THE HIGH COURT

[2023] IEHC 634

RECORD NO: 2022/207/MCA

BETWEEN:

WEB SUMMIT SERVICES LIMITED

Appellant

and

RESIDENTIAL TENANCIES BOARD

Respondent

and

AIDAN HALL

Notice Party

<u>Judgment of Mr Justice Cian Ferriter delivered 17th October 2023</u>

Introduction

1. This is an appeal on a point of law pursuant to section 123(3) of the Residential Tenancies Act 2004 (the "2004 Act") from a determination and order of a Tenancy Tribunal ("the Tribunal") of 17 June 2022 holding that the appellant was in breach of s.16(f) of the 2004 Act in respect of its obligations as tenant of a residential property in Dublin 6.

2. The Tribunal held that the breach occurred "*as a result of the acts of the occupants in disposing of grease, coffee granules and food waste which caused a blockage in the waste pipe.*" The waste pipe was connected to the kitchen sink. The blockage led to extensive water damage to the property. The Tribunal ordered the appellant to pay €20,000 to the landlord (the notice party to these proceedings) being damages in excess of normal wear and tear to the property. The landlord's evidence was that the cost of repairing the damage was significantly in excess of that sum but €20,000 is the statutory limit to what the Tribunal can order by way of much damages.

3. The appellant claims in this appeal that the Tribunal's determination and order (for ease, "the decision") is vitiated by errors of law, particularly on the question of whether the appellant's use of the sink was normal such that the resulting blockage and damage was owing to normal wear and tear. The Respondent ("the Board") denies any such errors. The notice party landlord did not participate in the appeal.

Section 16 of the 2004 Act

4. Given its centrality to the appeal, it is useful to set out the material provisions of s.16 of the 2004 Act. Section 16 of the 2004 Act is headed "*Obligations of tenants*". Section 16(f) provides:

> *"16.—In addition to the obligations arising by or under any other enactment, a tenant of a dwelling shall—*
> *(f) not do any act that would cause a deterioration in the condition the dwelling was in at the commencement of the tenancy, but there shall be disregarded, in determining whether this obligation has been complied with at a particular time, any deterioration in that condition owing to normal wear and tear, that is to say wear and tear that is normal having regard to—*
> *(i) the time that has elapsed from the commencement of the tenancy,*
> *(ii) the extent of occupation of the dwelling the landlord must have reasonably foreseen would occur since that commencement, and*
> *(iii) any other relevant matters."*

5. Section 16(g) provides that if a tenant is in breach of section 16(f):

> "*a tenant must take steps as the landlord may reasonably require to be taken for the purpose of restoring the dwelling to the condition mentioned in paragraph (f) or to defray any costs incurred by the landlord in his or her taking such steps as are reasonable for that purpose.*"

6. The effect of s.16(f) is that a tenant is prohibited from doing any act that causes deterioration in the condition of the dwelling beyond normal wear and tear. What

constitutes "normal wear and tear" will fall to be judged on a case by case basis having regard to the criteria set out in the subsection.

Background

7. The appellant is a corporate entity which has held a lease as tenant of a residential property in Dublin 6 ("the property") since in or around 1 July 2015. The appellant organises annual technology conferences. The appellant uses the property to house staff and clients. The terms of the lease are on relatively standard terms. The lease operated without any formal issues arising until March 2021.

8. On 24 March 2021 the residents of the dwelling notified the appellant's facilities manager that the washing machine was not working and that there appeared to be a leak in the kitchen. Between the appellant and the landlord, a number of plumbers came to look at the matter but had difficulty identifying the cause of the leak. Eventually, on 9 April 2021 a plumbing outfit called until DC Drain Clearing identified that the cause of the leak was a significant blockage in a pipe connected to the kitchen sink. DC Drain Clearing concluded that coffee granules and other food deposits had been the cause of the blockage.

9. The landlord delivered a notice of breach of obligations on the appellant on 10 June 2021. The landlord proposed a figure of approximately €88,000 for repairs.

