THE HIGH COURT

[2023] IEHC 216

Record no. 2022/107 MCA

IN THE MATTER OF SECTION 123(3) OF THE RESIDENTIAL TENANCIES ACTS 2004 - 2021

BETWEEN

VALERIE ENNERS

APPELLANT

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

BALLYCORNEY LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 28th day of April 2023

Introduction

1. In the present proceedings, the Appellant, who represented herself, seeks to appeal a determination order made by the Respondent (otherwise the "RTB") in circumstances where the Respondent (represented by Mr. Finnegan BL) and the notice party (represented by Mr. Clancy BL) contend that the relevant appeal was made outside the time limit laid down in s. 123 of the Residential Tenancies Act 2004 (the "2004 Act"). On 17 April 2023, the court considered, by way of a preliminary issue, whether the appeal was brought within time.

Section 123 of the 2004 Act

2. For present purposes, the following provisions of s. 123 of the 2004 Act are particularly relevant:-

> "*Binding nature of determination orders.*
>
> *123.— . . .*
>
> *(2) A determination order embodying the terms of a determination of the Tribunal shall, on the expiry of the relevant period, become binding on the parties concerned unless, before that expiry, an appeal in relation to the determination is made under subsection (3).*

(3) Any of the parties concerned may appeal to the High Court, within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law.

. . . .

(8) In this section "relevant period" means the period of ***21 days beginning on the date that the determination order concerned is issued to*** *the parties*". (emphasis added)

3. It is clear from the foregoing that the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is to lay down a strict 21–day time limit for the bringing of an appeal.

4. Furthermore, the said 21–day time limit commences when the tribunal's decision is "*issued to*" the relevant person. Section 123 plainly does not use the words *received by* the relevant person.

5. On a literal analysis, it would be to do violence to the plain meaning of the word used, and would involve departing from what the legislature intended, were this Court to interpret the words "*issued to*" as meaning "*received by*".

6. As will presently be explained, the determination in question issued to the Appellant on 16 March 2022. It was received by her on 24 March 2022. A 21–day period commencing 16 March 2022 expired on 5 April 2022. Thus, to be 'within time' the Appellant was required to make an appeal by the end of 5 April 2022. She did not do so. On 11 April 2022, she sought to bring an appeal. This was out of time.

7. The Appellant does not seek an *extension* of time. Rather, her principal argument is that she brought her appeal *within* time. This is clear from the following averment:

"*I believe I am within my rights and in time limit to make a Statutory Appeal using 21 days from date of receiving the final decision*". (See para. 1 of the Appellant's affidavit, as filed in the Central Office on 11 April 2022).

8. For the reasons set out in this decision, I am satisfied that the Appellant is incorrect. In my view, she did not bring her appeal within time.

9. Even though, regarding herself as having appealed in time, the Appellant does not seek to extend time, it seems appropriate and in ease of the Appellant for this court to consider whether it enjoys the jurisdiction to extend the time limit specified in s. 123 of the 2004 Act.

10. In this Court's decision (Noonan J.) in *Noone v. Residential Tenancies Board & Roe* [2017] IEHC 556, the court considered:

"*Does the High Court have jurisdiction to enlarge the time for bringing an appeal to this Court from a determination order made by the Respondent (the RTB)? That is the essential preliminary issue that arises on this appeal which if resolved against the Appellant disposes of the matter".*

11. At para. 20 of the judgment in *Noone,* the court adopted the analysis by Hogan J. contained in the Court of Appeal's decision in *Keon v. Gibbs* [2017] IECA 195. For the sake of completeness, it should be noted that when the case was argued before this Court, both parties in *Keon* proceeded on the assumption that the Court enjoyed jurisdiction under O. 84C to extend the time within which an appeal from a decision of the Respondent could be brought. Thus, in *Keon* this court was not invited to carry out any analysis of s. 123 (3) of the 2004 Act and did not do so (see *Keon v. Gibbs* [2015] IEHC 812, per Baker J.). Although the observations by the Court of Appeal in *Keon* were made *obiter,* it is clear that Mr. Justice Hogan's analysis comprised the *ratio* of this Mr Justice Noonan's decision in this Court in *Noone.*

