

THE HIGH COURT

[2022] IEHC 517

RECORD NO. 2022/89MCA

BETWEEN

CARLEY HAMILTON

APPLICANT

- and -

PRTB

RESPONDENT

- and -

KEVIN MCKEOWN

NOTICE PARTY

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 27 July

2022

Background

1. There are two related motions in this matter – the first a motion brought by the respondent to these proceedings, the Residential Tenancies Board, and the second a motion brought by the notice party, Mr. McKeown (hereafter the “landlord”), who rents a property at 8 Shelbourne Rd., Dublin 4 to the appellant in these proceedings (hereafter the “tenant”).
2. In short, the facts are that the landlord entered into a 12-month fixed term tenancy with the tenant on 5 October 2020 in respect of the premises at 8 Shelbourne Rd. Rent was

agreed at the rate of €3,250 per month. The tenant failed to pay rent from April 2021 in accordance with the tenancy agreement and a Notice of Termination was served requiring the tenant to vacate the dwelling within 28 days on 18 May 2021.

3. The landlord referred the dispute to the respondent and solicitors came on record for the tenant. On 11 June 2021 Hatstone solicitors wrote confirming that the tenant was in rent arrears but that the tenant would be challenging the Notice of Termination served. They also raised an alleged lack of compliance with the Housing (Standards for Rented Houses) Regulations 2019 (S.I. 137/2019).
4. An adjudication hearing took place on Thursday, 30 July 2021. The tenant was represented by Hatstone solicitors. The tenant acknowledged she had not paid rent since 5 March 2021 and the adjudicator determined the tenant owed the sum of €12,528.10 in rent arrears to the notice party, the landlord. The tenant was awarded €1,500 in respect of the claim for breach of landlord obligations. The adjudicator upheld the Notice of Termination and determined that the tenant was overholding.
5. An appeal was lodged by the tenant and a Tenancy Tribunal took place on 14 December 2021. As of the date of the hearing the rent arrears stood at €27,068.50. In its determination, the Tribunal upheld the Notice of Termination. The landlord was held to have breached his obligations and to be liable in the sum of €1,709 to the tenant. The tenant was directed to pay the sum of €25,359.50 to the landlord, being rent arrears less the amount owing by the landlord, by way of monthly instalments of €3,250 and a final instalment. In the event of default of repayment, the full sum was to become due. The tenant was directed to continue to pay rent at the rate of €3,250 per month until the dwelling was vacated. The determination was made pursuant to s.108(1) of the Residential Tenancies Act 2004 as amended which provides that the Tribunal shall, on completion of its hearing, make its determination in relation to the dispute and notify

the Residential Tenancies Board of that determination. The determination was in relation to the entirety of the dispute between the landlord and tenant.

6. The tenant appealed to this Court by way of originating Notice of Motion of 29 March 2022, grounded on an affidavit of the tenant of the same date. The appeal is limited to a challenge to the Tribunal's findings in respect of the validity of the Notice of Termination and the award of damages made in her favour arising from a breach of obligation by the landlord.
7. It is important to understand that there is no appeal of the outstanding amount of arrears and there is no dispute that the tenant has failed to pay rent. Indeed, at paragraph 9 of her affidavit in the substantive proceedings, I am told that the tenant acknowledges that she has not discharged the rent as accrued since March 2021. However, in relation to these motions, although the tenant is represented by solicitor and counsel, they received no instructions in respect of the motions and no submissions were made on her behalf.
8. Because the appeal is not in relation to the determination of the Tribunal requiring the tenant to discharge the rent, or the finding that she is obliged to continue to pay rent pending the determination of the appeal, the findings of the Tribunal in that respect will not be disturbed irrespective of the outcome of the appeal. Therefore, at the conclusion of the appeal, the tenant will owe the existing sum in respect of unpaid rent and whatever additional amount she has accrued in rent if she remains in occupation and continues to avoid discharging her rent.
9. In her affidavit of 27 May 2022, Ms. O'Halloran of the respondent avers the tenant owes €45,500 as of 5 May 2022. In the affidavit sworn by the landlord on 22 June 2022 in support of his motion, he avers the sum as of the date of swearing is €48,750.

