**APPROVED** **[2023] IEHC 627**

THE HIGH COURT

2022 227 MCA

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT 2004

BETWEEN

THOMAS JOSEPH ASHE

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

BELINDA DYER
GEORGE DYER

NOTICE PARTIES

**JUDGMENT of Mr. Justice Garrett Simons delivered on 20 November 2023**

## INTRODUCTION

1. This matter comes before the High Court by way of an appeal on a point of law from a determination of the Tenancy Tribunal of the Residential Tenancies Board. The determination of the Tenancy Tribunal had been to the effect that a

notice of termination, which had been served on the grounds that the landlords require the dwelling for occupation by a member of their family, was valid. The relevant determination order is dated 17 August 2022.

2. By virtue of Order 84C of the Rules of the Superior Courts, the appropriate respondent to the appeal is the Residential Tenancies Board (formerly known as the Private Residential Tenancies Board). For ease of exposition, I will refer to the appellant as "***the Tenant***"; the decision-maker as "***the Tenancy Tribunal***"; and the Residential Tenancies Board as "***the RTB***" or "***the Board***". The landlords are notice parties to these proceedings. They will be referred to collectively as "***the Landlords***". Mr. George Dyer gave evidence before the Tenancy Tribunal on behalf of both landlords.

**APPEAL ON A POINT OF LAW ONLY**

3. The appeal comes before the High Court pursuant to Section 123 of the Residential Tenancies Act 2004 ("***RTA 2004***"). The appeal is by way of an appeal on a point of law.

4. The High Court's jurisdiction on an appeal on a point of law has been explained as follows by the Supreme Court in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment):

> "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.

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)."

5. The principles in *Fitzgibbon* have been applied in the specific context of an appeal under Section 123 of the Residential Tenancies Act 2004 in a number of High Court judgments. In *Marwaha v. Residential Tenancies Board* [2016] IEHC 308, the High Court (Barrett J.) summarised the principles as follows (at paragraph 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."

6. Most recently, the High Court (Ferriter J.) in *Web Summit Services Ltd v. Residential Tenancies Board* [2023] IEHC 634 emphasised "*the very high bar*" which an appellant must surmount in order to show that no reasonable decision-maker could have arrived at the impugned findings of the Tenancy Tribunal.

7. Finally, it should be emphasised that the point of law must arise from the determination under appeal. The High Court is not hearing the matter *de novo* but rather is considering the legality of the decision of the Tenancy Tribunal. The High Court should normally decline to decide a point of law which had neither been argued before, nor decided by, the Tenancy Tribunal. See, by analogy, *Governors & Guardians of the Hospital for the Relief of Poor Lying-in*

*Women, Dublin v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1 (at paragraph 90 of the reported judgment). See also the judgment of the High Court (Noonan J.) in *Hyland v. Residential Tenancies Board* [2017] IEHC 557 (at paragraphs 25 to 27).

8. This limitation on the High Court's appellate jurisdiction assumes an especial importance in the present case in circumstances where a number of the objections sought to be advanced by the Tenant are not ones which were pursued at first instance before the Tenancy Tribunal. In particular, the suggestion that the Landlords' intention in seeking to terminate the tenancy was informed by reasons other than the stated reason, i.e. to allow the dwelling to be occupied by their daughter, was not raised before the Tenancy Tribunal. It is impermissible to attempt to raise a factual issue, for the first time, in the context of an appeal on a point of law.

## DISCUSSION OF GROUNDS OF APPEAL

### *(1). Service of statutory declaration*

9. The principal objection made to the Tenancy Tribunal's determination centres on the finding that the version of the statutory declaration served upon the Tenant had been the *original* and not a photocopy. To assist the reader in understanding this objection, it is necessary to pause and explain the procedure by which a landlord may terminate a tenancy. One circumstance in which a residential tenancy may be terminated is where the landlord requires the dwelling for occupation by a member of his or her family. In order to terminate the tenancy on this ground, the landlord must serve a notice of termination giving the requisite period of notice. The notice of termination must cite the reason for the

termination and must either contain or be accompanied by a statutory declaration specifying (i) the intended occupant's identity and his or her relationship to the landlord, and (ii) the expected duration of that occupation. The (former) tenant must be offered a fresh tenancy in the event that the landlord's relative vacates the dwelling within twelve months. See Section 34 of the Residential Tenancies Act 2004.

10. The Tenant interprets this procedure as mandating the service of the *original* statutory declaration. The Tenant sought to argue before the Tenancy Tribunal that he had been served with a copy and not the original. The Tenant placed emphasis on the fact that the affidavit of service referred to a "*True copy Statutory Declaration*".