10. On 9 July 2021, the landlord made a complaint to the Board and alleged *inter alia* that the appellant had breached its tenancy obligations by failing to pay rent in accordance with the tenancy agreement; by causing/allowing damage to occur at the property; and by failing to notify the landlord promptly of defects in the property to enable him to carry out repairs.

11. A notice of termination was purported to be served by the landlord on 12 July 2021.

RTB Process

12. The Board operates a two-stage dispute resolution process. On a referral for dispute resolution services pursuant to section 76 of the 2004 Act, a complaint may be referred to an adjudicator or on a consensual basis to a mediator for resolution. If the parties refuse mediation, then the Board will arrange for an adjudication to take place. Following the adjudication, the adjudicator's determination will be set out in a report which the Board will issue to the parties to the dispute.

13. Section 100 of the 2004 Act provides that a determination of an adjudicator may be appealed to a Tribunal. This is a *de novo* appeal (*Teniola v. Private Residential Tenancies Board* [2014] IEHC 604, at para. 17).

14. Ordinarily, where an appeal is a *de novo* appeal, the decision and ruling of the first instance decision-maker is of no relevance and neither the evidence heard, nor the positions taken by the parties in the first instance hearing has any bearing on the appeal hearing. This ordinary rule is modified somewhat in the case of appeals to a Tribunal by section 104(7) of the 2004 Act which provides that "*In the case of an appeal under section 100, the Tribunal may have regard to the report of the adjudicator.*" This allows, but does not require, the Tribunal to have regard to the report of an adjudicator.

15. The procedures governing hearings before the Tribunal are set down in the Procedural Rules made pursuant to section 109 of the 2004 Act and the Tenancy Tribunal Procedures. The Board can and does act in an informal manner. It has been given wide powers including the power to take unsworn evidence and to take the necessary steps itself to ensure that it has adequate evidence to decide the dispute before it (see *Stulpinaite v. Residential Tenancies Board* [2021] IEHC 178 at para. 62).

Adjudicator's decision

16. The dispute between the landlord and the appellant in this matter came before the Board pursuant to section 76 of the 2004 Act and was referred by the Board to an adjudicator ("the Adjudicator").

17. Following a hearing, the Adjudicator issued a report. In that report, he concluded that the warning notices and notice of termination were not served in accordance with the 2004 Act and were invalid; and that the appellant breached the terms of the lease and section 16(a) of the 2004 Act by failing to pay rent when it fell due but as the rent had been repaid no damages were warranted. These findings are not of relevance to this appeal.

18. The Adjudicator addressed the alleged breach of s.16(f) by the incorrect disposal of coffee grounds and food waste down the kitchen sink as follows:

> "*17. The next issue I will consider is the Applicant Landlord's allegation that the Respondent Tenant is responsible for causing the blockage of the kitchen drain by the incorrect disposal of coffee grounds contrary to s16(f) of the 2004 Act. The report by DC Drain Cleaning Ltd on which the Applicant Landlord relies for this claim states that they "removed a lot of coffee waste, grease and food wastes etc., which was the cause of the blockage." For there to be a breach of the Respondent Tenant's obligations under s16(f) of the 2004 Act, the Applicant Landlord must prove, on the balance of probabilities that the Respondent Tenant, and/or the occupants of the dwelling under its tenancy, used the dwelling, or in this case the kitchen sink, in such a fashion so as to cause deterioration beyond normal wear and tear. The disposal of coffee grounds in the kitchen sink does not constitute such. It is unfortunate that the blockage was allowed to build up to such an extent, but such blockages occur through normal use. Accordingly, on the basis of the written reports and submissions and of the oral submissions at hearing, I find, on the balance of probabilities, that the Applicant Landlord has not proven its case in this regard."*

19. The Adjudicator did however find that the water egress from the blocked drain and the damage caused by it predated the date when the appellant claimed to have first become aware of the issue; that the appellant was responsible for failing to notify the landlord of the problem within a reasonable period of time (in breach of its obligations under s.16(d) of the 2004 Act); that this failure exacerbated the damage to the dwelling caused

by the blocked drain, contrary to s16(f) of the 2004 Act; and that such damage was in excess of normal wear and tear. He found that the appellant was responsible for 20% of the cost of remedying the damage to the dwelling caused by the blocked drain, which equated to a sum of €19,944.50.

