APPROVED **[2024] IEHC 409**

THE HIGH COURT

2024 70 MCA

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT 2004

BETWEEN

CORMAC O'SHEEHAN
MANTAS SKIPANAS
PELLIN FILDISI

APPELLANTS

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

CHRIS RICHARDSON
JANE RICHARDSON

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 July 2024

NO REDACTION REQUIRED

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 relevant determination order is dated 10 January 2024.

2. The Tenancy Tribunal held that the monthly rent charged under the tenancy agreement was excessive having regard to the legislative provisions governing the setting of rents in rent pressure zones. The Tenancy Tribunal also held that a notice of termination, which had been served on the ground that one of the two landlords required the dwelling for her own occupation, was valid.

3. The notice of termination had been served shortly after the landlords had learnt that the tenants had made a (well founded) complaint to the Residential Tenancies Board to the effect that the rent charged under the tenancy agreement was excessive. The tenants have consistently maintained the position that the service of the notice of termination was in retaliation for their having made this complaint, and that the ground purportedly relied upon in support of the termination of the tenancy is not genuine.

4. The resolution of this statutory appeal requires consideration of, *inter alia*, the statutory concept of the "*occupation*" of a "*dwelling*"; the concept of "*penalisation*" within the meaning of section 14 of the Residential Tenancies Act 2004; and the adequacy of the reasons stated by the Tenancy Tribunal for its determination.

5. 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 appellants as "***the Tenants***"; 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***".

CHRONOLOGY

11 May 2022	Residential Tenancy Agreement
13 February 2023	Meeting between Landlords and Tenants
20 March 2023	Referral of rent dispute to RTB by Tenants
31 May 2023	RTB notify Landlords of referral
9 June 2023	Notice of termination
16 August 2023	Adjudication hearing
September 2023	Adjudicator's determination
27 September 2023	Landlords submit appeal to Tenancy Tribunal
8 December 2023	Tenancy Tribunal hearing
10 January 2024	Determination Order
16 January 2024	Determination Order sent to the parties
6 February 2024	Tenants institute statutory appeal to High Court
15 April 2024	Judicial review proceedings instituted
13 June 2024	High Court hearing

APPEAL ON A POINT OF LAW ONLY

6. 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.

7. 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)."

8. 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."

9. More 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. The concept of curial deference is dependent on the Tenancy Tribunal having provided a properly reasoned decision and does not afford a mechanism for compensating where the decision is not so reasoned (see, by analogy, *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33).

10. The Supreme Court has confirmed that an appeal on a point of law encompasses errors such as "*defective or no reasoning*" (*Attorney General v. Davis* [2018] IESC 27, [2018] 2 I.R. 357).

11. 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 judgments of the High Court in *Hyland v. Residential Tenancies Board* [2017] IEHC 557 (at paragraphs 25 to 27) and *Ashe v. Residential Tenancies Board* [2023] IEHC 627 (at paragraphs 24 to 27). 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.

12. It will be necessary to return to consider this limitation on the High Court's appellate jurisdiction presently. This is because the Landlords contend that the

nature and extent of their intended "*occupation*" of the dwelling had not been raised as an issue before the Tenancy Tribunal. This contention is addressed in detail at paragraphs 94 *et seq*. below.

RESIDENTIAL TENANCIES ACT 2004

13. It may assist the reader in a better understanding of the discussion which follows to pause here, and to highlight the following three aspects of the Residential Tenancies Act 2004.

(i). Grounds for lawful termination

14. It should be recalled from the outset that the RTA 2004 regulates and restricts the property rights of landlords. Such regulation and restriction are necessary to achieve one of the principal purposes of the Act, namely, to confer security of tenure on certain classes of tenant. In brief, a tenant who has been in occupation of a dwelling under a tenancy for a continuous period of six months will, if certain conditions are met, be entitled to a statutory tenancy for a period of unlimited duration. This is subject to certain transitional provisions for tenancies, such as in the present case, which predate the legislative amendment under the Residential Tenancies (Amendment) Act 2021: under the previous version of the legislation, the statutory tenancy had a duration of six years.

15. The Act achieves security of tenure by severely restricting the circumstances in which a landlord may lawfully recover possession of his or her property. A landowner, who chooses to engage in commercial activity consisting of the letting of dwellings, does so against this legislative backdrop. The landowner chooses to forgo the right to deal with his or her property in an unrestricted manner as a *quid pro quo* for the benefit of obtaining a rental income from the

property. The landowner *qua* landlord is conferred with the benefit of a statutory dispute resolution and enforcement regime.

16. Section 34 of the RTA 2004 includes a table which enumerates various grounds upon which a landlord may lawfully terminate a tenancy. Relevantly, the table includes, at paragraph 4, the following ground: the landlord requires the dwelling or the property containing the dwelling for his or her own occupation or for occupation by a member of his or her family. This ground will be referred to in this judgment by the shorthand "*the landlord / family occupation ground*". This is the ground which the Landlords in the present case purported to invoke.

17. In cases where the landlord / family occupation ground is invoked, the landlord is required to indicate, in both the notice of termination and an accompanying statutory declaration, the identity of the person who is to occupy the dwelling and the estimated duration of that occupation. If the landlord's or family member's occupation persists for less than twelve months, then it is necessary for the landlord to offer the former tenant an opportunity to enter into a fresh tenancy of the dwelling. The practical effect of this provision is, therefore, that a landlord who relies on the landlord / family occupation ground is precluded from letting out the property to a *third party* for a period of twelve months without first offering it to the former tenant. Once the twelve month period has expired, it seems that the property may be let out in the ordinary way. There is a potential risk, therefore, that a cynical landlord, who was willing to accept the loss of rental income for a twelve month period, might disingenuously invoke the landlord / family occupation ground in an attempt to expunge the rights of a tenant.

18. A tenant is entitled to challenge an intended termination on the basis, *inter alia*, that the ground stated by the landlord for the purposes of terminating the tenancy was not valid or that the notice used to terminate the tenancy did not comply with the Act. See section 78(1)(g) of the RTA 2004. It follows, as a corollary, that the Tenancy Tribunal has jurisdiction to determine these issues. The Tenancy Tribunal is not bound to take the landlord's stated ground at face value but is entitled to assess whether the stated ground is genuine and *bona fide*, or, whether, alternatively, the actual intention is different.

