THE HIGH COURT

CIRCUIT APPEAL

RECORD NO.: 2018/80 CA

IN THE MATTER OF SECTION 124 OF THE RESIDENTIAL TENANCIES

ACT, 2004

APPLICATION UNDER SECTION 124 OF THE RESIDENTIAL TENANCIES

ACT, 2004

BETWEEN:

THE RESIDENTIAL TENANCIES BOARD

Applicant

-AND-

MARY DUNIYVA

Respondent

-AND-

BARBARA GIBSON AND PATRICK GIBSON

Notice Parties

JUDGMENT delivered by Ms. Justice Tara Burns on the 31st July, 2018

1. The Applicant brought an Application before Dublin Circuit Court seeking an Order pursuant to s. 124 of the Residential Tenancies Act, 2004 (hereinafter referred to as the "Act of 2004") directing the Respondent, who is a lay litigant, to comply with a Determination Order issued by the Applicant on 12th April, 2017 in respect of the tenancy of Flat 4, Grosvenor Square, Rathmines, Dublin 6.

2. The terms of the Determination Order are:

> a) That the Respondent and all persons residing in the said dwelling shall vacate the dwelling and give up possession of the Dwelling in favour of the Notice Parties
>
> b) That the Respondent shall pay to the Notice Parties any further rent outstanding from 27th March 2017 at the rate of €500 per month or proportional part thereof at the rate of €16.44 per day unless lawfully varied and any other charges as set out in the terms of the tenancy agreement for each month or part thereof, until the Dwelling is vacated.

3. The Applicant also sought an Order for Possession of the Dwelling in favour of the Notice Parties.

4. The matter came before the Circuit Court on 29th January 2018. On 8th February, 2018 the Circuit Court judge made an order in terms of the Notice of Motion granting the Applicant the reliefs sought.

5. The Respondent appeals against the Order of the Circuit Court to this Court.

Hearing before this Court and additional material

6. The hearing before this Court is an appeal *de novo* and this Court is not bound by any of the findings of the Circuit Court judge.

7. Prior to the matter starting before this Court, I asked that the papers in the matter be handed into me. A booklet of the papers before the Circuit Court and the procedural appeal papers lodged by the Respondent were provided. The Respondent indicated that she had further material which she wished to give me. I asked the Respondent to show to the Applicant's Counsel and Solicitor, the additional papers which she wished to provide to me so that a view could be taken as to whether this could be done on an agreed basis. Having carried out that task, Counsel for the Applicant indicated that she was objecting to further material being handed into me.

8. Order 61 rule 8 of the Superior Court Rules provides:-

> "Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court. Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral, or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court."

9. An affidavit of this nature has not been filed by the Respondent despite the numerous times the matter has been mentioned before the High Court. In light of the objection from the Applicant to further material being received by the Court and the fact that no such affidavit had been filed by the Respondent, the necessity of which is expressed in mandatory terms in Order 61 of the Rules of the Superior Courts, I determined not to accept further material from the Respondent. However, in the course of the hearing, the Respondent referred to the Notice of Termination of her Tenancy which was served on her by the Notice Parties and which formed the basis of the Determination Order which is the subject matter of these proceedings. As it transpired, this Notice had not formed part of the material before the Circuit Court. This document, which the Respondent made submissions in respect of, was in my opinion relevant and important to the matters before the Court. When asked, Counsel for the Applicant, on instruction, consented to this

document being made available to the Court.

History of the Proceedings
10. The Respondent entered into a tenancy agreement with the Notice Parties, in respect of the property previously referred to, on 27th November, 2010. Accordingly, this is a tenancy to which the provisions of Part 4 of the Act of 2004 apply. Rent was agreed at €500 per month and was paid throughout her period of occupation. A Notice of Termination was served on the Respondent on 3rd November, 2016. The Notice specified that the landlords required the dwelling for the occupation by a member of their family, Ciaran Gibson, the landlords grandson, who expected to occupy the dwelling for a period of nine months from 3/4/2017 to 31/12/2017. The Notice indicated that the Respondent's tenancy would terminate on 31st March 2017.

11. On 1st December 2016, the Respondent applied to the Applicant for Dispute Resolution Services claiming that the Notice of Termination was invalid.

12. On foot of this application, the Applicant wrote to both parties by letter dated 8th December, 2016 to advise them that an adjudication hearing in relation to the dispute would take place on 11th January, 2017.