Appeal to Tribunal

20. The appellant appealed the Adjudicator's decision to the Tribunal pursuant to s.100 of the 2004 Act and provided written submissions in support of its appeal. The effect of the appeal to the Tribunal proceeding to a determination is that the Adjudicator's determination falls away: s.99(4) of the 2004 Act.

21. The appeal proceeded as a *de novo* hearing before the Tribunal on 12 May 2022. The only evidence heard by the Tribunal was from Alan McKenna, a property agent for the landlord. No evidence was called by the appellant. I had the benefit of a full transcript of the hearing before the Tribunal.

The Tribunal's determination

22. The Tribunal's determination was handed down on 17 June 2022 and an order made by it on 29 June 2022. The Tribunal found on the balance of probabilities *"that there was a breach of the obligations of the Tenant under section 16(f) of the Act as a result of the acts of the occupants in disposing of grease, coffee granules and food wastes which caused a blockage in the waste pipe"* and ordered the appellant to pay €20,000 to the landlord, being damages in excess of normal wear and tear to the property.

The s.123 appeal to this Court and grounds of appeal

23. The appellant lodged an appeal to this Court pursuant to s.123 of the 2004 Act seeking an order setting aside the Tribunal's determination and order. The grounds of appeal set out in the appeal motion were that the Tribunal "erred in law and in its application or interpretation of s.16(f)." The grounds referenced the Tribunal's conclusion that the accumulation of minor food waste deposits caused the blockage and this this was not normal wear and tear within s.16(f). The grounds of appeal asserted that the Tribunal

erred because “such accumulations and/or blockages occurred through normal use” and “it was not claimed, and there was no evidence to support, that there was anything other than normal use of the kitchen sink”.

24. The appellant in written and oral submissions refined the formulation of its appeal so that essentially two grounds of appeal were advanced at the hearing before me: firstly, that the Tribunal erred in law in failing to make any finding as to whether or not the disposal of small amounts of grease, coffee and food waste and the accumulation of same, arose out of the normal use of the kitchen sink or was non-normal use. It was said that such a finding was essential (in the context of this appeal before the Tribunal) in order to lawfully arrive at a determination of a breach of s.16(f); the absence of such a finding was fatal to the determination. Secondly, if the Tribunal had implicitly found that there was such non-normal use, it was said that the determination was vitiated because this was a finding which no reasonable decision-maker could have made on the evidence before the Tribunal.

Law governing appeals of this nature

25. The principles applicable to the scope of a section 123 appeal (being an appeal on a point of law only) are well established and are not in dispute. The leading summary of the principles applicable to appeals on a point of law is found in *Deely v. The Information Commissioner* [2001] 3 I.R. 439 (“*Deely*”) 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…"*

26. *Deeley* was followed in *Sheedy v Information Commissioner* [2005] 2 IR 272 and in *Fitzgibbon v. Law Society* [2015] 3 IR 516. The principles in *Deeley* have been applied in the specific context of an appeal under section 123 in a number of High Court judgments: see e.g. *Doyle v PRTB* [2015] IEHC 724 and *Marwaha v. RTB* [2016] IEHC 308.

27. As can be seen, an appeal may not succeed unless, *inter alia*, there was no evidence to support a material finding of primary fact, or an inference or conclusion on the facts was one which no Tribunal could reasonably have reached. As we shall come to, in so far as these principles are engaged in this case, apart from the question of the proper interpretation of s.16(f), the focus is on the question of whether inferences drawn from the 'primary findings' of fact were ones which a reasonable decision making body could draw.