12. For the benefit of the Appellant, the term *"ratio decidendi"* or *"ratio"* describes, for present purposes, reasoning which forms a precedent for other similar cases i.e. the essential reasoning in the judgment (as opposed to "*obiter"* observations which are not binding on future cases, but may be persuasive). Again, and for the benefit of the Appellant, it is a well established principle that *"…as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong*" [See Clarke J. (as he then was) in *Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, para. 4]. The following is a *verbatim* quote from para. 20 of this Court's decision in *Noone*. I refer to it because, not having any basis for regarding it as wrong, it seem to me that the following reasoning is binding on this Court in the present application:

> "*20. Hogan J. went on to express some very helpful views on the jurisdictional issue under s. 123. While these observations were clearly made obiter, I have found them to be of great assistance and I respectfully adopt and agree with them. Thus, Hogan J. continued:*
>
> > *'[24.] Perhaps the first thing to note is that there is nothing in s. 123 of the 2004 Act which indicates that this statutory time limit might be extended under any circumstances. It is true that in Law Society of Ireland v. Tobin [2016] IECA 26 this Court held that it enjoys an inherent jurisdiction to extend time where the relevant statutory provision permitting an appeal did not expressly provide for such a power. This, however, was in the context of an appeal from the High Court to this Court, where the right of appeal is constitutionally guaranteed by Article 34.4.1 unless regulated or excepted by law....*
> >
> > *[25.] The present case is quite different, since - unlike the position in Tobin - the right of appeal to the High Court from the Tribunal is entirely dependent on statutory vesture. If, however, the Oireachtas has not provided for a power to extend time in this particular context, an issue must arise as to whether there is such a power at all under any circumstances, no matter what good reason for the delay may be advanced by any putative appellant.*
> >
> > *[26.] The second thing to note is that the High Court proceeded on the basis that Ord. 84C independently conferred a power to extend time. I am not, with respect, convinced, however, that this premise is altogether correct. It is true that Ord. 84C, r. 2(5)(b) does provide for a power to extend time, but this is expressed to be contingent on "any provision to the contrary in any relevant enactment." If the*

proper construction of s. 123(3) of the 2004 Act is that it provides for a strict 21 day time limit which is not capable of extension, then this would amount to a "provision to the contrary" such as would negative the potential operation of Ord. 84C, r. 2(5)(b). Certainly, if this is the proper construction of s. 123(3), then the scope of that appellate jurisdiction could not be changed or enlarged by Rules of Court: see, e.g., The State (O'Flaherty) v. O Floinn [1954] I.R. 295; Rainey v. Delap [1988] I.R. 470. A further consideration is that in view of the provisions of Article 15.2.1 of the Constitution (which vests exclusive legislative power in the Oireachtas) then, as I observed in Gokul v. Aer Lingus plc [2013] IEHC 432:

"any such change could only be brought by primary legislation enacted by the Oireachtas and could not be done not simply by Rule of Court....'' '

21. The wording of s. 123(3) and (8) is clear on its face and an appeal must be brought within 21 days of the date that the determination order is issued. By any reckoning, the Appellant was outside the 21 day period in bringing this appeal. ***There does not appear to me to be any ambiguity in the wording of the section which might be said to leave open the possibility of the court having a discretion to extend the time. Had the Oireachtas intended that such a discretion be available to the court, it could have expressly so provided.*** *It is worth noting in that regard that s. 88 of the 2004 Act gives express power to the RTB to extend the time limited by the Act for referral of a dispute to it for resolution. Thus s. 88 provides:*

'(1) The Board may, on application to it, extend the time limited by any provision of this or any other Part for the referral of a dispute to it for resolution.

(2) The Board shall not extend the time concerned unless the Appellant for the extension shows good grounds for why the time should be extended...'

22. Had the Oireachtas wished to provide for a similar power to extend on the part of the court in the case of an appeal to the High Court, it would presumably have done so in similar terms. The fact that the Oireachtas did not do so must be viewed as not only deliberate but as amounting to a provision 'to the contrary' within the meaning of O. 84C r. 2(5)(b) as suggested by Hogan J.