Landlord's motion

10. The landlord seeks various reliefs, including relief directing that the tenant be directed to

maintain the sums she will receive from her mother's estate pending the determination of the appeal and/or not dissipating the amount she will receive as part of her inheritance pending the determination of the appeal. In the motion brought by the landlord, it is contended that the tenant is the beneficiary of part of her mother's estate. It is identified that on the basis of the information that he and his solicitor have been able to glean, it appears that the tenant may be entitled to 1/6 of her mother's estate. Solicitor and counsel appeared for the tenant but indicated they had no instructions in these motions and therefore were unable to make any argument or participate in them. However, they did provide some information about the estate of the tenant's mother through correspondence, although this correspondence was not put on affidavit. There is a dispute between the landlord and tenant as to the likely share of the tenant in her mother's estate and why it does not equate to 1/6 of the value of the house that her mother left. What is quite clear is that there has been no distribution of the mother's estate to date, although it appears that the house that belonged to her mother is now sale agreed.

Decision on Respondent's motion

11. Before giving my judgment on the motion brought by the landlord, it is necessary that I first consider the motion brought by the respondent of 27 May 2022. By that motion the respondent seeks an Order directing the tenant to pay €45,000 to the landlord or other appropriate party being rent arrears owing to the landlord up to 4 May 2022 pursuant to s.86 of the 2004 Act and/or s.28 of the Supreme Court of Judicature Act (Ireland) 1877 and/or the inherent jurisdiction of this Honourable Court. However, at the hearing it was accepted by counsel for the respondent that s.86 only sets the parameters of the Order and does not provide the Court with jurisdiction for the Order sought.
12. At paragraph 2 an Order is sought directing the tenant to continue to pay the monthly rent of €3,250 to the notice party i.e. the landlord, or other appropriate party pending the

determination of the within appeal or up to the date of vacant possession pursuant to s.86 and/or s.28 of the Judicature Act and/or the inherent jurisdiction of the Court.

13. At paragraph 3 an Order is sought that the appeal be struck out should the tenant fail to make payment in accordance with paragraphs 1 and/or 2. However, at the hearing of the motion it was explained that that relief was not being pursued at this point.
14. It was said that the applications were effectively for an injunction pending the determination of the appeal. I have some reservations about whether paragraph 1 is really an interlocutory Order. First it is not so expressed. Moreover, it does not appear to me to be interlocutory injunctive relief intended to hold the line pending the determination of the appeal. Rather it directs the tenant to pay the sum of €45,000 to the landlord and does not appear to envisage that there will be any revision of that amount when the final appeal comes on and is determined.
15. But even leaving that objection aside, the application cannot be determined without recourse to the scheme established by the 2004 Act. Of particular relevance are two sections – s.86 and s.123. Section 86 of the 2004 Act provides that “*pending the determination of a dispute that has been referred to the Board*” the rent payable under the tenancy concerned shall continue to be payable to the landlord by the tenant. It states that if the dispute relates to the amount of rent payable, no increase in the amount of rent may be made. It further provides that a termination of the tenancy may not be effected pending the determination of a dispute.
16. It appears to be the case that the reference to the “determination of a dispute” includes an appeal to the High Court against such a determination.
17. Those provisions of s.86 clarify, *inter alia*, that when a dispute is before the Board, there is no change in the tenant’s obligations to pay the rent under the tenancy agreement. In other words, it makes it clear that the *status quo* is maintained despite the existence of the

dispute. It removes the possibility of a tenant arguing that the obligation to pay rent is suspended during the life of an appeal.

18. Separately, s.123 addresses the legal status of a determination order pending the determination of an appeal to the High Court. Section 123(2) provides that a determination order shall, on the expiry of the relevant period, become binding on the parties concerned unless an appeal in relation to the determination is made.
19. Under s.123(5) the High Court may, as a consequence of the determination it makes, cancel the determination order or vary it.
20. The wording of s.123(2) makes it absolutely clear that a determination order is not binding on the parties if an appeal is lodged within time to the High Court. Here as I set out above, the determination order of the Tribunal directed payment of the sum of €25,359.50. That is an essential part of the determination. That obligation has not come into force because an appeal has been lodged.
21. The respondent seeks an Order directing the tenant to pay €45,000 to the notice party or other appropriate party. That sum is made up in part of the sum of €25,359.50. An obligation to pay that sum has already been imposed by the Tribunal and the operation of s.123 expressly prevents that obligation from being binding until the appeal is determined. If I were to make the Order sought in paragraph 1, that would amount to a clear circumvention of the rule in s.123 that an obligation in a determination is not binding until there is a resolution of the appeal. Because of the doctrine of ouster, which provides that where legislation is addressed to an area, the Court does not enjoy inherent jurisdiction in that area, I could not exercise my inherent jurisdiction to set aside a regime that is expressly provided for in the 2004 Act. Because the relief sought is not in my view an interlocutory injunction designed to hold the line pending the determination of the appeal, s.28 of the Judicature Act does not apply. But even if I am wrong about this, it would be

quite inappropriate to exercise my jurisdiction under the Judicature Act to circumvent a legislative scheme.