28. At the hearing before me, there was some criticism levelled by the appellant at what it perceived to be attempts by the Board to supplement the reasoning and rationale for the Tribunal's decision in its statement of opposition and in the replying affidavit filed by the Chairman of the Tribunal. The appellant submitted that it was only after this appeal has been lodged that the Tribunal suggested that it concluded the appellant had not used the sink in a normal fashion, pointing to a plea in the statement of opposition (at para. 11) that "*the disposal of food wastes down a sink, which caused such extensive damage to the Dwelling, was not a normal or ordinary use of a kitchen sink*". The appellant submitted that this finding or reasoning was not in the decision of the Tribunal and could not be retrospectively imported into the decision on this appeal. It relied on this regard on the well-established principle that a court when reviewing a decision must confine itself to the terms of the decision itself and not permit an *ex post facto*

rationalisation (for a recent endorsement of this principle see *M.N.N v The Minister for Justice & Equality* [2020] IECA 187 where the Court of Appeal adopted the principle articulated by the Court of Appeal of England and Wales in *R v. Westminster City Council ex p. Ermakov [1996] All E.R. 302,* which confirms *"that when reviewing a decision, a Court must confine itself to the decision itself and the reasons contained on its face and not permit an ex post facto rationalisation."*).

29. The Tribunal confirmed at the hearing before me that it was not seeking to go outside the terms of the decision. In fairness, the relevant pleading and associated commentary in the Tribunal's affidavit was more in the nature of submission than anything else. For the avoidance of doubt, I have confined my consideration of the meaning and reasoning of the decision to its terms and have not had regard to pleading or affidavit evidence in that regard.

Analysis of appeal issues

Was s.16(f) really in issue before the Tribunal on the appeal?

30. Before addressing the appeal grounds in detail, it is necessary to address one preliminary issue. There was a thread through the appellant's submissions to the effect that it was not truly in dispute before the Tribunal that the disposal of coffee grinds (and other food waste) down the kitchen sink was a normal use. This had been the Adjudicator's decision and the appellant contended that the parties proceeded before the Tribunal on the basis that this was common case on the appeal to the Tribunal. The appellant did not seek to contend that the Tribunal had no jurisdiction to address the s.16(f) issue on the food waste wear and tear point; rather, the appellant sought to rely on the contention that "normal use" was not in dispute as part of its case as to why the Tribunal (improperly in its view) made no finding on the normal use issue, or that if it did, such finding was irrational.

31. We have already seen the Adjudicator's decision on the use issue (see para. 18 above). In support of its appeal to the Tribunal, the appellant in its written submissions (under the heading "Issues on which the adjudicator was correct") submitted "*That the tenant has not done any act that would cause a deterioration in the condition the dwelling was*

in at the commencement of the tenancy save for normal wear and tear….In particular: If, which is denied, the leak at the centre of this complaint was caused by the disposal of coffee grounds in the sink as alleged, that is through normal use and not a breach of section 16(f) of the 2004 Act."

32. The appellant says that at no stage during the hearing before the Tribunal was that position challenged and points to the fact that counsel for the appellant in outlining his case to the Tribunal focused on the awareness/notification of the leak issue (i.e. the s.16(d) issue) and expressed doubt as to whether the landlord was "pursuing the case that the incorrect disposal of coffee beans is a breach of [s.16(f)]" (transcript p.17). The appellant relied on the fact that in closing oral submissions the solicitor for the landlord focused on the s.16(d) awareness/notification of the leak issue and did not make submissions on the s.16(f) use issue.

33. I do not believe it can fairly be said on a consideration of the transcript as a whole that the landlord was dropping or not contesting the s.16(f) use issue on the appeal to the Tribunal.

34. At the commencement of the hearing, the Chairperson asked the parties what matters were in contention, noting that "*we'll rehear all the issues again*" (transcript, p.7, line 25), and that "*we have to hear the whole case again*" (p.8, line 6). The landlord's agent responded by stating that *"[i]f the whole case is being heard all over again, that was part of our case. I'm happy for it all to be reheard*" (p.8, line 7) to which the Chairperson responds by stating "*Okay. So you want it all to be reheard*". Counsel for the appellant then responded by stating that "*I understand that it is a de novo hearing. If the landlord wants to rerun all those issues again, I'm not in a position to object to that*." (p.8, line 13).