23. In the context of planning legislation, the authorities suggest that time limits must be adhered to in the absence of express provision to the contrary and the court has no power to interfere – see State (Elm Developments Limited) v. An Bord Pleanála [1981] ILRM 108 (at p. 111), Brown v. Kerry County Council [2011] 3 I.R. 514 and McCann v. An Bord Pleanála [1997] 1 I.R. 264.

24. In Curran v. Solicitors Disciplinary Tribunal [2017] IEHC 2, the court was required to consider s. 7(12) (b) of the Solicitors (Amendment) Act 1960 which provides for the bringing of an appeal to the High Court from a decision of the Solicitors Disciplinary Tribunal 'within 21 days of the receipt by the Appellant of notification in writing of the finding'. Eagar J. held

that the language of this section, similar in its terms to s. 123 of the 2004 Act, was mandatory in nature and did not permit of an extension of time. In finding that the wording of the provision was clear, Eagar J. noted (at para. 22):

> *'When the legislature chose to extend the availability of an appeal against the decision of no finding of prima facie case, it expressly chose to limit this wider right of appeal to a strict time frame, without discretion to extend time.'*

25. Even if there was any potential conflict between the terms of s. 123 and O. 84C, which I do not believe there is, for the reasons explained by Hogan J. the clear intent of the legislature, evident from the wording of s. 123, cannot be overborne by secondary legislation such as the Rules of the Superior Courts". (emphasis added)

13. The conclusion to which the Court came on the question of the jurisdiction to enlarge time under s. 123 of the 2004 Act was set out at para. 29 of Noonan J.'s decision, as follows:

"*Conclusion*

29. For these reasons therefore, I am satisfied that ***the time limit stipulated in s. 123 of the 2004 Act is an absolute one and the court does not enjoy any jurisdiction to extend it****. Thus, as this appeal was not brought within the time limited in that behalf by s. 123 it must accordingly fail in limine. In that event, it is unnecessary to consider any of the other issues raised by the Appellant. Accordingly, I will dismiss this appeal*". (emphasis added)

14. Applying the forgoing principle to the facts in the present case, the Appellant's appeal was not brought within the time limit laid down by s. 123 and, in circumstances where this Court enjoys no jurisdiction to extend the strict 21–day time limit, the preliminary issue must be resolved against the Appellant.

15. Regardless of the sincerity with which the Appellant believes that she has the *right* to bring an appeal within 21 days from the date of *receiving* the final decision, she enjoys no such right, and this Court enjoys no jurisdiction to extend such a right to her. This is because doing so would breach the fundamentally important separation of powers, in that it would, in reality, constitute judicial law-making, contrary to the expressed intention of the legislature.

16. The proposition that the 21 days does not begin to run until a determination has been delivered or *received* (as opposed to *issued* or posted) was considered by Mr Justice Meenan in this Court's decision in *Halbherr v. Residential Tenancies Board & McCann* [2018] IEHC 595. At para. 4 of his judgment, the learned judge noted that the relevant Appellant placed reliance on s. 25 of the Interpretation Act 2005 which provides:-

"*25. Where an enactment authorises or requires a document to be served by post, by using the word 'serve', 'give', 'deliver', 'send' or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed,*

unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

17. In *Halbherr*, the RTB's determination dated 14 July 2017 was issued to the relevant appellant by letter dated 18 July 2017. Given the relevance to the present case, it is appropriate to quote *verbatim* paras. 5 – 11, inclusive, from *Halbherr*:-

"*5. As a determination is 'issued' rather than 'served' or 'given', or expressions to that effect, it must follow, in accordance with s. 123(8) of the Act of 2004, that time started to run on 18th July, 2017 and ended 7th August, 2017.*

6. The Act of 2004 contains no provision whereby a court could extend the time for the purposes of appealing a determination.

7. The second named respondent, Mr. Stephen McCann, supported the application of the Board.

8. The Appellant submits that although the determination may have issued on 18th July 2017, he did not have notice until some days after. Therefore, he maintains that the 21 days did not begin to run until he received the determination.
Conclusion

9. I accept the submissions made on behalf of the Board. It is clear that s. 123(8) of the Act of 2004 refers to the date that the determination 'issued', there is no reference to a determination having been 'served', or the use of some other term, as would bring s. 25 of the Interpretation Act 2005 into play.

