satisfied that there was no evidence to support such finding. It was submitted that in this case there was ample evidence before the Tribunal of the landlord having the requisite intention at the time of service of the notice of termination; namely, the oral evidence of Mr. Ryan, the statutory declaration made by the notice party and the significant volume of documentary evidence that had been placed before the Tribunal.

44. It was submitted that there had been no breach of the appellant's right to cross-examine the notice party, because such right did not arise, due to the fact that the notice party had not given evidence before either the adjudicator, or the Tribunal. It was submitted that a right to cross-examine only arose when a person gave evidence before a court or other body. If and when they gave evidence, the opposing party had a right to cross-examine them.

45. It was submitted that the appellant could not complain that the notice party had not been called to give evidence as a witness, because she had not exercised her right to obtain a subpoena to secure his attendance before the Tribunal. She had not written in advance of the Tribunal hearing, nor had she made any such request at the hearing itself. The facility to obtain the attendance of witnesses by the issuance of a subpoena, was not only provided for in the Act, but was set out clearly in the explanatory documentation that had

been sent to the appellant in the weeks prior to the Tribunal hearing. In such circumstances, it was submitted that she could not complain about the absence of the notice party from the Tribunal hearing, because she had taken no steps to secure his attendance.

46. Similarly, it was submitted that the fact that the Tribunal did not exercise the power which it had under s.105 of the Act to summon the notice party before it, did not mean that they had acted erroneously in not taking that step. As was made clear in the affidavit sworn by Mr. Keaney, the chairman of the Tribunal, the Tribunal was aware of the power which it had in that regard, but did not feel that it was necessary for it to invoke that power, as they were satisfied that they had sufficient evidence before them to enable them to adjudicate on the dispute.

47. It was submitted that the content of the documentary evidence that had been placed before the Tribunal was significant. It was clear from various documents that had been issued by various parties, who although acting as agents of the notice party, were independent of him; all of these documents supported the contention that the property was being actively marketed for sale at the relevant period. It was submitted that that was strongly supportive of the assertion that the landlord intended to sell the properties.

48. It was pointed out by Ms. Ní Dhúgáin BL that, not only had the appellant not objected to the introduction of the documentary evidence before the Tribunal, she had submitted a number of documents which strongly supported the assertion that the notice party was actively trying to sell the properties: see the CAVA letter dated 29th March, 2019; the email of 18th February, 2019 and the Irish Times article of 24th June, 2019.

49. In relation to the s.35A point, it was submitted that that section did not arise for two reasons: firstly, it only applies where there is a sale of ten or more units and in this case it was accepted that there were only five tenants in total between the two properties that were being put on the market for sale; secondly, no effort had been made to establish that any such sales were to take place within the prescribed period as set out in s.35A. It was submitted that the section had no application in the circumstances of this case.

50. In relation to the application that the court should exercise some form of inherent jurisdiction to apply the provisions of s.35A to the provisions of this case, it was submitted that the court could not do so because this was an appeal on a point of law from a decision of the Tribunal and the Tribunal had no such "*inherent jurisdiction*" to apply sections of a statute to circumstances that did not come within the relevant section in the statute. Even if it did have such jurisdiction, it was submitted that neither the Tribunal, nor the court, should exercise such jurisdiction to apply statutory provisions in circumstances where they were clearly not warranted by the terms of the statute itself.

51. It was submitted that while the Tribunal could be invited to draw an adverse inference by virtue of the non-attendance of a witness, who might be thought of as being capable of giving relevant evidence on a particular issue, it was submitted that such inferences could only be drawn once the party had established a *prima facie* case, against which the other

party, who might be expected to call the particular witness, was responding: see dicta of O'Donnell J in *Whelan v. AIB* [2014] 2 I.R. 199 at p.246 – 247.

52. It was submitted that the burden of proof lay on the appellant to prove that the notice party did not have the intention as stated in his statutory declaration. It was submitted that in the present case, the appellant had not established a *prima facie* case that the notice party did not have the requisite intention to sell the properties within the required time period when he served the notice of termination on 25th March, 2019. All she had done was to state, through Ms. O'Dowd, that she and the other tenants were "*sceptical*" of the landlord's true intentions, having regard to his change of intention following the striking down of the previous notice of termination. It was submitted that that was not enough to allow for the drawing of any adverse inferences in the matter.