19. The case law confirms that the statutory declaration, which must accompany a notice of termination, does not have a presumptive evidential status. See *Gunn v. Residential Tenancies Board* [2020] IEHC 635 (at paragraphs 55 to 58) and *Stulpinaite v. Residential Tenancies Board* [2021] IEHC 178 (at paragraphs 64 to 68).

20. There had been some disagreement, at least initially, between the parties as to whether a landlord must intend to occupy the property as a self-contained residential unit. The Tenants submitted that the intended occupation must be occupation as a dwelling. The RTB had sought to suggest, in its written legal submissions, that because occupation by the landlord or a family member was unlikely to involve a letting, the statutory definition of "*dwelling*" does not operate to alter or confine the meaning of the word "*occupation*". It was submitted that it would be sufficient, in order to avail of the landlord / family occupation ground, that a landlord required physical control or possession of the property. The RTB's position at the hearing before the High Court was more nuanced. It was accepted that the landlord must intend occupation as a dwelling, i.e. in the sense of a form of residential use. Counsel submitted that there is a

certain "*elasticity*" to the concept and that it is ultimately a question of fact and degree. Counsel further submitted that the Tenancy Tribunal should be afforded a wide margin of appreciation in this regard.

21. The Landlords adopted a more absolutist position. Counsel on behalf of the Landlords submitted that the concept of occupation should not be conflated with the concept of use. It was sufficient that the second landlord would have the right to occupy the property as if she were the owner and to exclude any other person from enjoyment of such a right. Counsel cited case law from England and Wales which addresses the meaning of the concept of "*occupation*" in general.

22. With respect, this focus on a single word, i.e. "*occupation*", in isolation is not consistent with the modern law on statutory interpretation. The proper approach to statutory interpretation has recently been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313. Murray J., writing for the Supreme Court, emphasised that in no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

23. Here, the object of Part 4 of the RTA 2004 is to confer security of tenure on certain classes of tenant. This is achieved by restricting a landlord's right to recover possession to specific circumstances. One of these is where the landlord

requires the property for his or her own occupation or for occupation by a member of their family. A landlord is not entitled to exercise his property rights by terminating a tenancy for the precise purpose of letting it out, at a higher rent, to a third party. The legislature has, however, drawn a distinction where the intended occupation will be by the landlord or his or her family. The legislature has ordained that a landlord retains the right to recover a tenanted property for his or her own accommodation needs or those of their family. This right prevails over any right which a tenant would *otherwise* enjoy to a secured tenancy of unlimited duration.

24. That this is the correct meaning of "*occupation*" is confirmed by a consideration of the structure of section 34 and its accompanying table. Crucially, the contingency of a "*change of use*" of the property "*to some other use*" is addressed separately. This confirms that the term "*occupation*", as deployed in the context of the landlord / family member occupation ground, must refer to occupation of the property for its existing use, i.e. as a self-contained residential unit. The landlord is only entitled to recover possession of the property, i.e. by terminating the tenancy, where it is intended that the landlord personally or a family member will occupy the property as a self-contained residential unit.

25. The fact, if fact it be, that occupation by the landlord or a family member is unlikely to involve a letting, i.e. the payment of rent, does not justify jettisoning the statutory definition of "*dwelling*" in its entirety.

26. It is a question of fact and degree in any particular case as to whether the proposed use is such as to constitute occupation as a dwelling. It is not necessary that the premises be occupied as the sole or principal residence of the landlord or family member. Had this been intended, then the legislature would have used

language similar to that commonly found in many pieces of legislation relating to property, i.e. "*principal residence*" or "*principal private residence*". At the other end of the spectrum, occasional or intermittent occupation will not be sufficient. It must be doubtful, for example, whether a landlord would be entitled to rely on the landlord / family occupation ground where the proposed use of the tenanted property is as a holiday home.

(ii). Prohibition on penalisation

27. Section 14 of the RTA 2004 provides, relevantly, that a landlord shall not penalise a tenant for giving notice of his or her intention to refer, or actually referring, any dispute between the tenant and the landlord to the RTB for resolution under Part 6 of the Act.

28. A tenant is to be regarded as having been penalised if the tenant is subjected to any action that adversely affects his or her enjoying peaceful occupation of the dwelling concerned (see subsection 14(2) RTA 2004).

29. Subsection 14(3) provides as follows:

> "Such action may constitute penalisation even though it consists of steps taken by the landlord in the exercise of any rights conferred on him or her by or under this Act, any other enactment or the lease or tenancy agreement concerned if, having regard to—
>
> (a) the frequency or extent to which the right is exercised in relation to the tenant,
>
> (b) the proximity in time of its being so exercised to the tenant's doing the relevant thing referred to in subsection (1), and
>
> (c) any other relevant circumstances,
>
> it is a reasonable inference that the action was intended to penalise the tenant for doing that thing."

30. Subsection 14(4) provides that the section is without prejudice to any other liability (civil or criminal) that the landlord may be subject to for doing a thing prohibited by the section.

31. It is apparent from the wording of subsection 14(3) that what would otherwise be a lawful exercise by a landlord of a statutory right of theirs may nevertheless constitute an act of penalisation.

32. The RTA 2004 does not state, in express terms, what are the legal consequences of a landlord engaging in an act of penalisation. However, it is implicit from the language of section 14 that some legal consequences are intended: the reference to "*any other liability*" to which the landlord may be subject under subsection 14(4) indicates that some form of liability arises under the section itself.

33. Section 78(1)(g) of the RTA 2004 indicates that the categories of dispute which may be referred to the RTB for determination include a challenge to the validity of an intended termination on the basis that the notice used to terminate the tenancy did not comply with the Act. A notice of termination which has been served in breach of the prohibition under section 14 cannot be said to comply with the RTA 2004. It follows that if a landlord serves a notice of termination in retaliation for the tenant having made a referral to the RTB, then this operates to invalidate the notice.