35. Under cross-examination, Mr. McKenna for the landlord outlined that the property had "*incurred significant damage due to the actions or inactions of the tenant and it is the tenant's responsibility to return the property in the condition that it was let in to the landlord*" (p.50, line 17). A member of the Tribunal panel interjected while Mr. McKenna was being cross-examined and stated that the obligation on a landlord to carry out repairs does not apply "*to any repairs that are necessary due to the failure of the*

tenant to comply with section 16(f)" and it was suggested that this was the landlord's position. When it was suggested by counsel for the appellant that this issue could not be raised by the landlord because it "*was not what was found by the adjudicator*" (p. 50, line 33), it is promptly noted by the Tribunal that it is a *de novo* hearing and Mr. McKenna confirmed the landlord's position as follows: *"[W]hile the adjudicator found its findings, the appellant tenant filed for its appeal which did not – which is why we're sitting in this tribunal awaiting the decision of the tribunal to find where responsibility lies. The landlord accepted the decision of the adjudication and will accept the decision of the tribunal. But we are currently in dispute and once that dispute has been resolved will and has always met their obligations*." (p. 51, line 12).

36. It is also relevant to note that Mr McKenna gave evidence (lines 4-11, p.28) of an email of 9 April 2021 to Patrice Finneran of the appellant. This email stated that the cause of the blockage was as a result of "*the large build-up of coffee granules which have been disposed of incorrectly down the kitchen sink*" and that *"[d]ue to the incorrect disposal of these coffee granules and users error of the residents over a prolonged period [of] time, along with the delay in notifying us of the issue a considerable amount of damage has been incurred to the property*" i.e. evidence directly relevant to the s.16(f) issue.

37. It is also relevant to note that counsel for the appellant briefly addressed the s.16(f) use question in his closing oral submissions (p.52 lines 32-34; p.53 lines 1-4).

38. The fact that the landlord's solicitor did not in terms make closing submissions on the s.16(f) use issue does not mean that he was conceding that issue or that the issue was not before the Tribunal. It is clear from the run of the hearing as a whole, as evidenced by the transcript references set out above, that the Tribunal was conducting a full *de novo* hearing, that there was evidence led relevant to the s.16(f) use/wear and tear issue and that this issue was one that had to be determined afresh by the Tribunal, irrespective of the Adjudicator's views on that issue.

Alleged lack of finding that disposal of coffee and food waste was non-normal use

39. The appellant submitted that if Tribunal wanted to conclude that the appellant had used the sink other than in a normal fashion, it was incumbent on the Tribunal to state this

clearly in the decision. It did not do so, meaning that its determination that there had been a breach of s.16(f) lacked an essential legal and factual foundation. The appellant contended that the Tribunal failed to engage with the appellant's case on this issue as reflected in its written submissions to the Tribunal; that there was a complete failure in the Tribunal's decision to reason the question of the normality or otherwise of the use at all; and that in fact there had been no evidence before it of non-normal use.

40. The Board for its part said that this contention was misconceived where the Tribunal did make a finding as to non-normal use (in holding that it did "*not accept that the manner of the disposal of this food waste was normal wear and tear*") and that such a finding was a perfectly proper inference from the primary factual findings as to the cause of the blockage which are spelled out in the decision.

41. In order to consider this issue, it is important to look at what the Tribunal found and the evidence before it. The Tribunal made a finding of primary fact based on evidence that "*the blockage was caused as a result of grease, coffee waste and other foodstuffs that the occupants of the dwelling disposed of into the waste pipe*". The Tribunal expressly addressed and rejected a suggestion of the appellant that the blockage was caused by structural damage in the waste pipes. This finding that the blockage was caused by disposal of coffee and other waste into the pipe was not challenged and was one clearly open to the Tribunal on the evidence of the report from DC Drain Clearing.