10. In dealing with the time of 21 days, both the first and the last date are included. This would mean that the time for appeal expired on 7th August, 2017. In accordance with O. 84C of the Rules of the Superior Courts, this appeal commenced by way of an originating notice of motion. This is dated 14th August 2017 and is clearly out of time. Even allowing the commencement date of the appeal as being the date the affidavit was filed in the Central Office, 8th August, 2017, the appeal is still out of time.

11. It follows from the above that ***the appeal was not brought within the time provided for by the Act of 2004 and there is no provision in the said Act for extending time****. Therefore, I will dismiss the appeal*". (emphasis added)

18. The foregoing analysis applies equally to the facts in the present case and compels this court to dismiss the Appellant's claim as being an appeal brought out of time.

Litigant in person

19. Although what is contained in this decision, thus far, is sufficient to dispose of the question, I am conscious that the Appellant is someone who appeared in person without legal representation and, for that reason, I propose to continue the analysis by looking in granular detail at the particular facts, against the backdrop of relevant principles. I do so in the hope that the Appellant has the clearest understanding of why her application was not successful.

The particular facts in this case

20. The Respondent is a creation of statute, and its principal function concerns the resolution of disputes between tenants and landlords. Parties to such a dispute may request that a complaint be referred to an adjudicator or to a mediator. A determination by an adjudicator may be appealed, by way of a *de novo* hearing to a tenancy tribunal. Parties who engage with mediation may also request a referral to a tenancy tribunal. After a determination made by a tenancy tribunal, the said tribunal notifies the RTB, following which the latter makes a determination order. It is such an order which is referred to in subsections (2), (3) and (8) of s. 123 of the 2004 Act, as quoted earlier.

21. As previously seen, a determination order becomes binding on the parties concerned unless an appeal is made to this Court on a point of law within 21 days from the date on which the determination order is issued to the Appellant in question.

22. In the present case, the adjudicator's report was sent to the Appellant and to the notice party by letters dated 3 November 2021.

23. By email of 11 November 2021, the Appellant made an appeal to a tenancy tribunal against the adjudicator's determination.

24. A tenancy tribunal appeal hearing took place on 20 December 2021.

25. Pursuant to s. 108 of the 2004 Act, the tribunal notified the Respondent of its determination, on 5 January 2022.

26. A determination order was made by the Respondent on 2 March 2022.

16 March 2022

27. The determination order issued to the Appellant by letter dated 16 March 2022. The said letter began in the following terms:-

> "*I refer to the tenancy tribunal hearing of 20 December 2021 in connection with the appeal/referral in respect of the above – referenced case.* ***Enclosed is*** *the* ***report of the Tribunal*** *and the* ***determination Order made by the Residential Tenancies Board*** *in this matter in accordance with s. 121 of the Residential Tenancies Act 2004.*
>
> *This determination order shall, on the expiry of a period of 21 days from the date of issue, become binding on the parties concerned, unless an appeal is made by any of the parties*

directly to the High Court on a point of law before then, pursuant to s. 123 (3) of the Residential Tenancies Act 2004...". (emphasis added)

28. It is a matter of fact that the said letter of 16 March 2022 enclosed both (i) the report of the tribunal (of 5 January 2022) and the determination order made by the RTB (of 2 March 2022). The former was signed by Mr. Eoin Byrne, chairperson, for and on behalf of the tribunal on 5 January 2022. The latter was signed by Ms. Linda Creighton, higher executive officer, duly authorised to sign on behalf of the director of the respondent, on 02 March 2022.

29. Among the submissions made by the Appellant is that the 16 March 2022 letter was not posted until 23 March 2022. The Appellant submits, in particular: *"If I received it on the 24th of March, the date of issue must be the 23rd".*

30. The foregoing submission is not evidence–based. Furthermore, it is entirely undermined by objective evidence before the court as to when, in fact, the determination order was posted to the Appellant (i.e., on 16 March 2022), to which I now turn.

31. First, at para. 18 of the affidavit sworn by Mr. Eoin Byrne on 10 June 2022, he avers that the respondent's determination order issued by letter dated 16 March 2022. Second, Tab 5 of his affidavit comprises what Byrne avers to be a true copy of an 'An Post' tracking form, confirming the posting and delivery of the 16 March 2022 letter.