(iii). Monetary limit on damages

34. The Tenancy Tribunal's jurisdiction to direct the payment of damages is subject to a monetary limit or cap under section 115 of the RTA 2004. Insofar as relevant to the present proceedings, the Tenancy Tribunal may not direct the payment of an amount in excess of €20,000 by way of damages. There is no

express provision for the return of an overpayment of rent (cf. arrears of rent) and therefore it falls to be treated as statutory damages.

35. The practical significance of this for the present case is that it should have been unnecessary for the Tenancy Tribunal to determine the precise amount of the overcharged rent in circumstances where the parties were, ultimately, agreed that, whatever the precise figure, same would be in excess of the €20,000 cap. In the event, however, the Tenancy Tribunal purported to direct the Landlords to pay the sum of €29,660.95 to the Tenants by way of nine consecutive monthly instalments.

PROCEDURAL HISTORY BEFORE RTB

36. These appeal proceedings relate to a dwelling house at Fernvale Drive, Crumlin, Dublin 12 ("*the Property*"). The Property is located in close proximity to the second landlord's place of work. The Property is one of a number of residential units which the Landlords own and let out. The Landlords built two houses in the garden of the Property. These two houses are let out to other tenants. The fact that the Landlords own other properties within the immediate vicinity, which might provide them with alternative accommodation, is potentially relevant to the question of whether the Landlords "*need*" to occupy the Property.

37. The Property is situated within a "*rent pressure zone*" within the meaning of the RTA 2004. The Property had been let out by the Landlords to the Tenants by way of a tenancy agreement dated 11 May 2022. The tenancy commenced on 13 May 2022. The rent specified under the tenancy agreement is €3,250 *per* month.

38. The tenancy agreement states, in handwriting, that the rent is "*absolute*" and will be paid monthly regardless of tenancy occupancy. This may be relevant to one of the points raised by the Landlords at the hearing before the Tenancy Tribunal whereby they seemed to suggest that there was something improper in the remaining three tenants making a claim in respect of a former co-tenant.

39. The Property had previously been let out by the Landlords to a third party under an earlier tenancy agreement. The Landlords assert that this third party caused significant damage to the Property and that they incurred expenditure repairing the Property. The rent payable under the earlier tenancy agreement had been fixed, by way of rent review, at €1,643.95 *per* month with effect from 7 January 2021.

40. The Tenants contend, correctly, that it was impermissible for the Landlords to have purported to fix the rent under their tenancy agreement at €3,250. Rather, the Landlords were restricted to fixing a rent which complied with the two per cent per annum restriction under Part 3 of the RTA 2004. The earlier tenancy had expired less than two years prior to the creation or coming into being of the new tenancy. The practical effect is that the Tenants have been overcharged rent in a sum in excess of the maximum statutory damages payable (€20,000).

41. It seems that the Tenants only became aware in January 2023 that the level of rent was in breach of the legislation. This information seemingly came to their attention when they were investigating the BER certification of the Property. The Tenants first raised the overcharging with the Landlords in early February 2023.

42. The Tenants allege that, at a meeting on 13 February 2023, they were told by the Landlords that if they chose to "*go down the road of a dispute*", the Landlords would be issuing an "*eviction notice*".

43. The Tenants, as is their statutory right, referred the dispute in relation to rent to the RTB for resolution on 20 March 2023 ("*the referral*"). The RTB first notified the Landlords of the referral on 31 May 2023. This notification indicated, mistakenly, that the RTB had received an application for *mediation*. Strictly speaking, the referral had been for the resolution of a dispute *simpliciter*. On receipt of a referral, the RTB is obliged to request each of the parties to state whether he or she consents to the dispute being the subject of mediation. The Tenants, as is their statutory right, elected not to consent to mediation. This had the consequence that the RTB was obliged to arrange for the matter to be the subject of adjudication.

44. The Landlords, in a number of written communications, indicated their displeasure at the fact that the Tenants had escalated the matter to adjudication rather than consenting to mediation.

45. The Landlords purported to serve a notice of termination on 9 June 2023. Tellingly, this occurred within days of the Landlords having been informed that the dispute in relation to rent had been referred to adjudication by the Tenants. The Landlords have since acknowledged, in their written appeal to the Tenancy Tribunal, that the timing of the subsequent "*eviction process*" was "*reactionary*".

46. The reason for the proposed termination is stated as follows in the notice of termination:

> "The reason for the termination of the tenancy is because the landlord requires the dwelling or the property containing the dwelling for occupation by myself Jane Richardson to occupy the dwelling until *indefinitely*."

47. The termination date is stated as 9 December 2023, i.e. six months after the date of the notice.

48. The statutory declaration, which accompanied the notice of termination, reads in relevant part as follows:

> "We *Chris and Jane Richardson* the landlord do solemnly and sincerely declare that:
>
> 1. I require the dwelling or the property containing the dwelling at *20 Fernvale Drive* for my own occupation indefinitely
>
> 2. I will offer you the opportunity to re-occupy the dwelling under a tenancy if:
>
> a) the dwelling is vacated by *Jane and Lauren Richardson* within a period of twelve months from […]".

49. It seems that a separate notice may have been served on one of the tenants. (See adjudicator's report, page 6 of 7).

50. As of the date upon which the Landlords served the purported notice of termination, the Tenants' referral in respect of the rent dispute was still pending before the RTB. The Tenants submitted additional information to the RTB on 16 June 2023 to address the fact that a notice of termination had since been served upon them. The Tenants indicated that they sought to challenge the notice of termination, alleging that the Landlords had "*decided on it the moment they found out about the RTB dispute*" in relation to the rent. In support of this submission, the Tenants appended screenshots of an exchange of WhatsApp messages between the Tenants and the Landlords. A flavour of the content of same is provided by the following extracts.

51. The second landlord, in a WhatsApp message date stamped 1 June 2023, wrote as follows:

> "Hi guys thank you for your text. As stated to you previously I have no appetite or energy for this anymore and so have taken the decision not to rent the house anymore and will be using it for my own needs. I have an appointment with my solicitor tomorrow morning and so will be in touch afterwards."