42. The Tribunal had evidence before it from Mr McKenna that the "*incorrect disposal*" of these coffee granules caused the blockage. The landlord's case – as evidenced in Mr McKenna's email of 9 April 2021 and his oral evidence at the Tribunal – was that there had been an incorrect use of the sink for these disposal purposes i.e. abnormal use leading to abnormal wear and tear. The Tribunal found that use was abnormal: it held that "*it did not accept that the <u>manner</u> of the disposal of the waste was normal wear and tear."*(emphasis added). It explained its reasoning on this finding as follows: "*It is unlikely that it was the deposit of one or two large amounts of waste that caused the blockage. Given the length of the tenancy that had elapsed it is more than likely that it was a large number of small deposits that accumulated over a period of time. Nonetheless, the Tribunal finds that this course of action caused a deterioration in the condition of the dwelling and that it was not normal wear and tear."* In my view the

only sensible reading of this part of the decision in context is that the Tribunal made a finding that the use embodied in the manner of disposal of the waste was not normal use.

43. The appellant chose not to go into evidence (as was its right) so there was no contrary evidence from the users of the sink as to precisely how the level of waste present in the kitchen sink pipe had accumulated to the extent it did. (The Tribunal expressly noted in its "findings and reasons" that the landlord's agent (i.e. Mr McKenna) was the only person to give direct evidence in relation to the condition of the dwelling).

44. In my view, the evidence as a whole that was before the Tribunal (which included the evidence of the report of DC Drain Clearing as to the level of waste accumulated in the pipe) supported the finding by inference that the "*manner of the disposal of this food waste*" was "*not normal wear and tear*". The finding that "*it was a large number of small deposits that accumulated over a period of time*" was a finding reasonably open to it. The Tribunal found that "this course of action" (i.e. the manner of disposal of food waste over a long period) caused a deterioration in the condition of the dwelling and that it was not normal wear and tear; again, these were findings reasonably open to it on the evidence.

45. There was also evidence before the Tribunal to support its finding that "*there was extensive damage caused to the dwelling as a result of this breach*". Accordingly, the Tribunal properly determined that the disposal of grease, coffee granules and food waste which caused a blockage in the waste pipe was in breach of section 16(f) of the 2004 Act.

46. In my view the Tribunal was not obliged to make a specific finding *in terms* as to whether the disposal of coffee (and other) waste down the kitchen sink was a non-normal "use" in order to validly determine a breach of s.16(f). As the language of s.16(f) itself makes clear, the Tribunal is obliged to consider essentially two matters in considering an allegation of breach of s.16(f):

(a) whether there is deterioration in the condition of the dwelling since commencement of the tenancy.

(b) Whether that deterioration was owing to normal wear and tear having regard to the time elapsed since commencement of the tenancy, reasonably foreseeable occupation and any other relevant matters.

47. The first matter – deterioration - was not in dispute here. In relation to the second matter – causation of the deterioration – the Tribunal held that disposing of food waste down the sink in a manner which led to a large build up over the years of the tenancy was not normal and led to non-normal wear and tear.

48. The question of what constitutes "normal wear and tear" will be context specific and is necessarily an evaluative exercise. The Tribunal properly focused on the statutory language and performed the evaluation it was required to perform. It did so in circumstances where the landlord put forward a case that the deterioration was caused by incorrect disposal of coffee and other food waste down the sink which was supported by what DC Drain Clearing had found as to the cause and level of the blockage. The appellant sought to meet that case not by calling any evidence as to use but by simply asserting that the use was normal and running a defence that the blockage was caused by structural defects in the piping.