11. The Tenancy Tribunal heard oral evidence from both the Landlord and Tenant on this issue. The Tenancy Tribunal set out its findings on this issue in its determination as follows:

> "It was the Landlord's evidence at the appeal hearing that he served the original Notice of Termination and Statutory Declaration and that he understood the reference to a 'true copy' of the Statutory Declaration in the affidavit of Service dated 9 February 2022 to mean the original statutory declaration was being served.
>
> Pursuant to Section 34(4) a notice of termination must contain or be accompanied by a statutory declaration. It is notable prior to the adjudication no reference was made of copy documents having been served on the Tenant on the 4 February, 2021. There is no reference to copy documents being served in the party's evidence and submissions to the adjudicator. When invited to particularise why he formed the opinion that the statutory declaration served on him was a copy, the Tenant was unable to provide any specific or particular reason to the Tribunal as to why he believed the documents served on him in February 2021 were copies. The Tenant was only able to state that to his untrained eye the documents appeared to be copies. Further, having apparently formed the view that the statutory declaration was a copy, this view was never raised prior to or during the

> Adjudication process by the Tenant. The Landlord's evidence in relation to the service of original documents on the Tenant on the 4 February, 2021 was definite and persuasive and his evidence was that there was 'no doubt' about it but original documentation was served on the 4 February, 2021. He gave detailed evidence about attending at his solicitor's office to sign the said original documentation and thereafter personal service of the original documentation. Having weighed up the evidence before it, and on the balance of probabilities, the Tribunal prefers the Landlord's account. The fact that the Tenant did not raise a dispute pursuant to Section 80 of the Act in relation to the validity of Notice of Termination supports the Tribunal in it's view, that on the balance of probabilities, the original Notice of Termination and the original Statutory Declaration were served on the Tenant on the 4 February 2021."

12. Counsel on behalf of the Tenant has sought to criticise the reasoning of the Tenancy Tribunal in this regard. It is said, in particular, that there was a conflict of fact between the oral evidence of the landlord, Mr. Dyer, and the written evidence in the form of the affidavit of service.

13. With respect, these criticisms are not well founded. The assessment of which version of the statutory declaration had been served upon the Tenant involves a question of fact. It is quintessentially a matter for the Tenancy Tribunal. The High Court, in the context of an appeal on a point of law, could only interfere with a finding of fact in the limited circumstances identified in the case law discussed earlier. A finding of fact can only be set aside if there is no evidence to support the finding or the finding is one which no reasonable decision-making body could reach. Here, the Tenancy Tribunal had the benefit of oral evidence from both the Landlord and the Tenant. The Tenancy Tribunal's determination records that the Tenant was unable to provide any specific or particular reason to the Tribunal as to why he believed that the documents served on him were copies. By contrast, the Tenancy Tribunal's determination records that the Landlord's evidence in relation to the service of the original documents upon the

Tenant was "*definite and persuasive*". The Tenancy Tribunal also attached some weight to the fact that the supposed failure to serve the original version had not been raised by the Tenant at the adjudication stage.

14. These findings of fact and the inference drawn from the Tenant's failure to raise the objection at the adjudication stage are ones which were reasonably open to the Tenancy Tribunal on the evidence before it.

15. It is correct to say, as counsel for the Tenant does, that there is a discrepancy between the oral evidence and the affidavit of service. It will be recalled that the affidavit of service refers to a "*True copy Statutory Declaration*". The explanation offered by Mr. Dyer, one of the joint landlords, for this discrepancy is that he had understood the reference to a "*true copy*" to mean that the original statutory declaration was being served. It was a matter for the Tenancy Tribunal, having had the benefit of hearing the landlord give his evidence and having been able to observe his demeanour, to determine whether this explanation was sufficient to resolve the discrepancy. It cannot be said that the findings of fact reached by the Tenancy Tribunal were unreasonable. It is at least plausible that a lay person, not versed in law, might mistakenly think that a "*true copy*" signified more than a mere photocopy.

16. In all the circumstances, the Tenancy Tribunal's findings of fact on the issue of service cannot be set aside in an appeal on a point of law. It cannot be said that there was no evidence to support the findings nor that the findings and inferences are ones which no reasonable decision-maker could have reached.

17. It follows, therefore, that it is unnecessary for the purpose of resolving this appeal for the High Court to express any concluded view on whether service of the original of a statutory declaration is mandatory under Section 34 of the RTA

2004 or whether, alternatively, it would be sufficient to serve a photocopy. On the facts of this case, the *original* was served and therefore the legal issue simply does not arise.

***(2). Date of determination order***

18. To assist the reader in understanding this next ground of appeal, it is necessary to explain the distinction between a "*determination*" and a "*determination order*". Upon completion of its hearing in relation to a dispute, the Tenancy Tribunal makes its "*determination*" and notifies the Residential Tenancies Board of same. Thereafter, the Director of the Residential Tenancies Board is charged with the preparation of a written record of that "*determination*" and with issuing same to the parties. This written record is referred to under Section 121 of the RTA 2004 as a "*determination order*". Importantly, the RTA 2004 does not prescribe any time-limit within which a determination order must be issued.