52. On the same date, the first landlord sent a WhatsApp message as follows:

> "[…] As we have said numerous times you are under no obligation to stay in the house. The contract you signed states that you have to give 30 days notice to vacate, we have told you that we will waive this as a favour to you.
>
> The rent that we require for this house is set out in the contract you signed, anything less than this is insufficient.
>
> Again nothing is stopping you from vacating this house, if you are unhappy with the rent it is easy to remove yourself from the contract you signed.
>
> Apologies if you felt that my comment felt threatening to you, this was not my intention. This is a business arrangement we are in as you wish."

53. It should be explained that it is not open to a landlord to seek to "*contract out*" of the provisions of the RTA 2004 which govern the setting of rent. (See section 18 of the RTA 2004). The repeated references, throughout the exchange of WhatsApp messages, to the Tenants having agreed to or signed up to the excessive rent are incorrect as a matter of law.

54. The Landlords filed a detailed response to the referral with the RTB. The Landlords acknowledged they would have made a different decision had the Tenants applied for mediation:

> "We feel that by our tenants' calling *us deceitful, exploitative and neglectful of accountability* we feel the relationship has broken down and we no longer want to continue. As a result of this breakdown in the relationship we made the decision and will not be renting out this property anymore. Had the tenants come and spoken to us or even applied for mediation we would have made a different decision but when a relationship breaks down and there is no trust, there is no

> option but to walk away. This is within our rights as landlords and is not being vindictive but realistic."

55. The adjudication came on for hearing on 16 August 2023. As of that date, there were two issues in controversy. The first related to the maximum rent which could lawfully be set for the Property. The second related to the validity of the purported notice of termination which the Landlords had served in reaction to the Tenants having exercised their statutory right to refer the rent dispute to the RTB for resolution.

56. The Landlords had, initially, sought to stand over the excessive rent specified in the tenancy agreement. More specifically, the Landlords sought to argue that the rent should not be calculated by reference to that set under the earlier tenancy on the grounds that there had been a "*substantial change in the nature of the accommodation provided*"—within the meaning of section 19 of the RTA 2004—since the rent was last set under a tenancy for the Property. The Landlords' contentions in this regard were rejected by the adjudicator.

57. The adjudicator concluded that the Tenants had been overcharged rent in the amount of €1,601.49 *per* month since the commencement of the tenancy in May 2022. The total overpayment exceeds the maximum amount of damages payable under section 115(3) of the RTA 2004, i.e. €20,000.

58. The adjudicator found as follows in relation to the validity of the notice of termination:

> "In respect of the Notice of Termination with a service date of the 9th June, 2023, the Adjudicator considers that this is invalid for the following reasons:
>
> 1. The Respondent Landlords' claim that they need it due to her medical grounds is not supported by medical evidence that her condition causes her to be unable to drive. Further, she claims that on the last occasion when she had a difficulty with her medical

> condition she was out of work altogether. The Adjudicator does not accept that she has a bona fides intention to move into this property immediately for 3 days a week as claimed or indeed at all.
>
> 2. The Respondent Landlords also claim that they need it for their daughter's occupation when she attends college. However, she is just going into 6th year now, so she clearly does not need it for her immediate needs in December, 2023. Further, this was not specified in the notice of termination.
>
> 3. The Respondent Landlords claim that they were caused stress by being a Landlord. However, on further inquiry it appears to be the case that they were caused stress by this claim being lodged. They are happy to continue to rent to other tenants, but not to these tenants. The Adjudicator is satisfied that this is an attempt to punish the Applicant Tenants for bringing this application.
>
> For all of those reasons, the Adjudicator finds that the Notice of Termination is invalid and constitutes a penalisation pursuant to section 14 of the Residential Tenancies Act as amended. The Adjudicator considers that the sum of €2,000 would be reasonable compensation in respect of this penalisation. However, as the maximum amount of damages that can be awarded has already been reached, the Adjudicator cannot award any more than the sum already awarded."

59. The Landlords filed an appeal against the adjudicator's determination on 27 September 2023. The appeal was confined to the question of the validity of the notice of termination. The Landlords indicated, at the hearing before the Tenancy Tribunal, that they accepted the decision that was made in respect to the overcharging of rent. The Landlords did, however, seek clarification on how to pay the amount to be returned to the Tenants. This query related to the fact, supposedly, that a fourth tenant had vacated the Property on 30 April 2023. The Landlords queried whether the remaining tenants had any right to recover any excess rent attributable to payments by this former tenant. With respect, this issue is largely academic in circumstances where (i) the fourth tenant has never

sought to recover the rent overpaid by her, and (ii) the aggregate amount owing to the three remaining tenants alone exceeds the €20,000 statutory cap on damages. There is no question of the three tenants being overcompensated.

60. As to the validity of the notice of termination, the Landlords, in effect, put forward four grounds upon which they said they required the property. The written appeal included the following:

> "After this case we feel it is impossible to continue a relationship with the tenants, as they have accused us of lying then retracting the statement and weaponizing my wife illness. We feel that this relationship is no longer sustainable.
>
> We also would like to note that this property with the current and previous tenancy has been extremely costly and stressful. Our previous tenant refused to pay the correct rent for 2 years. Destroyed the property and caused criminal damage. Then took us to adjudication to try to get her deposit back (which was awarded in our favour), This was an extremely stressful situation, and we made the decision we would sell the property if this ever happened again. However as stated above our circumstances have changed and we now require the property for our own needs. We acknowledge we have other properties, but they have young families on the hap scheme whereas this property has professionals not related to each other. This property also suits our family needs and requirements. We acknowledge the timing of the eviction process was reactionary, but we also know how difficult and the length of time the eviction process can take. (It took 10 months for us to renovate the property after the previous tenant destroyed it!)."