13. This hearing took place with the parties in attendance. The Respondent submitted that it was her view that the Notice Parties grandson would not live in the dwelling and she challenged the *bona fides* of the Notice Parties as she did not think the reason for the termination was genuine. The second named notice party submitted that he had sworn a declaration stating that his grandson would reside at the dwelling. The Adjudicator determined that the Notice of Termination was valid and required the Respondent to vacate the property.

14. The Respondent appealed this decision on 2nd February, 2017. The Applicant considered this application and granted an appeal. Accordingly, a Tenancy Tribunal hearing was scheduled for 27th March, 2017 of which the parties were notified. On foot of this notification, the Respondent requested the Tenancy Tribunal to issue a subpoena to the Notice Parties grandson. The Tribunal aceeded to this request. The parties to the dispute were present at the hearing. The Respondent had Councillor Ruairi McGinley in attendance with her. The report of the Tenancy Tribunal is exhibited in the papers before the Court.

15. Before the Tenancy Tribunal, as this was the Respondent's appeal, the Respondent was the moving party and she was invited to present her case first. Further, as the landlord's grandson was subpoenaed on her behalf, he was also called in the course of the Respondent's case. The Respondent gave evidence alleging, amongst other matters that the reason stated in the Notice of Termination, namely that the Landlord needed the premises for his grandson, was spurious; that the Landlord simply wanted to get her out of the premises; that this was a conspiracy on his part; proof of this was that the premises was not suitable for a student and that there was a history of this type of behaviour on the part of the Landlord evidenced by previous applications to the Applicant. The landlord' grandson gave evidence. He indicated that he had commenced a four year course at DIT Aungier Street and that he was working part time as a car park attendant at the RDS. He lived with his parents in Knocklyon and that being closer to both of these locations was easier for him than living at his family home. He also wanted to be independent of his parents. The report of the Tribunal notes that "he disagreed with the tenant that the flat would be too noisy for him to study, as he said he would be doing his studying at the library. He also said he had been to the flat with his grandfather to repair a window and was fully aware of the layout."

16. The Notice parties (the landlords) were then permitted to present their case. The second named Notice Party gave evidence saying that the purpose of the Notice of Termination was genuine and was not "simply to get her out".

17. The Tenancy Tribunal, having considered all of the documentation before it and having considered the evidence presented by the parties found that the Notice of Termination was valid and a Determination Order issued. It is this Determination Order which is now sought to be enforced.

18. The Respondent appealed the decision of the Tenancy Tribunal to the High Court pursuant to section 123(3) of the Act of 2004 which permits such an appeal on a point of law. The grounds of appeal agitated by the Respondent were that the Tenancy Tribunal mis-applied s. 34(4) of the Act of 2004; the Tenancy Tribunal failed to show regard for the right to peaceful and exclusive occupation of her rented dwelling; the Tenancy Tribunal's hearing and determination were one sided and biased in favour of the landlord, failing to apply the principles of natural and constitutional justice; and that the Tenancy Tribunal breached fair procedures by not allowing her to properly cross-examine witnesses.

19. The matter came on for hearing before Mr Justice Barrett, who having heard the case, reserved judgment which was then delivered on 12th October, 2017. Mr Justice Barrett found against the Respondent on the issues of law raised by her.

20. On foot of a letter from the Applicant warning her that they could institute enforcement proceedings, the Respondent indicated that she was complying with the Determination Order, by letter dated 23rd November, 2017.

21. However, the Respondent failed to comply with the Determination Order.

22. A motion seeking such enforcement or the Determination Order was issued by the Applicant on 19th December, 2017.

Jurisdiction of the Court on an application pursuant to s. 124 of the

Residential Tenancies Act, 2004
23. Section 124 of the Act of 2004 provides:-

> "(1) If the Board or a party mentioned in a determination order is satisfied that another party has failed to comply with one or more terms of that order, the Board or the first-mentioned party may make an application under this section to the Circuit Court for an order under subsection (2).
>
> (2) On such an application and subject to section 125, the Circuit Court shall make an order directing the party concerned (the "Respondent") to comply with the term or terms concerned if it is satisfied that the Respondent has failed to comply with that term or those terms, unless—
>
> > (a) it considers there are substantial reasons (related to one or more of the matters mentioned in subsection (3)) for not making an order under this subsection, or

(b) the Respondent shows to the satisfaction of the court that one of the matters specified in subsection (3) applies in relation to the determination order.