53. Finally, insofar as the appellant complained of the Tribunal acting on hearsay evidence, it was pointed out that the appellant's evidence had been delivered through Ms. O'Dowd and was therefore also of a hearsay character. It was submitted that it was well established that the Tribunal was allowed to act in an informal manner, including acting on hearsay evidence, where appropriate.

Conclusions on the legal issues

(a) Nature of an appeal on a point of law

54. Section 123(3) provides that any of the parties concerned in dispute resolution under the Act of 2004 may appeal to the High Court from a determination of the Tribunal (as embodied in a Determination Order) on a point of law. Subsection (5) provides that the High Court may, as a consequence of the determination it makes on such appeal, direct the Board to cancel the Determination Order concerned, or to vary it in such manner as the court specifies.

55. The principles applicable to an appeal on a point of law were set out by the Supreme Court in *Fitzgibbon v. The Law Society* [2015] 1 I.R. 516, where Clarke J (as he then was) stated at paras. 127 and 128:-

> *"[127] The applicable principles were helpfully summarised by McKechnie J. in Deely v. Information Commissioner [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, as follows:-*
>
> *'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
>
> *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision …

This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in Sheedy v. Information Commissioner [2005] IESC 35, [2005] 2 I.R. 272.

[128] In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decisionmaker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

56. In *Petecel v. Minister for Social Protection* [2020] IESC 25, O'Malley J stated as follows in relation to the narrow scope of an appeal on a point of law:-

"Questions as to the scope of the jurisdiction of the High Court in a statutory appeal must always be answered by reference to the terms of the statute creating that jurisdiction. The fact that one Act uses similar terminology to another may be helpful but is not necessarily determinative. However, it may be borne in mind that an appeal on a point of law is the narrowest of the four categories of statutory appeals identified by Clarke J. in Fitzgibbon v. Law Society [2014] IESC 48."

57. The jurisdiction of this Court when hearing an appeal on a point of law in relation to appeals from the RTB was considered by Barrett J in *Marwaha v. Residential Tenancies Board* [2016] IEHC 308, where, having reviewed the relevant case law in relation to appeals on a point of law, the learned judge set out the following principles at para. 13:-

"What principles can be drawn from the foregoing as to the court's role in the within appeal? Four key principles can perhaps be drawn from the above-considered case-law:

(1) the court is being asked to consider whether the Tenancy Tribunal erred as a matter of law (a) in its determination, and/or (b) its process of determination;

(2) the court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them;

(3) as to mixed questions of fact and law, the court (a) may reverse the Tenancy Tribunal on its interpretation of documents; (b) can set aside the Tenancy Tribunal determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by the Tenancy Tribunal on the primary facts before it could not reasonably be drawn; (c) must set aside the Tenancy Tribunal determination, if its conclusions show that it was wrong in some view of the law adopted by it.

(4) even if there is no mistake in law or misinterpretation of documents on the part of the Tenancy Tribunal, the court can nonetheless set aside the Tribunal's determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn."

58. The court is satisfied that the principles enunciated in the cases cited above, and in particular those set out in the *Fitzgibbon* and *Marwaha* cases, correctly set out the jurisdiction of this Court when considering the appeal in this case.

Proceedings before the RTB/Tenancy Tribunal

59. The capacity of tribunals and other decision making bodies to act in an informal manner was recognised by Henchy J in *Kiely v. Minister for Social Welfare (No. 2)* in the following terms at p. 281:-

> *"Tribunals exercising quasi – judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or a fair result."*

60. The nature of the dispute resolution mechanisms provided for under the Act was described by Baker J in *Doyle v. The Private Residential Tenancies Board* in the following way at paras 40 and 41:-

"[40] Finally, and arising from first principle, I consider that the applicant is incorrect as his argument is in essence that the resolution process established by the Act, whether at first instance before the adjudicator, or on appeal before the Tribunal, requires pleadings and processes akin to those of a court. One of the purposes of the Act was to simplify the resolution of landlord and tenant disputes in the residential sector. This is clear from the long title which identifies the common good as one of the principles upon which the Act of 2004 was founded. At para, (c) of the long title the following appears:

"(c) with the aim of allowing disputes between such parties to be resolved cheaply and speedily, for the establishment of a body to be known as an Bord um Thionóntachtai Cónaithe Priobháideacha or, in the English language, the

Private Residential Tenancies Board and the conferral on it of powers and functions of a limited nature in relation to the resolution of such disputes,"

[41] The dispute resolution mechanism established by the Act of 2004 cannot involve the denial of natural or constitutional justice or fair process, but it is undoubtedly the case that the process was intended to be cheaper, more speedy and accordingly less cumbersome and weighed down with formal procedures than those which must be adopted by litigants in the courts. Thus, the procedure for the lodging of a short-form application for submission to dispute resolution does not of itself delimit the dispute and the extent of the dispute can come to be formulated in the course of a hearing before an adjudicator, or before the Tribunal, or in the case of the Tribunal by the Tribunal's own exercise of identifying the relevant documents and information which it considers relevant to the dispute and in respect of which the parties are given an opportunity to consider in advance of the hearing."

61. In *Foley v. Johnson* [2017] IEHC 424, Ní Raifeartaigh J noted that proceedings before the respondent were relatively informal and it was not necessary to have a lawyer. Similarly, Denham J (as she then was) in *Canty v. Attorney General & Ors*. [2011] IESC 27, cited with approval the judgment of McKechnie in the High Court, which had noted that the 2004 Act established a framework by which disputes between landlords and tenants could be resolved, with the intention of that being done informally, expeditiously, and as cheaply as possible.

62. The court is satisfied that the Tribunal has the power to act in an informal way. In addition, it is noteworthy that under the Act it has been given wider powers than those enjoyed by a court. It can subpoena witnesses on its own behalf; it can demand production of documents to it and it can receive unsworn evidence. Thus, it can be seen that the Tribunal does not act in a strictly adversarial scenario, in that it has powers of its own to ensure that the relevant witnesses and documentation are placed before it, so as to be put in a position to resolve the dispute. It can take the necessary steps itself to ensure that it has adequate evidence to decide the dispute.

63. The court is satisfied that the Tribunal has the power to act on documentary evidence and on hearsay evidence and can adopt such informal procedures as appear to it to be appropriate as being best suited to achieving a fair resolution in the case. However, the Tribunal must always act within the bounds of fairness. If a party challenges the truth or accuracy of a document, the Tribunal must decide whether it is necessary to have that document formally proved in evidence. Furthermore, the parties to the dispute are given the express right under the Act, to cross-examine any witnesses that may be called to give evidence before the Tribunal. They are also given the right to have the Tribunal issue a subpoena to have witnesses called on their behalf. The court is satisfied that the procedures of the Tribunal, which are set out in the Act and in a document that is circulated to the parties in advance of the hearing, are designed to ensure that, while the hearing before the Tribunal is of an informal nature, it nonetheless adheres to the requirements of natural justice.

The evidential status of a statutory declaration

64. There was some debate in the course of the argument in the appeal as to the correct evidential status to be attached to the statutory declaration which is sworn by a landlord when serving a notice of termination. In *Sadiq v. Minister for Justice and Equality* [2019] IEHC 517, Barrett J, in commenting upon what he described as being terse and self-serving statutory declarations in relation to the nature of certain payments that had been made by the applicant to members of his family in his country of origin, stated that a statutory declaration was a form of evidence, and might even be persuasive evidence when viewed in the round with such other evidence as was presented. He referred to a number of cases to support that proposition. Later in the course of his judgment he reached the conclusion that the Minister had acted unreasonably because the statutory declarations provided some evidence in relation to the nature of the payments made; while the Minister was free to place such weight on those declarations as he considered appropriate; he could not properly proceed on the basis that no documentary evidence had been provided. In argument at the bar in this appeal, it was submitted on behalf of the respondent and the notice party, that the statutory declaration in this case could be seen as "*persuasive evidence*" that the notice party had the requisite intention at the time of service of the notice of termination.