61. The Tenants filed a written response to the Landlords' appeal. Relevantly, the Tenants maintained their challenge to the validity of the notice of termination. The gravamen of this challenge is summarised as follows in their submission:

> "With regards to the eviction, it's very hard for us to take their reasons as genuine, claiming their circumstances have changed. They told us, both verbally and in the WhatsApp conversations we submitted previously, that they would be happy to keep us as tenants for years to come if we did not pursue the issue of the rental price further and that they would have to evict us if we did. They then give us eviction

> notice as soon as they learn we filed a dispute. They have admitted the eviction notice under review in the dispute was reactionary. This along with them not appealing the lowering of the rent should be enough to conclude the tribunal promptly.
>
> Should time be given to discuss the latest attempt to evict us without having served any new notice to action a new dispute over, we trust it will be seen as disingenuous.
>
> The medical letter clearly states Jane is fit to work and drive. It even states the episodes 'have become far less frequent', so if their circumstances have changed, in terms of the medical issue, this appears to have changed for the better and would have even less need for the property than before, if there was ever a need to begin with. If the episodes are intermittent and unpredictable, we don't see how having possession of the property would be of any benefit, unless the entire family move and live here on a permanent basis, changing the children's school etc in the process. As the house is very poorly insulated and doesn't retain the heat and is very uncomfortable in any degree of cold weather, the conditions may also be in advisable for somebody with such medical history due to heightened vasoconstriction."

62. The Tenancy Tribunal hearing took place on 8 December 2023. The determination order is dated 10 January 2024 and was issued to the parties on 16 January 2024.

63. One of the difficulties in the case is that the precise nature of the proposed occupation by Ms. Richardson has not been consistent. At a very early stage of the process, it was suggested that she might overnight in the property three nights a week. This was the stance adopted before the adjudicator. This stance was not, however, repeated. During the course of the oral evidence before the Tenancy Tribunal, the principal purpose stated was that she might require to rest in the property in the event that she suffered an episode while at work.

PROCEEDINGS BEFORE THE HIGH COURT

64. The Tenants instituted a statutory appeal pursuant to section 123 of the RTA 2004. This appeal was instituted before the High Court by way of originating notice of motion dated 6 February 2024.

65. The points of law grounding the appeal are as follows:

> "a. The Respondent erred in law in interpreting section 34 of the 2004 Act as meaning that one of the landlords stated desire's to occasionally use the property to avoid commuting from her own home to work, for health reasons, met the requirement for 'occupation' as set out in the Table to section 34 at paragraph 4.
>
> b. The Tribunal, in its determination, and in breach of its obligations, failed to carry out any enquiry or properly adjudicate upon whether the claimed requirement of possession of the subject property by the landlords was a *bona fide* requirement and not a requirement that in truth did not exist or one that was advanced to achieve an unlawful objective. Relevant evidence in this regard was also not taken into consideration.
>
> c. The medical evidence before the Tribunal was insufficient to enable it to come to the conclusions reached."

66. The RTB and the Landlords subsequently filed opposition papers. The Landlords made an application for a priority hearing date on the basis of a medical letter of 20 March 2024. The statutory appeal came on for hearing before me on 13 June 2024. Judgment was reserved.

67. During the course of preparing this judgment, it became apparent to me that certain items had been omitted from the booklet prepared for the hearing by the appellants. Copies of most of the omitted items were available to me on the Central Office file. However, copies of the *exhibits* to affidavits are not normally filed in the Central Office. Accordingly, in order to ensure that I had a complete set of papers prior to the delivery of judgment, I arranged for the matter to be relisted before me on 4 July 2024. The parties were requested to agree an index

of pleadings and affidavits, and to furnish the registrar with copies of all items which had been omitted from the original booklet. All of these items have been carefully considered in preparing this judgment.

68. The parties were also asked, at the hearing on 4 July 2024, to confirm the date upon which the Landlords were first notified by the RTB of the making of the referral by the Tenants. The relevant email notification of 31 May 2023 was subsequently sent to the High Court registrar.

69. In parallel to the statutory appeal, the Tenants also instituted separate judicial review proceedings: *O'Sheehan v. Hynes (Member of the Tenancy Tribunal) & Ors* High Court 2024 522 JR. These judicial review proceedings seem to have been issued out of an abundance of caution lest a procedural objection be taken to the effect that certain arguments went beyond the scope of a statutory appeal.

70. All parties agreed at the hearing on 13 June 2024 that the court should hear and determine the statutory appeal first, and to defer further consideration of the judicial review proceedings. The parties were agreed that the transcript of the hearing before the Tenancy Tribunal, which has been exhibited as part of the judicial review proceedings, could be relied upon for the purpose of the statutory appeal.

DETAILED DISCUSSION

71. The proper determination of the appeal before the Tenancy Tribunal required it to address two related issues as follows. The first issue involves the ascertainment of the extent of the Landlords' proposed use of the Property and consideration of whether this proposed use, if *bona fide*, would constitute occupation as a dwelling for the purposes of section 34. The second issue

involves consideration of whether the Landlords had a genuine intention to put the Property to the proposed use. This second issue also allowed for consideration of whether the service of the notice of termination might constitute "*penalisation*" for the purposes of section 14. These two issues are elaborated upon under separate headings below.

(i). Proposed use of the premises

72. The Landlords' position as to what precise purpose they proposed to put the Property changed throughout the process. It was, at various points, suggested that the Property was required for use by the Landlords' daughter as term-time accommodation while she attended third level college in Dublin; for use by the second landlord for overnight accommodation three nights a week; for use by the second landlord for respite accommodation in the event she took ill at work; and for *potential* use by the second landlord in the contingency that she suffered a recurrence of a medical condition which had prevented her from driving some five years previously.

73. This inconstancy of approach is apparent from the content of the notice of termination, and the statutory declaration, respectively. There is no reference to occupation by the Landlords' daughter in the notice of termination, but she is referenced at one point in the statutory declaration.

74. The Tenancy Tribunal was required, first, to identify which, if any, of the various proposed uses posited by the Landlords represented the operational use which could be relied upon to ground the notice of termination. Thereafter, the Tenancy Tribunal was required, secondly, to consider whether this identified proposed use, if *bona fide*, would constitute occupation as a dwelling, i.e. as a self-contained residential unit, for the purposes of section 34. This second limb

of the analysis might not be straightforward. This is because a number of the proposed uses canvassed by the Landlords were either speculative (in the sense that the "*need*" was contingent on the medical condition of the second landlord deteriorating), or, alternatively, entailed only a minimal use of the Property. The Tenancy Tribunal would have to examine the nature and extent of the use and determine whether it constituted occupation as a self-contained residential unit. Matters were further complicated by the fact that the Landlords owned other property on the same street which might, in principle, have been occupied as an alternative.