(3) The matters mentioned in subsection (2) are—

(a) a requirement of procedural fairness was not complied with in the relevant proceedings under this Part,

(b) a material consideration was not taken account of in those proceedings or account was taken in those proceedings of a consideration that was not material,

(c) a manifestly erroneous decision in relation to a legal issue was made in those proceedings,

(d) the determination made by the adjudicator or the Tribunal, as the case may be, on the evidence before the adjudicator or Tribunal, was manifestly erroneous.

24. Section 124 of the Act of 2004 was considered by Ms. Justice NiRaifeartaigh in *Foley v. Johnson* (Unreported, High Court, 6th February, 2017) where she stated at p 4 of the judgment:-

> "[A] determination can only be departed from if one of the conditions in (a) or (b) is satisfied, and not for any other reason. These grounds on which an order can be challenged are extremely narrow and would, to lawyers, be broadly familiar as essentially a paraphrase of the tests which would apply in judicial review proceedings."

25. As can be seen from the terms of s. 124 of the Act of 2004 and as commented on by Ms. Justice NiRaifeartaigh, the grounds upon which a Determination Order can be challenged are extremely narrow. The Court can only set aside a Determination Order if it considers that there are substantial reasons relating to one or more of the matters set out in s.124(3) to not make the Order sought by the Applicant, or the Respondent shows to the satisfaction of the Court that one of the matters specified in s. 124(3) applies in relation to the determination order.

The matters set out in sub-section 3 of section 124 of the Act of 2004
a) Absence of Procedural Fairness in the proceedings leading to the Determination Order

26. In the substantive appeal in this matter brought pursuant to s. 123 of the Act of 2004, Mr Justice Barrett considered the question of Bias and Breach of Principles of Natural and Constitutional Justice on the part of the Tenancy Tribunal as raised by the Respondent. He stated at paragraph 9 of the judgment:-

> "Ms. Duniyva contends that the Tenancy Tribunal's hearing and determinations were one-sided and biased in favour of the landlord, failing to apply the principles of natural and constitutional justice, and that she was not allowed properly to cross examine witnesses. In point of fact, over a 2 and a half hour period, Ms Duniyva was given a full opportunity to present such evidence as she thought appropriate, to cross examine all of the landlords' witnesses, including the landlord's teenage grandson, and to make all appropriate submissions. There is no bias or breach of the principles of natural and constitutional justice presenting. Nor does it follow from the fact that the Tenancy Tribunal reached conclusions adverse to Ms Duniyva that it was possessed of some bias against her or necessarily acting (in point of fact it did not act) in breach of the principles of natural or constitutional justice. Nor the court notes, given that Ms Duniyva has, with respect, a certain tendency to loquacity, is it the case that a tribunal must continue unendingly with a hearing when all that a party is doing is repeating the same points and/or has patently iterated the points which that party has come to the hearing to make. What is required as a matter of administrative law is fair procedures (which need not be perfect procedure), including a fair hearing (which need not be a perfect or endless hearing). Ms. Duniyva's allegations of bias on the part of, and breach of the principles of natural and constitutional justice by the Tenancy Tribunal, are respectfully rejected by the Court."

27. While Mr Justice Barrett's determinations in this regard are not binding on me, I must nonetheless pay significant regard to the findings of a court of equivalent jurisdiction. This is particularly so, in the interest of legal certainty, when those determinations are made in the same case and on the same factual basis. Indeed, while it has not been raised before me by Counsel for the Applicant, an argument may well have been made that the doctrine of Res Judicata applied to this argument made by the Respondent which would have prohibited the Respondent arguing this issue before a Court again.

28. With regard to the Respondent's complaint of bias, I am of the opinion that there is no evidential basis for this suggestion and I am not satisfied that bias on the part of the Applicant whether real or objective is made out.

29. With regard to the question of whether the Respondent was afforded a fair hearing, the Respondent complains that she was not afforded an adequate opportunity to cross examine the Notice parties grandson. I note that Mr Justice Barrett decided against the Respondent on this issue. In the course of the hearing before me, the Respondent alleged that she had been stopped by the Tenancy Tribunal from asking questions of the landlord's grandson, specifically regarding the apparent discrepancy between the notified dates of his proposed occupancy at the premises, stated in the Notice of Termination to be a period of 9 months compared to the length of his course of study, namely 4 years.