65. On behalf of the appellant, it was submitted that that was a misinterpretation of the evidential status of a statutory declaration. Mr. Fitzgerald SC relied on the decision of Simons J in *Gunn v. Residential Tenancies Board* [2020] IEHC 635, where it had been argued on behalf of the RTB that a statutory declaration had a particular evidential status. Specifically, it had been asserted that the legislature had expressly provided that a statutory declaration sworn by a landlord would be evidence to establish intention on his or her part. It was further submitted that, in the absence of cross-examination, such a statutory declaration could not be gone behind. Mr. Fitzgerald SC submitted that Simons J had roundly rejected that submission in the following terms at paras. 55 – 57 of his judgment:-

> "*[55] Out of deference to the submissions of counsel, however, I will briefly set out my views on this issue. The legislative intent in prescribing a requirement for a statutory declaration is to ensure that this ground of termination is not invoked lightly. It would, however, be inconsistent with the overall scheme of the legislation to confer some sort of presumptive evidential status upon such a statutory declaration. The RTA 2004 allows a tenant to challenge a notice of termination on the basis inter alia that the ground stated by the landlord for the purposes of terminating a tenancy was not valid. (See section 78(1)(g)). A tenant is thus entitled to bring a challenge on the basis that a landlord did not have the requisite intention to enter into an enforceable agreement within three months.*
>
> *[56] The jurisdiction to determine such challenges resides ultimately with the Tenancy Tribunal. The legislation envisages that the Tenancy Tribunal will exercise its appellate jurisdiction by way of oral hearing, with the tribunal having statutory power to administer an oath or affirmation.*

[57] It would set this elaborate procedure at naught—and undermine the ability of a tenant to pursue an allegation that the ground stated by the landlord for the purposes of terminating a tenancy was not valid—were a statutory declaration to have a presumptive evidential status. It would be perverse were a measure intended to enhance the protection of tenants to have the practical consequence of making it more difficult for a tenant to test the validity of a landlord's intention. This practical consequence is acknowledged in the written submissions on behalf of the RTB, at paragraph 41, where it is stated that " it is hard to see how a tenant could endeavour to undermine a landlord's testimony of intention". With respect, it is precisely for this reason that the RTB's understanding of the legal status of a statutory declaration is incorrect. The introduction of the requirement for a statutory declaration was not intended to diminish the tenant's rights in this way, nor to detract from the importance of an oral hearing before the Tenancy Tribunal."

66. In argument at the bar in this case, counsel for the respondent did not submit that the making of the statutory declaration was conclusive or even presumptive evidence of the matters stated therein; instead he submitted that having regard to the fact that there were penal sanctions where a person made a false or misleading statutory declaration, the making of a statutory declaration by the notice party in this case was a significant piece of evidence that the respondent was entitled to take into consideration in the course of its deliberations.

67. Notwithstanding that the dicta of Simons J in the *Gunn* case were *obiter dicta*, the court is satisfied that they represent an accurate statement of the law in relation to the evidential value of statutory declarations. The statutory declaration made by a landlord is not presumptive evidence, much less is it conclusive evidence of the matters stated therein. Indeed, it could be argued that a statutory declaration is not admissible as evidence of the matters stated therein at all, as it would constitute a statement by a person confirming their own state of mind and as such its admission could be seen as offending the rule against self-corroboration.

68. However, the court is of the view that for the Tribunal to exclude a statutory declaration as evidence, would be to take too restrictive a view of the issue of admission of evidence before it. Given the informal nature of proceedings before the Tribunal, the better view is that a statutory declaration constitutes evidence of intention, due to the fact that there are penal consequences if the statement made therein is not true; however, given that the statutory declaration is essentially just a statement by the interested party confirming his own stated intention, it is not strong evidence of intention, but is nonetheless some evidence that can be taken into account by the Tribunal.

The right to cross-examine a witness

69. As noted earlier, while the procedures before the Tribunal are informal in nature, there is an express statutory right given to the parties to cross-examine any witnesses called by the opposing party to the dispute.

70. The right to cross-examine witnesses that may be called against a person is a fundamental right. However, it only arises where a person has given evidence at the hearing. One cannot have a freestanding right to cross-examine people who are not called to give evidence at the substantive hearing.