22. The respondent says that I am entitled to grant the relief sought, observing that if the tenant was disputing the question of the rent owing in her appeal the matter might be different and s.123 might prevent me from making such an Order. It is argued that because the tenant is not so disputing the question of the rent owing, s.123 does not prevent me from granting the relief.
23. It is certainly true that, irrespective of the outcome of the appeal, the tenant will have an obligation to pay all the outstanding rent less any deductions because she is not appealing the finding in respect of her obligation to pay rent. But that situation cannot obscure the fact that the determination clearly imposes an obligation requiring the payment of the rent outstanding. That is precisely the relief sought in paragraph 1 of the motion. The legislation makes it clear that no obligation in a determination is binding until the appeal is determined. There is no provision in the Act which allows for a part of the determination not appealed against to be binding in the event of an appeal. Perhaps it should be possible to divide the different findings in a determination, such that the parts not appealed against would not be subject to s.123(2). But the legislature has not provided for such an approach. Section 123(2) is entirely clear. It says that the determination order will not become binding where an appeal is made. That includes all parts of the determination order, including in this case the part in respect of the amount of rent payable.
24. Had the determination not provided for the payment of outstanding rent by the tenant, it might have been possible to look for an Order directing the payment of the amount of rent outstanding. But that is not the situation here.
25. The respondent also says that if the tenant were permitted to appeal a determination order and cease to pay rent, there would be no sanction or consequence and that would seriously

hamper and directly impact the confidence that parties have in the effectiveness of the dispute resolution process. I agree with that sentiment but nonetheless the impact of s.123(2) is that while an appeal is ongoing and a determination order, the subject of the appeal, addresses the payment of rent, the landlord must await the outcome of the appeal for the determination to become binding.

26. In summary, there is no possibility of holding the line in respect of a matter the subject of a determination under appeal where the legislature has already determined how that line should be held. As described by Mr. Justice Simons in *Carroll v Residential Tenancies Board* [2021] IEHC 561, there is in effect a statutory stay pursuant to s.123(2). In the circumstances I cannot accede to the relief at paragraph 1.
27. In relation to the relief at paragraph 2, i.e. an Order directing the tenant to continue to pay monthly rent, it is otiose. The tenant already has an obligation to continue to pay the monthly rent pursuant to the tenancy agreement and it is made clear by s.86 that this obligation is not in any way suspended or set aside by a dispute in relation to that tenancy agreement. I could not make an Order pursuant to s.86 in this regard since s.86 simply confirms in legislative form that there is no change to the obligations of the tenancy agreement. Indeed s.86 clarifies the position such that there is no necessity for such an Order. Were I to make that Order, it would in fact undermine the purpose of s.86 which makes it clear that the obligation under the tenancy agreement remains extant during the life of a dispute. For similar reasons I decline to exercise my jurisdiction under s.28 of the Judicature Act or my inherent jurisdiction.

Decision on Landlord's motion

28. By the second motion, the landlord seeks various interlocutory Orders including an Order that the tenant preserve the sum she is due to receive as a beneficiary in the estate of her mother pending the determination of the within appeal. He has identified that

there is an amount owing pursuant to the determination of the adjudicator and subsequently the Tribunal. As I identify above, an appeal against the Tribunal's determination has been lodged by the tenant.