30. This allegation had not been set out in affidavit by the Respondent. When replying to the Respondent, Counsel for the Applicant objected to the Court having regard to these assertions, indicating that further evidence may have been put on affidavit had this case been properly made out on affidavit by the Respondent.

31. I note that the Respondent states in paragraph 8 of an affidavit which she filed on 8th February, 2018, when taking issue with an assertion in Kathryn Ward's affidavit to the effect that "there was ample evidence that the Notice-Parties required the dwelling", that "[T]here was none since my evidence was suppressed-thus denying me fair procedures." I also note in another affidavit, sworn by the Respondent in this matter on the same date, that she states at paragraph 5 that she was not given the opportunity to make full oral submissions.

32. Neither of these averments make the specific allegation which the Respondent made in the course of her submission and in no way could the averments cited above put the Applicant on notice of what the Respondent now alleges so as to alert them to the necessity of filing an additional affidavit if they wanted to controvert the allegation now made.

33. Obviously, I cannot accept the Respondent's submissions on this issue as evidence in the matter.

34. The assertions which were stated in the course of the Respondent's submissions should have been put on affidavit in a detailed manner by the Respondent. However, what is clear from the evidence which I can consider, namely the report of the Tenancy Tribunal, is that the Landlord's grandson gave evidence in the Respondent's case and that she did ask questions of the grandson. Indeed, the Respondent's submissions to this court in this regard implicitly accepted that more than one question was asked of him, although she indicated that she had only asked one.

35. I also note with regard to this issue that the Respondent was accompanied at the hearing and I note that the Respondent was not a stranger to the Applicant's dispute resolution procedures or indeed court applications. Reference is made in the Tenancy Tribunal's report and in an affidavit sworn by the Respondent on 8th February, 2018 to other dispute resolution references made by her to the Applicant and the fact that there had been a previous High Court case in relation to an attempted termination of the tenancy, the subject matter of these proceedings.

36. With this knowledge together with my experience of the Respondent, who presented her case with vigour, passion and ability, I cannot accept that she was wrongfully silenced at the Tribunal hearing whether it be in evidence or presenting her arguments, as asserted by her in the affidavits which she has filed.

37. Accordingly, having regard to the evidence which I have before me and having regard to the findings of Mr Justice Barrett, already referred to, I am of the view that procedural fairness was complied with at the hearing before the Tenancy Tribunal.

b) A material consideration was not taken account of in the proceedings or account was taken of a consideration that was not material.

38. An issue which the Respondent submits falls under this heading is the issue of the apparent discrepancy between the notified proposed length of stay, by the landlord's grandson, which was stated as 9 months in the Notice of Termination, and the fact that the course of study which the grandson was attending was four year. The Respondent argues that this apparent discrepancy was a material consideration not taken into account by the Tribunal.

39. I do not see this apparent discrepancy as a material consideration which was not taken account of. On a preliminary note, it is not established that there was in fact a discrepancy between these two independent pieces of information: The Tenancy Tribunal report does not reflect the landlord's grandson stating that he intended to stay at the premises for the entirety of the course he was engaged in. In the absence of that assertion, a discrepancy does not in fact exist. However, far more importantly is the fact that the Tribunal was clearly aware of this issue. In its ruling, the Tribunal refers to the notification of the proposed time period of the Grandson's occupation of the premises in the Notice of Termination being from 3rd April 2017 to 31st December, 2017. It is entirely a matter for the tribunal as to how it resolves this issue but clearly the Tribunal was aware of it.

40. A further issue which the Respondent raises is the condition of the premises, asserting that it was so sub-standard, it was incomprehensible that a student, with family home comforts not far away would stay there. Again, having heard evidence on the matter, it is entirely a matter for the tribunal to consider this evidence.

41. In neither respect, am I in a position to find that a material consideration was not taken into account by the Tribunal.

c) A manifestly erroneous decision in relation to a legal issue was made

42. The Respondent claims that the requirements of section 34(4) of the Act of 2004 were not made out as the circumstances of the case did not establish that the Landlord "required" the dwelling for occupation by a member of his family. Again, this is a matter which may well be covered by the doctrine of Res Judicata, however this was not raised by Counsel for the Applicant.