75. Regrettably, the Tenancy Tribunal failed to engage with these issues in its written determination. The discussion of these issues in the curial part of the written determination is confined to the following:

> "Therefore, for the notice in question to be deemed valid, the Tribunal must first find that the Appellant Landlord in the matter, 'required' rather than 'desired' occupation in the property in question.
>
> The Respondent Landlords claim that they need the Dwelling for their daughter's college use was not a ground cited in the notice although the daughter was named in the statutory declaration. Whilst the Tribunal may apply the slip rule in relation to the party not being mentioned in the notice, the fact that no college place has been offered at the time of service of notice and that there was no requirement from the termination date of December 2023 renders the point moot. If a place were to be offered the requirement may be from the summer of 2024 and this was not the termination date provided.
>
> The Respondent Landlords' claim of a requirement due medical ground is supported by medical evidence. The Tribunal accepts the requirement as a need and finds the notice valid on this basis. The second named Appellant Landlord requires the dwelling as respite accommodation for her place of work so that she may continue in her profession. The tribunal is satisfied that this need meets the requirements cited herein."

76. As appears, the Tenancy Tribunal correctly discounted any potential use of the Property by the Landlords' daughter as accommodation while she attended third level college in Dublin. The daughter had not been identified as the intended occupant in the notice of termination (as is required by section 34). Moreover, there was no immediate "*need*" in that the daughter would still have been in secondary school as of the expiration date under the notice of termination (December 2023).

77. The Tenancy Tribunal's analysis of any supposed use of the Property by the second landlord is deficient. The written determination does not identify the nature and extent of such use. As of the date of the hearing before the Tenancy Tribunal, the Landlords had resiled from an earlier suggestion that the premises would be used for three overnight stays a week. Instead, there was a vague suggestion that the Property might be used on an *ad hoc* basis for respite accommodation (if the second landlord had an episode at work), or on a more sustained basis in the event that a medical condition, which had previously prevented the second landlord from driving, reoccurred. It seems that this medical condition had last occurred with such acuity some five years previously. It is doubtful whether such intermittent or potential use could properly be regarded as constituting "*occupation*" as a "*dwelling*".

78. None of these issues are addressed in the determination. Accordingly, it is impossible to know what findings, if any, the Tenancy Tribunal made on the principal issues in the appeal. One cannot know, for example, which version of the various proposed uses the Tenancy Tribunal thought to apply. It is also impossible to know whether and why the Tenancy Tribunal considered that an intermittent use was sufficient to constitute occupation as a dwelling. The legal

consequences of this failure to state adequate reasons are addressed at paragraphs 86 *et seq*. below.

79. For completeness, the reference in the determination to "*medical evidence*" does not assist in an understanding of the Tenancy Tribunal's rationale. The only independent medical evidence which had been before the Tenancy Tribunal consisted of a short medical opinion. The medical opinion is dated 24 October 2023, and, in relevant part, reads as follows:

> "Opinion
>
> Jane is fit to continue in work. In addition, she remains fit to drive. In the event that she has a further syncopal episode, she should be put into the recovery position. If she fails to recover within a couple of minutes, then an ambulance should be called for her. In most cases, she will have pre-syncopal aura where she is feeling unwell and can lie down or rest to avoid a full syncopal episode."

80. This opinion does not support a conclusion that there is a necessity for "*respite accommodation*" (whatever precisely that might mean). The opinion confirms that the second landlord is fit to work and to drive. There is no suggestion that she is unable to commute from her current place of residence to her workplace. The opinion does not support the notion that the second landlord requires a *pied-à-terre* where she might lie down or rest ("*a place that's beside work that I can use to go and lie down if I'm not feeling well*"). Rather, the implication is that in the event of an episode, the second landlord should be in the company of others who could observe her and call an ambulance if necessary. This indicates that she should remain at her place of work in such a scenario.

(ii). Whether notice of termination served bona fide

81. The second issue which the Tenancy Tribunal would have been required to address—on the hypothesis that the tribunal had actually identified the proposed

use—would have been whether the Landlords had a genuine intention to put the premises to such use. The Tenants have consistently challenged the genuineness of the Landlords' supposed intention to occupy the Property. On the Tenants' case, the service of an eviction notice was in retaliation for their having referred a dispute to the Residential Tenancies Board in relation to their having been overcharged rent. The Tenants had put before the RTB copies of an exchange of messages on the WhatsApp platform. The Tenants contend that the content of same confirms their allegation that the decision to serve a notice of termination was informed by an improper ulterior motive. There is also the timing of the notice of termination. It was served within a mere ten days of the Landlords first being notified by the RTB that the Tenants had made a referral in relation to the rent dispute. The Landlords have since acknowledged that the timing of the subsequent "*eviction process*" was "*reactionary*".

82. All of this material was before the Tenancy Tribunal as part of the case file. Notwithstanding this, the Tenancy Tribunal fail to address this issue at all in their decision.

83. As an aside, it should be noted that it is apparent, from the transcript of the hearing, that the chairperson of the particular panel of the Tenancy Tribunal appears to have misunderstood the status of the first instance adjudication. The chairperson seems to have thought that it followed, from the fact that the appeal to the Tenancy Tribunal is a *de novo* appeal, that the adjudicator's report had already been "*set aside*". In truth, an adjudicator's report continues to have significance: it is expressly provided under section 104(7) of the RTA 2004 that the Tenancy Tribunal may have regard to the report of the adjudicator. Relevantly, the adjudicator's report in the present case had made a finding that

the second landlord did not have a *bona fide* intention to move into the Property. The appeal involved a challenge to the finding. This was an issue which required to be addressed by the Tenancy Tribunal in their written determination.

84. The adjudicator had also made a finding that the Landlords had engaged in "*penalisation*" within the meaning of section 14 of the RTA 2004. Of course, this first-instance finding was not, in any sense, *binding* on the Tenancy Tribunal. The statutory appeal to the Tenancy Tribunal takes the form of a *de novo* hearing. It is, however, crucial to the effective operation of the RTA 2004 that decision-makers, at all levels of the hierarchy, are conscious of the legislative intent that tenants are not to be penalised for exercising their statutory right to refer a dispute to the RTB. Here, the Tenants had made an express allegation that the eviction process was in reaction to their having invoked the statutory dispute resolution mechanism. The Tenancy Tribunal was required to make a finding on this allegation, one way or another, and their failure to do so constitutes an error of law.