Intention – the burden of proof

71. Proof of intention, is a question of fact like any other question of fact in a case. In *Whelan v. Allied Irish Banks plc & Ors*. [2014] 2 I.R. 199, one of the issues for determination before the court was whether the third named plaintiff, Mr. Philip Lynch, had in fact made a decision not to enter into a particular transaction unless the loan was non-recourse in nature. In the course of his judgment O'Donnell J outlined the proof of intention in the following way at p. 239:-

> *"While the state of a man's mind is a matter of fact to be proved like any other, proof of a state of mind is always inferential. It is deduced from something else, such as the statement of the person and his or her actions. This is not a question of a conflict of oral evidence of perception as to whether certain matters occurred. In this case it is more a matter of evaluation and deduction from the evidence as to the state of Mr Lynch's mind and in particular whether he had made a decision not to enter the transaction unless the loan was non-recourse."*

72. In the present appeal, it was argued on behalf of the respondents that, as it was accepted that the notice of termination and the statutory declaration were formally valid, in that they contained the material required by the Statute, the burden of proof lay on the tenant to establish a *prima facie* case that the landlord did not have the intention stated therein.

73. I do not think that that submission is well founded. The Act provides that a Part 4 tenancy shall not be terminated save in accordance with s.34. That section provides that a landlord can terminate a tenancy on a number of grounds, including that he intends selling the property within the prescribed period. Once the tenant can establish some grounds for arguing that the landlord may not have had a *bona fide* intention to sell at the time that he served the notice of termination, it is reasonable for the Tribunal to hold that the burden of proof shifts to the landlord to establish that he had the requisite intention at the date of service of the notice of termination. The reason why the Tribunal might adopt that approach, is that it is fair and reasonable that the landlord should prove his state of mind, because that is something that is peculiarly within his competence; whereas it is very difficult, if not almost impossible, for a third party to prove that a person did not have a stated intention at a relevant time. Furthermore, it has to be remembered that the action of the landlord in terminating a Part 4 tenancy is *prima facie* invalid, unless and until he can bring himself within the grounds stated in s.34. Accordingly, it is reasonable that the burden of proof should fall on the landlord in this regard.

74. In this case, the tenants had given evidence that on 25th February, 2019, Mr. Ryan had stated that as of that date, the notice party intended carrying out refurbishments to the flats, while at a different adjudication hearing on 5th June, 2019, the same witness stated

that he had been told by the notice party to conduct off-market viewings of the properties as of late January 2019. In addition, the email of 18th February, 2019, further supported the contention that Mr. Ryan was engaged in facilitating DNG to prepare to market the property. Mr. Ryan repeated that evidence before the Tribunal

75. In these circumstances, there appeared to be contradictory evidence on the part of the landlord as to his state of mind at that time. Furthermore, in view of the history of his stated intentions as of 2018 to do refurbishments, which subsequently changed to an intention to carry out such works as did not require planning permission, which intention was subsequently abandoned altogether and was replaced by an intention to sell; it was reasonable in the circumstances for the burden of proof to shift to the landlord to establish his intention to sell the properties as of 25th March, 2019.

76. Accordingly, the court does not accept the submission made on behalf of the respondent that the burden of proof lay on the appellant to establish that the notice party did not have the intention as stated by him in the statutory declaration and as stated by Mr. Ryan in his evidence. The court is satisfied that the appellants had done more than merely state that they were sceptical of the notice party's stated intention and had done enough to cause a shift in the burden of proof on to the notice party.

Non-attendance of a witness – inferences that can be drawn

77. It is well established in Irish law that a court or other tribunal can draw inferences where a party does not call a witness whom it is reasonable to expect might be called on a particular issue and who is within the power of the party to procure as a witness at the hearing: see *Doran v. Cosgrove & Ors*. [1999] IESC 74; *H. v. St. Vincent's Hospital Trustees Limited* [2006] IEHC 443; *Dunne (An Infant) v. Coombe Women and Infants University Hospital* [2013] IEHC 58; *Reg v. IRC, Exp Coombes & Co*. [1991] 2 A.C. 283 and *Fyffes plc v. DCC plc* [2009] 2 I.R. 417.

78. In *Whelan v. AIB plc,* O'Donnell J adopted the principle set down by Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] P.I.Q.R. 324, at p. 340:-

> *"(1) In certain circumstances a court may be entitled to draw inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to drawn the desired inference: in other words, there must be a case to answer on that issue.*
>
> *(4) If the reasons for the witness's absence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation*

given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

79. In the present case, if the Tribunal was satisfied that the appellant had established a *prima facie* case, it was open to it to draw an adverse inference of the type put forward by O'Donnell J in the *Whelan* case. However, the Tribunal was not bound to do so. Even if it did, having regard to the totality of the evidence before it, it could still come to the conclusion that on the balance of probabilities the notice party had the requisite intention to sell the properties at the time of service of the notice of termination and thereafter. In other words, the drawing of an adverse inference is not determinative of the issue; it merely strengthens the case of the opposing party.