***Issued to* the Appellant on 16 March 2022**

32. The first page of the aforesaid certificate exhibited by Mr. Byrne at Tab 5 describes the sender as the RTB. It specifies the Appellant, by name, and contains her address as well as explicitly stating "*Wed 16 Mar 2022*" and a tracking number "*LG 036913058 IE*" is given. It comprises objective evidence that the letter was, in fact, posted on Wednesday 16 March 2022. Coupled with the sworn averments by Mr Byrne to that effect, there is incontrovertible evidence before this court that the determination *issued to* the Appellant on 16 March 2022.

33. The second page of the exhibit at Tab 5 refers to the tracking history in respect of the correspondence between 23 March and 24 March. In particular, it records delivery of the post at 10:34 on 24 March 2022. The 16 March 2022 was a Wednesday. The 17 and 18 March 2022 were both Bank Holidays. The 19 and 20 March were a Saturday and a Sunday, respectively.

***Received by* the Appellant on 24 March 2022**

34. It is a fact that the determination order was delivered by An Post to the Appellant on the morning of 24 March, having been issued by the RTB on 16 March 2022. The Appellant accepts that she received same at that stage.

35. As of 24 March 2022, the status quo was as follows: (i) having regard to the date and contents of the 16 March 2022 letter, the Appellant was on notice that the determination order had issued to

her on 16 March 2022; (ii) the Appellant was on notice that she had 21 days from that date within which to appeal; and (iii) she was well 'within time', had she made an appeal at that point (or at any point in the 12 days from receipt by her, on 24 March 2022, of the determination order).

27 March 2022

36. On 27 March 2022, the Appellant wrote to the Respondent in the following terms:-

> *"I am writing in relation to above case. The decision was made on 5 January 2022. I received decision by post on 24 March 2022.*
> *It is important to point out that Ms. Maria Burns attended my RTB tribunal hearing as witness and support and NOT as representative.*
> *I am seeking that record will be amended and I am seeking confirmation that new issue date of decision will be confirmed at RTB earliest convenience . . ."*

37. It seems fair to observe that, rather than focussing on bringing an appeal within 21 days from the date the determination order issued, the Appellant's letter was directed at other issues, namely (i) her contention that the "*record*" should be amended to reflect the fact that the tribunal's determination (of 5 January 2022) was not received by her until 24 March 2022; and (ii) her contention that the RTB was obliged to provide a "*new issue date of decision*".

38. It is also fair to say that the foregoing concerns, as articulated in the Appellant's 27 March 2022 letter, were reflected in her oral submissions to this Court on 17 April 2023.

39. Among the submissions made by the Appellant was to ask, rhetorically, if a determination was made on 5 January 2022, why a determination order was not made the next day? With respect, that is not the matter which falls for determination by this Court. Rather, the fact is that a determination order issued to the Appellant on 16 March 2022 and, thus, she had until the end of 5 April 2022 to make an appeal but failed to do so.

Zero days

40. A related submission by the Appellant is that she was given "*zero days*" to make an appeal. At para. 7 or her written submission, the Appellant argues that the: "*Respondent knowingly provided a Zero days to appeal and falsely claimed that Appellant was given 21 days and exceeded that time*" (para. 7). Similarly, at para. 10 or her written submission, the Appellant argues: "*It is a fact I was given Zero days to appeal and it is against the LAW"* (para. 10). These written submission was repeated several times in oral argument to the Court.

41. The claim that the Appellant was given zero days to appeal is based on her contention that she did not see the 5 January 2022 determination until well over 21 days had expired (i.e. calculating the 21 day period from 5 January 2022).

42. With respect, this submission ignores the important distinction between the tribunal's determination (05 January 2022) and the respondent's determination order (2 March 2022).

Furthermore, and most importantly, the determination order was issued to the Appellant on 16 March 2022 and, without doubt, received by her as of 24 March 2022. Thus, the facts entirely undermine the submission that she was given zero days to appeal.

43. Another submission made by the Appellant is that "*The RTB took away my rights*". As this Court understands it, this is a submission is to the effect that the Respondent deliberately gave the Appellant either no time to appeal, or less than what she regards as a statutorily–guaranteed period of 21 days (which must be calculated, she contends, from the receipt by her of the determination order).