85. The Tenancy Tribunal's failure to consider this issue at all is inexplicable having regard to the chronology of events. Section 14 of the RTA 2004 provides, relevantly, that one of the matters to be considered is the "*proximity in time*" between (i) the purported exercise of a statutory right by a landlord, and (ii) the referral of a dispute between the tenant and the landlord to the RTB for resolution. Here, the time period between the service of the notice of termination and the Landlords first being notified of the referral is a mere ten days.

FAILURE TO STATE ADEQUATE REASONS IS AN ERROR OF LAW

86. The Tenancy Tribunal's determination fails to disclose the reasoning of the tribunal in relation to the principal issues on the appeal before it. This, in turn, frustrates the High Court in the exercise of its statutory appellate jurisdiction. The High Court cannot, for example, rule upon the ground of appeal that the Tenancy Tribunal erred in its interpretation of section 34 of the RTA 2004 without first knowing what interpretation the Tenancy Tribunal actually gave to the section.

87. It is a condition precedent to the High Court exercising its appellate jurisdiction that it understands the reasons and rationale for the decision. As explained by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, one function of the obligation to give reasons is to allow the courts to exercise their supervisory jurisdiction. See paragraph 46 of the reported judgment as follows:

> "Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

88. It is essential to the effective exercise by the High Court of its appellate jurisdiction that the rationale of the first-instance decision-maker be disclosed. Were it otherwise, substantive errors of law would go uncorrected. The first-

instance decision-maker, by delivering an inscrutable decision, would be able to shield its decision from appeal. It follows that the failure on the part of a decision-maker to state adequate reasons for its decision must itself be regarded as an error of law which is amenable to an appeal on a point of law.

89. The failure on the part of the Tenancy Tribunal to state its findings and reasoning on the principal issues in controversy before it constitutes an error of law which is amenable to the statutory appeal under section 123 of the RTA 2004. This does not involve the imposition of an onerous obligation to state reasons. It does not involve a requirement that the Tenancy Tribunal provide a detailed discursive decision. What the Tenancy Tribunal cannot do, however, is to fail to address at all the principal issues in the appeal.

90. The Tenancy Tribunal will be afforded a significant margin of appreciation in relation to findings of fact. This is, however, contingent on the Tenancy Tribunal having explained in its decision the basis for its findings of fact. The Tenancy Tribunal cannot insulate its decision from review by failing to disclose reasons. The "*reasonableness*" test obliges the court to consider, to a very limited extent, the rationale or justification for the impugned decision. The courts will, of course, show significant deference to the decision-maker's expertise in the exercise of a discretion which has been entrusted to them under legislation. The concept of curial deference is dependent on the Tenancy Tribunal having provided a properly reasoned decision and does not afford a mechanism for compensating where the decision is not so reasoned (see, by analogy, *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33).

91. For completeness, is should be recorded that the chairperson of the relevant panel of the Tenancy Tribunal has sworn an affidavit in response to the statutory

appeal. The content of this affidavit consists, in large part, of a recitation of the procedural history and a rehearsal of the Tenancy Tribunal's determination. At some points, however, the chairperson seeks to elaborate upon the reasoning. With respect, this is impermissible. It is not open to the Tenancy Tribunal to seek to improve upon its reasoning *ex post facto*. There is a statutory duty to state reasons contemporaneously.

92. In summary, therefore, the Tenancy Tribunal's determination of 10 January 2024 must be set aside on appeal because of the failure to provide a proper statement of reasons.

93. It should be explained that the grounds of appeal in the present case do not specifically include a "*reasons*" challenge. However, the respective counsel on behalf of the Residential Tenancies Board and the Landlords each confirmed, at the conclusion of the hearing before me, that their side does not seek to take a pleading point in this regard. This approach is eminently sensible. The existence of a proper statement of reasons is a logically anterior requirement to any engagement with the substance of the appeal. Moreover, and in any event, a "*reasons*" challenge is expressly pleaded as part of the parallel judicial review proceedings. The parties cannot, therefore, have been taken by surprise by the adequacy of reasons having arisen as an issue on the appeal.

PROCEDURAL OBJECTION

94. As flagged at paragraph 12 above, the Landlords advance a procedural objection as follows. It is contended that the nature and extent of their intended "*occupation*" of the dwelling had not been raised as an issue before the Tenancy Tribunal. More specifically, it is submitted on behalf of the Landlords that the

Tenants never raised the meaning of the word "*occupation*" before the Tenancy Tribunal and certainly never raised an argument that the use on a number of nights each week and for intermittent use as respite accommodation did not meet the requirement for "*occupation*".

95. If this procedural objection had been well founded, then the Tenants would not, normally, have been allowed to advance this issue for the first time in the context of a statutory appeal limited to a point of law only. Logically, this procedural objection is one of the very first matters which this court has had to address in adjudicating on this appeal. This is because if the objection was well founded, then it would be neither necessary nor appropriate for the court to address the substantive issue. Although decided first, however, the rehearsal of the court's decision on this procedural objection has been deliberately *deferred* to this point in the judgment. This is done in the hope that it will be more readily understood by the reader now that they have a full appreciation of the circumstances of the case.

96. For the reasons which follow, the procedural objection is not well founded. It is apparent from the transcript of the hearing before the Tenancy Tribunal, and from the content of the written determination, that the nature and extent of the Landlords' intended occupation was recognised as a live issue on the appeal.