19. The Tenant complains that the determination order in the present case was drawn up without first allowing a period of twenty-one days to elapse from the date of the Tenancy Tribunal's determination. On the facts, the time period between the determination and the determination order was fifteen days. It is suggested that this has in some way prejudiced the Tenant in the exercise of his statutory right of appeal.

20. With respect, this complaint appears to be predicated on a misunderstanding of the significance of the twenty-one day period referred to under Section 123 of the RTA 2004. This twenty-one day period is the time-limit prescribed for the bringing of an appeal to the High Court against a determination of the Tenancy Tribunal. The time-limit runs from the date of the determination order (and not from the earlier date of the Tenancy Tribunal's determination). The time-limit

does not govern the *preceding* procedural step, i.e. the issuance of a determination order by the Director under Section 121 following receipt of the Tenancy Tribunal's determination.

21. The fact that the Director issued the determination order within fifteen days of the Tenancy Tribunal's determination of 2 August 2022 does not involve any breach of procedure. As explained, there is no time-limit prescribed under the RTA 2004 for the preparation and issuance of a determination order. Crucially, time only begins to run for the purpose of an appeal once the determination order has issued to the parties: Section 123(8). On the facts of the present case, the appeal to the High Court was made well within the twenty-one day period allowed and it has never been suggested that the appeal was out-of-time.

22. For completeness, the Tenant's reliance on *Carroll v. Residential Tenancies Board* [2021] IEHC 561 is misplaced. That judgment was concerned with a different question, namely what is the legal position in the interregnum between the making of an appeal to the High Court and the hearing and determination of that appeal. It was held that the combined effect of Section 86 and Section 123 of the RTA 2004 is that a termination of a Part 4 tenancy may not be lawfully effected where a statutory appeal has been made to the High Court within time and remains outstanding. The judgment is not authority for the proposition that there must be a twenty-one day period between (i) the date of the making of a determination by the Tenancy Tribunal, and (ii) the preparation and issuance of a determination order.

23. Finally, it should be explained that, as originally enacted, the RTA 2004 had imposed the function of preparing a "*determination order*" upon the Board rather than the Director. Although there was no time-limit prescribed under the parent

legislation for the discharge of this function, it had been addressed in procedural rules promulgated pursuant to Section 109 of the RTA 2004. Rule 29 had provided that the Board was to make a determination order at the next meeting of the Board after receipt of the determination of a Tenancy Tribunal, or as soon as practicable thereafter. The function of preparing a determination order has since been transferred to the Director with effect from 23 July 2018. It does not appear that the rule has been updated to reflect this change in the legislation. Even if the rule applies, by analogy, to the Director, it does not oblige him to allow a *minimum* period of twenty-one days to elapse before making a determination order. Rather, the duty is to make a determination order "*as soon as practicable*" after receipt of the Tenancy Tribunal's determination.

***(3). Statutory declaration and Landlords' intention***

24. The Tenant has, in his supplemental affidavit, sought to criticise the Tenancy Tribunal for its supposed failure to consider the Landlords' reasons for seeking to terminate the tenancy. More specifically, it is alleged that the Tenancy Tribunal did not appropriately weigh up the consideration that the Landlords were, supposedly, interested in "*commercially disposing*" of the dwelling or re-letting it at a "*much higher rent*" than it had been let to the Tenant. It is further alleged that the Tenancy Tribunal attached too much evidential weight to the content of the statutory declaration.

25. With respect, it is not open to the Tenant to seek, belatedly, to question the genuineness of the stated reason for terminating the tenancy, namely, that the Landlords required the dwelling for occupation by their daughter. No issue had been raised in this regard by the Tenant at the hearing before the Tenancy Tribunal. The Tenant had been legally represented at the oral hearing and if he

wished to challenge the stated reason for the termination, he should have done so at that time. One of the joint landlords, Mr. Dyer, gave oral evidence to the effect that the dwelling was required for their daughter as she was participating in a farming course locally. This evidence was not challenged by way of cross-examination.

26. It is not open to a party, in the context of an appeal on a point of law, to raise an entirely new issue of fact. This is not procedural pedantry: rather, it would be unjust to allow a party to raise a factual issue for the first time in the High Court in circumstances where that party did not avail of the opportunity afforded to it to pursue that issue before the decision-maker of first instance. The time for any challenge to the Landlords' intention was before the Tenancy Tribunal where the issue could have been fully explored in evidence.