44. Again, with respect, these are submissions I cannot accept. There is not a scintilla of evidence to suggest that the RTB did anything other than issue to the Appellant the determination order in question (specifically, by certified "express" post, on 16 March 2022). By that I mean, there is simply no evidence that the Respondent had any 'hand, act or part' in the performance, by 'An Post', of its duties (as regards the collection, processing and delivery of post).

45. In other words, having issued the determination to the Appellant on 16 March 2022 (a deliberate and entirely appropriate act) the Respondent discharged its duty under s. 123 of the 2004 Act. However, this Court simply cannot hold that any delay by 'An Post', as regards delivery, was a deliberate act on the part of the Respondent (still less a deliberate attempt to deny to the Appellant the time to make an appeal, or a deliberate attempt to 'cut down' the time available to her in that regard).

46. It is regrettable that, in these particular circumstances (where the 4 days which followed immediately after the posting of the letter comprised 2 Bank Holidays, a Saturday and a Sunday) a letter posted on 16 March was not delivered until 24 March. However, even in these circumstances, the following can be said:

(i) It does not establish a denial of rights by the respondent;

(ii) It does not create a jurisdiction to extend time which cannot be found in the relevant legislation.;

(iii) despite the delayed receipt, the Appellant had time within which to make an appeal in compliance with s.123.

<u>4 April 2022</u>

47. On 4 April 2022, the Appellant wrote again to the Respondent in the following terms:

> *"TO WHOM IT MAY CONCERN*
> *I request the explanation on the following matter.*
>
> *1. The RTB decision was made on **5 January 2022**. I received RTB final decision on **24 March 2022** but letter from RTB dated **16 March 2022** stating* "the determination order shall, on expiry of a period of 21 days from the date of issue . . .*". The RTB OFFICES providing MISLEADING information and documentation!!!!*

IMMEDIATELY Confirm the DATE OF ISSUE that will give a Right to Appeal of 21 days according to Law.

2. I also received no confirmation to request to previous correspondence "Maria was not my lawyer. She was only witness and support".

I am seeking confirmation and amendment of Details and confirmation of correct date of issue according to Law.

Please find below document RTB decision together with letter . . ." (emphasis in original)

48. It is fair to say that, by means of the foregoing correspondence, the Appellant was (i) insisting (contrary to the facts) that the determination order did not issue to her on 16 March 2022; (ii) calling on the Respondent to do something which, as a matter of fact and law, it could not do, namely; (iii) to confirm that the Appellant was correct as to when the determination order had issued (when the Appellant was *not* correct); (iv) to amend the record to reflect the 'fact' (as the Appellant saw it) that the determination order had not issued on 16 March 2022 (despite the fact that it had); and (v) to confer on the Appellant the right to calculate the 21 days period from the *receipt* by her of the determination order (contrary to the express provisions in s.123 of the 2004 Act). In those circumstances it is entirely unsurprising that the Appellant did not receive the response she called for.

49. Another observation can fairly be made, namely, that when the Appellant wrote in these terms to the Respondent on 4 April 2022, she was 'within time' in respect of an appeal. However, for whatever reason, the Appellant appears to have maintained a focus (just as she had done in her 27 March 2022 correspondence) not at the preparation of an appeal, but at a demand that the record be amended in ways she asserted that it ought to be.

50. It is clear from the contents of this 4 April 2022 communication that the Appellant was critical of the Respondent for stating, in the latter's 16 March 2022 letter, that the determination order "*…shall, on expiry of a period of 21 days from the date of issue. . .*" become binding. The Appellant described the foregoing as "*misleading information*". However, it should be said that, by stating the foregoing, the Respondent was doing no more than employing the very wording found in s. 123 (2) of the 2004 Act. Thus, the allegation levelled at the Respondent of providing misleading information is, with respect, entirely inappropriate.