Conclusions on this appeal

80. The issues arising in this appeal have to be considered in the light of the legal principles outlined above.

81. In order for this Court to overturn a finding of fact made by the Tribunal, it has to be established on an appeal on a point of law that there was no evidence before the Tribunal to support that finding. It was submitted on behalf of the respondent and also on behalf of the notice party, that in this case there was ample evidence to support the finding of the Tribunal that the notice party had the requisite intention at the time of service of the notice of termination. Having reviewed the evidence that was before the Tribunal, the court is satisfied that there was in fact overwhelming evidence of an intention on the part of the notice party to sell within the requisite period at the time of service of the notice of termination and in the months thereafter.

82. The Tribunal was entitled to have regard to the documentary evidence that was before it, some of which had been submitted by the appellant herself. The contents of that documentation have been summarised *in extenso* earlier in the judgment. The documents submitted to the Tribunal show an extensive pattern of conduct on the part of the notice party and his agents, which was entirely consistent with an intention on the part of the notice party to sell the properties.

83. The appellant did not contest the documentary evidence submitted to the Tribunal. She did not allege that any of the people making statements in the emails or correspondence were telling lies, when they stated that the properties were on the market for sale and at a later stage that they had in fact gone "*sale agreed*". The appellant accepted that the properties had been advertised for sale in the newspapers and online.

84. The appellant also submitted at the hearing that the notice party in fact had had an intention to sell the properties. Such statement was contained in the letter from CAVA dated 29th March, 2019; in the statements made to the journalists by various tenants in the article submitted by the appellant at the hearing and was also part of their submission made at the hearing in relation to the alleged "*trick*", whereby the appellant maintained that the notice party had had an intention to sell from as far back as the service of the first notice of termination in 2018.

85. The Tribunal was also entitled to have regard to the uncontroverted evidence of Mr. Ryan to the effect that he had been told by the notice party to make the properties available for off-market viewings as and from January 2019 and that he had furnished keys to the representative of DNG to enable photographs to be taken of the properties in preparation for marketing them for sale, as contained in the emails submitted by the appellant to the Tribunal.

86. The court is satisfied that it would be open to any reasonable person looking at the significant number of documents submitted and having regard to the evidence of Mr. Ryan, to come to the conclusion that the notice party had the intention to sell the properties in March 2019 and had taken active steps to carry that intention into effect. Indeed, one can go further and state that there was no evidence before the Tribunal which would have entitled it to find that, as of 25th March, 2019 and in the months thereafter, the notice party did not have an intention to sell the properties within the requisite period.

87. This raises the question, could the Tribunal make the finding that it had done in relation to the landlord's intention, in the absence of evidence from the notice party? The court has considerable sympathy for the argument put forward on behalf of the tenants. It does seem incongruous that where the sole issue is the intention which a landlord had at the date of service of the notice of termination, i.e. whether he genuinely had the intention to sell the properties as stated in the notice; the landlord can elect to establish his state of mind, not by giving evidence himself of his intention, but by sending in his letting agent and by submitting a plethora of documents, to establish that fact.

88. The letting agent could only give evidence of what he was told by the landlord and what he did on foot of that instruction. Insofar as it concerned what he was told by the landlord, that was hearsay evidence. It is almost impossible to cross-examine a witness on the accuracy or veracity of their hearsay evidence.

89. The landlord also submitted a large volume of documentation, which tended to show that he had the intention which he maintained he had at the time of service of the notice of termination. It is self-evident that a party cannot cross-examine a document.

90. However, the court cannot ignore the fact that the appellant knew that the landlord was not going to give evidence on his own behalf before the Tribunal, as he had not done so at any of the previous adjudication hearings. In these circumstances, she could have sought a subpoena from the Tribunal to ensure his attendance. She did not do that.