29. As I also identify above, there is no challenge to the finding that the tenant owes rent. Moreover, the tenant has a continuing obligation to pay rent under s.86 of the 2004 Act. In the circumstances, I am therefore satisfied that the tenant will at the time of determination of the appeal owe a very significant sum of money in rent, being made up of the amount she owed at the date of the affidavit sworn by the landlord as of 22 June i.e. €48,750 and whatever amount has accrued since then. This will depend on the date of determination of the appeal and/or the date upon which she leaves the apartment.
30. I am equally satisfied on the basis of the affidavit evidence that the tenant will have a sum of money owing to her by the distribution of the estate of her mother. It is not clear at this point precisely how much money she will receive from the mother's estate.
31. There is no doubt that the situation is quite unfair on the landlord as the tenant is remaining in the property without paying rent where she accepts that she is obliged to pay rent. It is in those circumstances that the landlord seeks the relief described above.
32. The legal basis for the application is stated to be s.28(8) of the Judicature Act 1877 which gives the Court jurisdiction to grant an injunction in all cases in which it shall appear to the Court to be just or convenient that such Order should be made and/or the inherent jurisdiction of the Court.
33. In the case of *Cosma v Minister for Justice, Equality and Law Reform* [2007] 2 IR 133, McCracken J. indicated that he was satisfied that the Supreme Court had an inherent power to grant interlocutory Orders pending the hearing of an appeal where such an Order was necessary to protect the rights of parties and gave, as an example, an Order preserving the property the subject matter of the proceedings. He noted such an Order must be made

sparingly and only in circumstances where it would not conflict with the undisputed rights of the parties. There is of course also a jurisdiction of the Superior Courts to grant Mareva type injunctions and the criteria for those were set out in the case of *O'Mahony v Horgan* [1995] 2 IR 411. The Supreme Court identified, *inter alia*, that the plaintiff must show that he has an arguable case, should identify there are grounds for believing the defendant has assets within the jurisdiction, should identify grounds for believing there is a risk of the assets being removed or dissipated and must give an undertaking in damages.

34. The landlord is not seeking a Mareva injunction as such but the effect of the Orders he is seeking are very similar to Mareva relief. Therefore, it seems that I should at least consider whether the tests in that respect are met in whole or part.
35. I am entirely satisfied that the landlord has identified an arguable case and has set out fairly the nature of the appeal. I am quite satisfied that the landlord will obtain an Order against the tenant directing she pay the unpaid rent that continues to accrue for the reasons set out above.
36. I am satisfied the landlord has provided compelling evidence that the tenant will receive some money from her mother's estate and indeed that is now confirmed by a letter from the solicitors for the tenant.
37. The landlord has not identified that the tenant is intending to take steps to ensure that her share of her mother's estate when received by her will not be available when judgment is given against her. However, given that the monies that are sought to be preserved have not yet been paid to the applicant, I think it would be difficult at this point in time for the landlord to show that there was an intention to dissipate.
38. Moreover, in the case of *Bennett Enterprises v Lipton* [1998] 2 IR 221, O'Sullivan J. made it clear that in relation to an intention to dissipate, direct evidence of same will rarely be available at an interlocutory stage and that it is legitimate to consider all the circumstances

in relation to the case. The relevant circumstances here give cause for concern in respect of the tenant's behaviour to date. She has failed to discharge her rent for 15 months. She has not made any payment, even a lesser amount than that owing. She has not paid any arrears. She remains in the property and has given no indication as to when she will vacate the property. No instructions were provided by the tenant to her legal team in respect of these motions. She has refused to provide an undertaking to preserve sums when requested to do so. In those circumstances, I am satisfied there is a real concern as to whether she would use her inheritance to pay the outstanding rent or whether she might seek to avoid doing so.

39. Moreover, the balance of convenience favours making an amended version of the Orders sought, given that such an Order will not deprive the tenant of any monies at present since the estate has not yet been distributed. On the other hand, the amended Order I propose to make preserves the position in relation to the repayment of rent arrears, since it will go at least some way towards ensuring that there are monies available to discharge the debt that the tenant will owe when the appeal is concluded.
40. Finally, it is clear that damages are not an adequate remedy in the particular circumstances of this case.
41. The last matter that I ought to address is the question of an undertaking. There is no undertaking proffered but that is understandable in circumstances where the tenant is not in fact challenging the decision on the amount of rent owing. Therefore, even if the landlord is unsuccessful on the appeal, the tenant will owe rent and therefore the landlord will not be obliged to make good any loss caused by the injunction. In the circumstances I will not require the landlord to provide an undertaking as the price of the Order that I intend to make.

Conclusion

42. In the circumstances I will make the following Order:

The tenant, or anyone acting on her behalf, are restrained from dissipating any amount received qua beneficiary in the estate of Elizabeth (Betty) Hamilton below the amount of €48,750 pending the determination of the within appeal and/or until such time as the rent arrears sum owed to the landlord is fully discharged and the tenant gives up possession of 8 Shelbourne Road, Ballsbridge, Dublin 4.