51. At para. 9 of her written submissions, the Appellant claims that the Respondent "*…. falsely stated that Appellant was given 21 days to appeal and exceeded that time limit. It is not true. I was never given a statutory 21 days, and this means I never exceeded a time limit*" (para. 9). This submission speaks to the Appellant's sincere, but mistaken, belief that she was given zero days to appeal and/or that 'time' should 'run', not from the date of *issue*, but from the date of *receipt*. Regardless of how sincerely the Appellant holds these views (and she struck the Court as someone acting *bona fide*

and motivated by very sincerely held views) the facts entirely undermine the proposition that the Appellant was given zero days; and for the 21 day time limit to be calculated from the date of receipt by a potential appellant, is not what the Oireachtas has provided in s. 123 of the 2004 Act.

5 April 2022 (12:07)

52. On 5 April 2022 (at 12:07) a representative of the Respondent emailed the Appellant in the following terms:-

> "*Thank you for your email.*
> *To confirm: The date of issue is the date it issued from the RTB – therefore it is the date on the letter –* ***16th March****.*
> *Your earlier letter has been forward to customer service for a response..."*

53. The Appellant was still 'within time' when this communication was sent. That is not to say that there was any lack of clarity at any prior point. The terms of the respondent's 16 March 2022 letter are perfectly clear. Indeed, they were understood by the Appellant as and from the morning of 24 March 2022. The key issue is that, whilst *understanding* the position explained by the respondent, the Appellant did not *agree* with same (and, in the manner examined, argued, mistakenly, that the record should be changed to give her 21 days from receipt, rather than from issue to her, of the determination order).

5 April 2022 (12:39)

54. Later on 5 April 2022 (at 12:39) the Appellant sent an email to the Respondent in the following terms:-

> *"TO WHOM IT MAY CONCERN:*
> *Immediately amend your Records!!!!*
> *And give me 21 days for APPEAL* ***according to law****. I request that somebody will call me now to confirm!!!!!"* (emphasis in original)

55. Again, this communication was sent by the Appellant *prior* to the expiry of the 21–day statutory deadline. Again, it argues for two things. The first is that the Respondent should amend its records in such manner as the Appellant directed. The second is the Appellant's contention that, according to law, she is entitled to a period of 21 days, not from the date when the determination order was issued (as laid down in s. 123 of the 2004 Act), but from a different date, in effect, the date the determination order was received (something not provided for in the 2004 Act).

Ultra Vires

56. Although the following may not be immediately apparent to the Appellant, given the fact that the Respondent is a creation of statute (i.e. a body created by the 2004 Act) it was obliged to act in accordance with the provisions of the legislation which created it. Its powers can only be exercised within the 'guardrails' of the Act which brought the Respondent into existence and sets out its role, function, duties and rights. Therefore, it lacked the power to depart from the provisions of s.123 of

the 2004 Act. In other words, it was powerless to do what the Appellant, sincerely but mistakenly, demanded that it do.

57. To look at matters from a different perspective, had the Respondent decided that, regardless of what is said in s.123 of the 2004 Act, it would allow appeals made within 21 days from *receipt by* a would-be appellant of the relevant determination order, such a decision would have lacked any valid basis or authority. It would have been a decision *outside* the respondent's powers (i.e. what the law calls an *ultra vires* decision). For these reasons, I feel bound to reject the submission made by the Appellant at para. 11 of her written submissions that: "*RTB knowingly violated appellant's constitutional right and liberty to statutory right to 21 day to appeal".* The Appellant has established no such thing.

58. The same logic applies to this Court, which has not been given by the 2004 Act, or by any other legislation or principle, the power to make a decision which would 'cut across' or undermine what the legislature has decided when it enacted s.123. I now return to the communication.

5 April 2022 (at 15:57)

59. Later on 5 April 2022 (at 15:57) the Appellant sent an email to the Respondent which stated inter alia: "*RTB sent on 23 March with backdated letter dated to 16 March 2022. Correct your (RTB) record IMMEDIATELY!!!!!"*

Backdated letter

60. In the manner previously examined, the Appellant's contention that the determination order issued on 23 March 2022 is no more than an assertion which is entirely undermined by evidence to the contrary. The determination order, in fact, issued on 16 March 2022. Thus, the use by the Appellant of the term "*backdated letter*" was entirely inappropriate and mistaken.