49. The Tribunal held on the evidence and arguments before it that the manner of disposal (i.e. the way in which the sink had been used) was not normal wear and tear. It was entitled to infer that such manner of disposal was not normal from the primary facts it found as to the cause of the blockage i.e. a significant accumulation of a large number of deposits of coffee granules and other food waste over a long period of use, having rejected the contention that the blockage was caused by something else. It is clear that the Tribunal understood the statutory requirements: s.16(f) is expressly set out in its decision and its ultimate finding of breach of s16(f) is correctly expressed expressly in the terms of the language of the provision. This finding was lawfully made following a review of the evidence before it.

50. In my view, the fundamental premise of this ground of the appellant's appeal is flawed: the Tribunal did make a finding of non-normal use in determining that the manner of waste disposal down the sink was not normal wear and tear. This finding was an

evaluative one arrived at by legitimate inference from the facts and evidence before it. Moreover, the Tribunal properly followed the statutory test in arriving at its conclusions. Its obligation was to make a determination as to whether the accepted deterioration was caused by non-normal wear and tear. It lawfully did that.

Finding re non-normal use/wear and tear one which no reasonable decision-maker could have arrived at?

51. For similar reasons, I am compelled to reject the appellant's case that the finding that there was non-normal use and non-normal wear and tear was one which no reasonable decision-maker could have arrived at.

52. As regards this ground, the appellant submitted that there was no evidence before the Tribunal that the appellant had not used the sink in a normal manner and that it was not contended by the landlord that the appellant had not used the sink in a normal manner. It submitted that the landlord did not make case that there had been use of the kitchen sink which was abnormal and implicitly accepted the Adjudicator's conclusion that the use of the kitchen sink had been normal.

53. While an obvious point, it is important to emphasise the very high bar which the appellant must surmount to show that *no* reasonable decision-maker could have arrived at the finding which the Tribunal arrived at here.

54. For the reasons already outlined, I am satisfied that the there was evidence from which the Tribunal was entitled to infer that the use was non-normal. There was evidence before the Tribunal that coffee granules and foodstuffs caused the blockage, that there was a large accumulation of waste, and that (in the view of Mr McKenna) these waste materials had been incorrectly disposed of down the sink. Having considered that evidence, the Tribunal made a primary finding of fact that the coffee granules and foodstuffs caused the blockage, and inferred from the circumstances before it (including the extent of the accumulation of food waste in the pipe, the length of time the tenant had been there and lack of an explanation as to use from the tenants) that the manner of disposal of this food down a sink was not normal wear and tear and the deterioration caused by this involved a breach of s.16(f).

55. In my judgment, this was a view plainly open to the decision-maker. The nature and level of accumulation of waste – in light of the period the tenant was in occupation – was plainly open to the inference that the use made of the sink was not normal.

56. With respect, the position of appellant was based on a flawed premise that it was axiomatic that the disposal of coffee waste and other food waste down the sink was normal irrespective of the context and circumstances; that blockages were normal; that a large accumulation of small amounts of waste in a kitchen sink was normal; that none of this could constitute a situation leading to non-normal wear and tear. However, whether such waste disposal in any given case was "normal" would depend on the level and nature of such waste (including whether it was appropriate to put waste such as coffee grinds down the sink at all); the regularity of its disposal; and whether ongoing, routine measures have been taken to flush through such waste and ensure the kitchen sink and pipe remain unblocked. The tenants, as was their right, chose not to give evidence to explain any of this. That left the Tribunal with the task of determining on the evidence before it, using their common sense and experience, whether the deterioration here resulted from normal or non-normal use/wear and tear. The evidence as to the level of accumulation and the extent of the blockage was plainly open to the conclusion that the level of use here was not normal and had caused deterioration beyond normal wear and tear. Simply put: a reasonable decision-maker was entitled to decide that any normal use of the kitchen sink would not have led to the level of waste accumulation (including coffee grinds) in the pipe that occurred here. I cannot hold in the circumstances that the Tribunal's finding of non-normal use/wear and tear was one that no reasonable decision-maker could have arrived at.

Conclusion

57. For the reasons outlined above, I will dismiss the appellant's appeal.

APPROVED by Mr. Justice Cian Ferriter 17 October 2023