97. During the course of the hearing, the chairperson of the relevant panel of the Tenancy Tribunal had expressly referred the parties to the judgment of the High Court (Barrett J.) in *Duniyva v. Residential Tenancies Board* [2017] IEHC 578. The Tenancy Tribunal subsequently cited a passage from that judgment in its written determination. The relevant passage, in slightly fuller form than cited by the Tenancy Tribunal, reads as follows:

> "[…] Having regard to the just-stated definitions, the court considers that the use of the third-person singular form of the verb 'to require' in para.4 of the Table to s.34 has the result that a landlord must 'need' the dwelling in issue, which has the effect that termination of the tenancy must be essential or very important to him (or her), rather than just desirable. That need has a subjective and an objective dimension, in the sense that a Tenancy Tribunal would need to look to whether a landlord subjectively requires a dwelling (here the statutory declaration, it seems to the court, would typically be determinative) and also to whether that perceived requirement is a *bona fide* requirement and not (i) a requirement that a landlord purports to exist but which does not in truth exist, or (ii) a requirement that is advanced to achieve an unlawful objective, e.g., the perpetration of unlawful discrimination contrary to the Equal Status Acts."

98. As appears from this passage, the Tenancy Tribunal, in adjudicating upon an objection that a notice of termination is invalid, must consider whether the landlord's stated intention is *bona fide*.

99. The chairperson drew the parties' attention to the distinction between a "*need*" and a "*want*". It is apparent, therefore, that the Tenancy Tribunal understood that the correct interpretation of the landlord / family occupation ground was a live issue in play on the appeal.

100. The principal authority relied upon by the Landlords in support of their procedural objection is *Ashe v. Residential Tenancies Board* [2023] IEHC 627. With respect, the circumstances of that case were very different from those of the present case. There, the tenant had sought to introduce an entirely new issue on the appeal to the High Court. A determination upon this issue would have necessitated the High Court making findings of fact *ab initio*. The tenant sought, for the first time on appeal, to challenge the validity of the notice of termination in that case on the basis that same was informed by an ulterior motive.

101. The High Court in *Ashe* held that this was impermissible for the following reasons (see paragraphs 25 and 26):

> "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.
>
> 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."

102. By contrast, the tenants in the present case have consistently queried the genuineness and nature and extent of the landlords' intended use.

103. The Landlords also rely upon the judgment in *Hyland v. Residential Tenancies Board* [2017] IEHC 557. There, the appellant had sought to argue, for the first time before the High Court, that the Tenancy Tribunal ought to have adjourned the hearing before it, pending the outcome of other litigation. No application had been made to the Tenancy Tribunal for an adjournment. The High Court held that in circumstances where the Tenancy Tribunal had never been asked to make any determination in relation to the issue, it could not be raised as part of the appeal on a point of law to the High Court.

104. It is apparent that the point, which it was sought to raise on appeal to the High Court in *Hyland*, was an entirely new point, unrelated to any argument before the Tenancy Tribunal. The distinction between the circumstances of *Hyland* and

those of the present case is that the interpretation and application of the landlord / family occupation ground had always been in contention.

105. More generally, as appears from the passage from *Duniyva* (which had been cited by the Tenancy Tribunal), it is inherent in any adjudication upon a challenge to the validity of a notice of termination served in purported reliance upon the landlord / family occupation ground that the Tenancy Tribunal must engage with the question of whether there is a *bona fide* intention to occupy the premises.

CONCLUSION AND PROPOSED FORM OF ORDER

106. The Residential Tenancies Act 2004 (as amended) prescribes a limited form of rent control for tenancies in "*rent pressure zones*". In the case of a dispute in relation to the setting of rent, a tenant has a statutory right to refer the matter to the Residential Tenancies Board for resolution. It is crucial to the effective operation of the RTA 2004 that decision-makers, at all levels of the hierarchy, are conscious of the legislative intent that tenants are not to be penalised for exercising their statutory right to refer a dispute to the RTB. Here, the Tenants made a well-founded complaint that the rent charged under the tenancy agreement was excessive. The Tenants alleged that the Landlords subsequently served a notice of termination in retaliation for their having invoked the statutory dispute resolution mechanism. The Tenants also alleged that the Landlords did not genuinely intend to occupy the dwelling. The Tenancy Tribunal was required to make a finding on these allegations—one way or another—and the tribunal's failure to do so constitutes an error of law.

107. The determination of the Tenancy Tribunal on the validity of the notice of termination is vitiated by an error of law, namely, the failure to provide a proper statement of reasons and findings. This error of law is one which is amenable to the statutory appeal on a point of law under section 123 of the Residential Tenancies Act 2004. It follows, therefore, that this aspect of the determination order of 10 January 2024 must be set aside on appeal.

108. Subject to hearing further submissions, my *provisional* view is that this is not an appropriate case in which to consider making an order remitting the matter to the RTB. First, the failure in reasoning is so fundamental that it seems unlikely that same could be rectified by way of a remittal. This is not a case where there was merely some shortcoming in the stated reasons. Rather, this is a case of an *utter failure* to address the principal issues in the appeal. Secondly, the notice of termination is inconsistent with the statutory declaration. It must be doubtful whether such contradictory documentation could properly ground an eviction. Thirdly, more than one year has elapsed since the date upon which the purported notice of termination was served. The factual circumstances of the parties may well have changed in the interim.

109. This appeal has been determined on the narrow basis that the Tenancy Tribunal failed to provide a proper statement of reasons for its determination. Having regard to that finding, it seems to me that it is unnecessary and inappropriate to consider the *substance* of the points of law pleaded. This is because the failure in reasoning has shielded the substance of the Tenancy Tribunal's determination from meaningful review by the High Court. If, however, any of the parties wish to contend for a different approach, namely that the High Court should now address those points of law as part of these appeal proceedings, they will have

an opportunity to make submissions to that effect when the matter is next listed before me.

110. The Tenancy Tribunal's determination addresses a second issue, namely, the overcharging of rent under the tenancy agreement. The determination order directs the Landlords to pay a sum in excess of the statutory cap of €20,000. This has not been appealed by the Landlords. Nevertheless a question *might* arise as to whether it is open to the High Court to affirm a determination order which would appear to be erroneous on its face. I will hear counsel further on this issue.

111. I will list these proceedings, for further submissions, at a date convenient to the parties. I will also hear submissions on that occasion as to the allocation of the legal costs of the appeal proceedings and of the parallel judicial review proceedings.

Appearances

Paul O'Shea for the applicants instructed by Cyril & Co. Solicitors
Michéal O'Connell SC and Paul Finnegan for the respondent instructed by ByrneWallace LLP
Fintan Hurley for the notice parties instructed by Buckley Law