5 April 2022 (at 16:20)

61. Later still on 5 April 2022 (at 16:20) the Appellant described the Respondent as acting in an unacceptable and negligent fashion. The Appellant contended that the RTB had made a mistake which she required the latter to correct, and her email stated inter alia: "*I want to appeal this decision and I have a right to 21 days. AMEND YOUR RECORDS NOW. CONFIRM NOW!!!!!".* There is no need to repeat at length the analysis set out earlier. Suffice to say that, for the reasons explained, the Appellant was mistaken, both as to the facts and the law. Her view that the letter of 16 March was not posted on 16 March was mistaken. Her view that she had a legal right to 21 days from receipt was also mistaken. Thus, there was no question of the Respondent being negligent, acting unacceptably or being obliged to amend its records.

5 April 2022 (at 17:09)

62. Later still on 5 April 2022 (at 17:09) the Appellant wrote again to the Respondent asserting that 16 March 2022 was a mistake and contending that the determination order in fact issued on 23

March 2022. In the manner examined, this is simply not so. The said email from the Appellant concluded in the following terms:-

> "*Confirm the date of issue is 23 March 2022 because I received on 24 March 2022.* ***IMMEDIATELY*** *I was waiting the whole day today by the phone and nobody called me.*
>
> *I want to Appeal this decision!!! It is your statutory duty to give correct 21 days to Appeal and confirm the same ASAP".* (emphasis in original)

In the manner examined, the mistake was on the part of the Appellant alone.

6 April 2022

63. On 6 April 2022, the Appellant wrote to the Respondent stating inter alia the following:

> "*2. I received the final decision with Determination letter on 24 March 2022. The Determination letter was dated by 16 March 2022. It was sent by registered post one day delivery and it is clearly was not sent on 16 March 2022. It was sent on 23 March 2022.*
>
> *3. I am officially letting you know that I have full intention to Appeal the RTB tribunal decision to High Court. I am within my rights and I intend to use 21 days for appeal from the day I received the Decision with Determination Letter which was on the 24 March 2022".*

64. The determination order was not, in fact, sent either by *"registered post"* or by what the Appellant describes as "*one day delivery"*. The evidence establishes that it was sent by certified express post, and that this was on 16 March 2022, not 23 March 2022.

Conclusion

65. For the reasons explained in this decision, I am satisfied that the Appellant failed to appeal the determination order within the 21–day period, mandated by statute, which runs from the date of issue to her of the said order.

66. Whilst, strictly speaking, the Appellant did not seek to extend the time limit (arguing, instead, that (i) as a matter of fact the letter was not sent on 16 March 2022, but on 23 March; and (ii) and that as a matter of law she was entitled to 21 days from receipt of same, on 24 March 2022) I am satisfied that this Court has no jurisdiction to extend the statutory time limit.

67. As touched on earlier, were this Court to purport to extend time, it would constitute impermissible judicial law–making, contrary to the will of the Irish people as expressed in legislation enacted by the Oireachtas (specifically the provisions of s. 123, in particular, subs. (8) thereof).

68. Regardless of the sincerity with which the appellant's submissions are made, they are not evidence based. In short, they are undermined by the facts and run contrary to the proper interpretation of s. 123 of the 2004 Act.

69. For the reasons set out in this judgment, the preliminary issue must be determined against the Appellant and her appeal dismissed *in limine*.

70. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

71. The Respondent has been entirely successful in the present application and the Appellant entirely unsuccessful. Having regard to s. 169 of the Legal Services Regulation Act 2015 which confers on an entirely successful party a presumptive right to costs and having considered relevant authorities (in particular *Veoila Water UK plc v. Fingal Co. Co. (No. 2)* [2007] 2 IR 81 (wherein Clarke J (as he then was) stated *inter alia* that: *"Parties who successfully defend proceedings are… prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings*") my preliminary view is that there are no facts or circumstances which would merit a departure from the 'normal' rule that 'costs' should 'follow the event' (i.e. that the Respondent is entitled to an order for their costs, to include any reserved costs). The parties should correspond, forthwith and, in the event of any dispute as to the final form of order, including as to costs, short written submissions (not exceeding 1,000 words) should, be filed in the Central Office within 14 days. In default of receiving such submissions within that timeframe, it is anticipated that a final order will be drawn up in their absence.