43. Section 34 of the Act of 2004 prohibits a Part 4 tenancy being terminated by the landlord unless "[t]he landlord requires the dwelling…for his or her own occupation or for the occupation by a member of his or her family."

44. This issue was considered and determined by Mr Justice Barrett who stated at paragraph 5 of his judgment:-

> "5. Ms. Duniyva points to the facts that the ground for termination is that the landlord "requires the dwelling" (emphasis added), and suggests that termination of the tenancy must be essential and important rather than just desirable. The court notes that in the Oxford on-line dictionary when it comes to: (1) the verb "*require*", the principal definition provided is "*need for a particular purpose*"; and (2) the verb "*need*", the principal definition provided is "*require (something) because it is essential or very important rather than just desirable*". 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, but 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 act. When it comes to the verb "to need", Ms. Duniyva in her submissions placed some emphasis on the meaning being attributed by Geoghegan J. in *Equality Authority v. Portmarnock Golf Club & Ors.* [2009] IESC 73, to the noun "needs" in s. 9(1)(a) of the Equal Status Act, 2000. With respect, the court does not see that the meaning afforded by the Supreme Court to a particular noun in a statute that is of no relevance to the within application has any bearing on the meaning to be given by this Court to an unrelated verb ("to need") which appears in the principal definition of yet another verb ("to require") that is employed in an entirely different statute.
>
> 6. Here the landlords want Ms. Duniyva's tenancy of her rented dwelling terminated in order that a grandson of theirs who is in college and desirous of independence from his parents, can live closer to where he studies and does not have to be taking two long bus rides to and from college each day, or (worse still) be cycling to or from college on dark mornings, and still darker evenings.
>
> 7. The court is not required in the within appeal to determine whether there is in the statutory declaration furnished by

> the landlord, and/or the broader facts presenting, sufficient to justify the requirements of the Act of 2004, as touched upon above. This being an appeal under s. 123(3) of the Act of 2004, the court is concerned solely with points of law. Turning to this aspect of matters, is it the case that the Tenancy Tribunal could not, acting in accordance with law, have concluded that the landlords to Ms. Duniyva required the dwelling and were *bona fide* in seeking to terminate the tenancy on the grounds specified? In this regard the court notes the averment by the Chairman of the relevant Tenancy Tribunal that "*the Tribunal took into account the evidence and materials before it namely the statutory declaration sworn by the landlord and the direct evidence of the landlord's grandson to the effect that he required the dwelling for his own occupation*". Moreover, in the reasons for its decision, the Tenancy Tribunal stated *inter alia*, in its Report, para. 7 that "*the Tribunal is satisfied that the dwelling is required for the landlord's grandson … the Tribunal is also satisfied that the intention is a bona fide intention and that the landlord does hold the required intention*". Clearly no unlawfulness presents in the landlord's *bona fide* requirement of the dwelling currently rented by Ms. Duniyva. So the Tenancy Tribunal addressed in effect the subjective and objective dimensions of the matter presenting before them and arrived at a perfectly valid finding that was reached in accordance with law. There is no misapplication of s. 34(4) of the Act of 2004 in that."

45. Mr Justice Barrett has carefully analysed this issue and I see no reason to come to a different conclusion. I accordingly am of the view that a manifestly erroneous decision in relation to a legal issue has not been established by the Respondent.

d) A manifestly erroneous decision was made by the Tribunal on the evidence

46. I am of the opinion that there is no basis for a claim that the decision made by the Tribunal on the evidence, and adopted by the Applicant, is manifestly erroneous. Nothing which has been submitted by the Respondent could establish this to be the case.

Retrospectivity

47. On a number of occasions, in the course of her argument to me, the Respondent raised the issue that the Notice of Termination was now spent, as the time period referred to therein in respect of when the Landlord's grandson was to reside at the premises, had now passed. This is an issue which I cannot engage in. I have no jurisdiction in relation to same having regard to the s. 124 application presently before me. My sole determination in this matter is whether the Determination Order should be enforced or not and the only issues which I can consider in determining this question are those set out in s. 124(3) of the Act of 2004 which I have already considered.

Conclusion

48. Accordingly, I am of the view that the matters which are set out in sub-section 3 of s. 124 of the Act of 2004, which would permit me to refuse to grant the relief sought, have not been established. That being so, I have no jurisdiction to do anything other than order the enforcement of the Determination Notice. I therefore grant an Order in terms of the Notice of Motion herein.