91. While it was argued that to have done so, would have meant that the notice party would have been the appellant's witness and therefore could not be cross-examined by the appellant, I do not think that that necessarily follows. It is certainly a rule of practice in the courts, that save in certain circumstances, one cannot impeach one's own witness; given that the Tribunal is allowed to follow informal procedures, they could have allowed the appellant to cross-examine the notice party, notwithstanding that he had been called by the appellant.

92. Alternatively, there is a procedure whereby the Tribunal itself can summon a witness before it. The appellant could have applied to the Tribunal to call the notice party as a witness, so as to enable her to cross-examine him. She did neither of these things.

93. Insofar as Ms. O'Dowd complained about the absence of the notice party as a witness, she did so in the form of a submission to the effect that in the absence of evidence from the landlord or his selling agent, there was insufficient evidence before the Tribunal to find that he had the necessary intention at the time of serving the notice of termination. That was a submission on the sufficiency of the evidence before the Tribunal. It was not an application to have him called as a witness.

94. The Tribunal was mindful of its power to summon a witness of its own motion. In his affidavit sworn on 24th September, 2020, Mr. John Keaney, Chairman of the Tribunal, stated at para. 12 thereof, that if the Tribunal had any issue with the evidence provided, it had been open to it to request the attendance of the notice party. However, as no such issue arose, the Tribunal made its determination based on the evidence and submissions before it.

95. Thus, one is left in a situation where the Tribunal, which is a body that is charged with ruling on disputes between landlords and tenants in a fast, cheap, informal, yet fair manner, had not been requested to call the notice party as a witness. They had before them a substantial volume of documentary evidence, which was entirely supportive of the contention that the landlord had the necessary intention to sell the property. They also had the evidence of Mr. Ryan as to what the landlord had told him and what actions he had taken on foot of such instructions. They could also have regard to the statutory declaration, which, while not of enormous weight, was something that could be put into the balance.

96. The court is satisfied that in these circumstances, the appellant cannot maintain that her right to cross-examine the notice party had been refused, because she had never sought that right. Neither had she been deprived of the opportunity to hear his evidence, because she had never sought that the notice party should give evidence.

97. The essence of the matter is that the Tribunal had regard to the evidence before it, the admission of which had not been objected to by the appellant and on that evidence they made a finding that the notice party had the requisite intention to bring him within s.34 of the Act. In these circumstances, the court cannot find any error of the type set out in the *Fitzgibbon* or *Marwaha* cases, which would allow it to overturn the findings of the Tribunal, or the determination of the respondent in this case. The court is satisfied that the Tribunal acted within the law and did not breach any of the requirements of constitutional or natural justice in the manner in which it conducted its hearing.

98. The Tribunal was entitled to hold that they had sufficient evidence before them to find that the notice party had the requisite intention to sell at the time that he caused the notice of termination to be served. The appellant cannot complain that the notice party

did not give evidence, because she did not seek to have him attend before the Tribunal as a witness.

99. While the Tribunal may have drawn an adverse inference by the failure of the notice party to give evidence, they were not bound to do so. Even if they had drawn such an inference, they were still entitled to find on a consideration of the totality of the evidence before it, that the requisite intention had been established.

100. For the reasons outlined above, the court refuses to make an order in the terms of paras. (a) and (b) of the originating notice of motion.

101. The second main ground of appeal can be disposed of quite shortly. Under that ground it was argued that the Tribunal had erred in finding that s.35A of the Act did not apply. That was a matter of interpretation of that section and its application to the facts of this case. It was common case that there were only five units occupied between the two properties at the time of service of the notices of termination in March 2019. As such, the case clearly does not come within the terms of the section, which only applies where there is a sale of ten or more units within a prescribed time period.

102. Insofar as it was argued that this Court should exercise its inherent jurisdiction to deem s.35A applicable to the circumstances of this case, that submission is not maintainable, as it was not open to the Tribunal to exercise any such jurisdiction; as this is an appeal on a point of law from that decision, the court does not have jurisdiction to make the order sought.

103. Furthermore, the court cannot exercise any so-called inherent jurisdiction to make a statutory provision applicable to a set of circumstances which clearly do not come within the terms of the statutory provision.

104. For the reasons set out herein, the court refuses the orders sought at paras. (c) and (d) of the originating notice of motion.

105. As this judgment is being delivered electronically, the parties will have fourteen days from receipt of the judgment to furnish written submissions in relation to the terms of the final order and on any ancillary matters that may arise.