27. For completeness, the Tenant's reliance on the judgment in *Stulpinaite v. Residential Tenancies Board* [2021] IEHC 178 is misplaced. The judgment is authority for the proposition that a statutory declaration whilst not strong evidence of intention, is nonetheless some evidence that can be taken into account by the Tenancy Tribunal. In the present case, the Landlords did not seek to rely solely on the statutory declaration as evidence of their intention but also gave oral evidence at the hearing before the Tenancy Tribunal. The Tenant had an opportunity to challenge this oral evidence in cross-examination but chose not to do so. Having failed to dispute the Landlords' evidence as to intention during the hearing before the Tenancy Tribunal, the Tenant cannot impugn same before the High Court.

***(4). Composition of Tenancy Tribunal***

28. The Tenant has, belatedly, sought to query whether all three members of the Tenancy Tribunal panel attended at the virtual or remote hearing held on 14 July 2022. This issue is summarised as follows in the supplemental affidavit filed by the Tenant (at paragraphs 23 to 25):

> "During the Determination Tribunal on 14 July 2022, which was conducted 'virtually', I would like to submit that I did not hear the voices of three panel members. I note that the Report of the Tribunal – appended to the O'Halloran affidavit – states that all these members were present, but that the O'Gorman affidavit does not address this at all. I find this a curious omission.
>
> While I am sure that this is an oversight, and that the panel members Mervyn Hickey and Maureen Cronin were indeed present during the 'virtual' hearing, I would respectfully ask the Court to seek affidavits from both these panel members in support of the decision reached, and to confirm their presence throughout the whole hearing on the day.
>
> Without this confirmation, I would have to respectfully ask the Court to conclude that the panel was not correctly constituted and that this would be unfair. This would, in my submission, be a reason for the decision to be cancelled under s.123 section 5 of the Residential Tenancies Act 2004."

29. This issue is not raised as a ground of appeal in the originating notice of motion: Order 84C of the Rules of the Superior Courts dictates that the notice of motion must state concisely the point of law on which the appeal is made. Moreover, in any event, as appears from the affidavit, the Tenant himself avers that he is "*sure*" that the two other members of the Tenancy Tribunal were present at the virtual hearing. In the circumstances, there is no merit to this ground of appeal.

***(5). European Convention on Human Rights***

30. The Tenant contends that the Tenancy Tribunal's decision and the Landlords' actions have violated his rights under the European Convention on Human

Rights. The breaches alleged involve, in effect, a repackaging of the complaints previously made in respect of (i) the Landlords' intentions in respect of the dwelling; (ii) the time lapse between the date of the Tenancy Tribunal's determination and the determination order; and (iii) the composition of the Tenancy Tribunal.

31. This judgment has already held that these complaints are not well founded. It adds nothing to the strength of these complaints to dress them up in terms of alleged breaches of the European Convention on Human Rights. The complaints remain devoid of merit.

32. In any event, the European Convention is not directly applicable in the domestic legal order and the Tenant has not sought to rely on the European Convention on Human Rights Act 2003. It has not, for example, been suggested that the proper interpretation of the provisions of Section 34 of the RTA 2004 is affected by the interpretative obligation under Section 2 of the ECHR Act 2003. Nor has a claim been made for a declaration of incompatibility under Section 5 of the ECHR Act 2003.

33. For completeness, it should be observed that it is doubtful whether the European Convention is applicable to a tenancy between two private parties. The position has been put as follows by the European Court of Human Rights in *F.J.M. v. United Kingdom*, Application No. 76202/16 (at paragraph 42 of the decision):

> "[…] there are many instances in which the domestic courts are called upon to strike a fair balance between the Convention rights of two individuals. What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected (see paragraph 16 above). If the domestic courts could override the balance struck by the legislation in such a case, the

> Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into."

**CONCLUSION AND PROPOSED FORM OF ORDER**

34. For the reasons explained, the appeal against the determination order of 17 August 2022 is dismissed pursuant to Section 123 of the Residential Tenancies Act 2004. The determination order, therefore, remains in the terms as it was originally made.

35. As to costs, my *provisional* view is that the Residential Tenancies Board, having been entirely successful in resisting the appeal, is entitled to recover its legal costs as against the Appellant/Tenant. This would represent the default position under Section 169 of the Legal Services Regulation Act 2015. Having regard to the principles in *Doyle v. Private Residential Tenancies Board* [2016] IEHC 36, I do not propose to make any order in respect of the notice parties' legal costs. If any party wishes to contend for a different form of costs order than that proposed, then they should contact the Registrar within seven days of today's date and arrange to have this matter listed before me for argument on 4 December 2023.

*Appearances*

Francis McGagh for the appellant instructed by O'Sullivan & Associates
Paul Finnegan for the respondent instructed by Byrne Wallace LLP
Seán O'Mahony for the notice parties instructed by Smithwick Solicitors

Approved