[2017] IEHC 424

THE HIGH COURT

RECORD NO: 2016/281 CA

James M. Foley

Plaintiff

AND

Christa Johnson and Laraine Johnson

Defendants

EX TEMPORE JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 6th February, 2017

This judgment was delivered *ex tempore* on the 6th February, 2017. At the request of the parties, this written judgment was prepared from the DAR.

1. This is a case which comes before this Court by way of appeal from an order of the Circuit Court. It is a case in which the plaintiff landlord is seeking to enforce, pursuant to s. 124 of the Residential Tenancies Act, 2004, ("the Act") a determination of the Private Residential Tenancies Board ("the P.R.T.B.") dated the 26th January, 2016. The Circuit Court Judge granted the relief sought by the landlord and the tenants, who are the defendants, have brought the present appeal.

2. The premises to which the decision of the P.R.T.B. relates are residential premises in Dalkey, Co. Dublin. It appears that the defendants have been renting and living in the premises since 2005. The rent was originally €2,000 per month, but this was reduced to €1,600 per month in the year 2014.

3. The plaintiff landlord, who is resident in the United States, has averred on affidavit that he wanted to implement improvements to the premises and make them available for himself and his family and, accordingly, wrote to the defendant tenants on the 23rd April, 2015, indicating that the premises would not be available for lease after the 30th September, 2015. The defendants have sworn on affidavit that the landlord visited them personally on the 17th April, 2015, and gave them verbal notice to vacate the property and that they were shocked, and that this was followed by a further visit within a few days with a written notice of termination which he, in their words, forced them to sign. The landlord averred that the first written notice was invalid, and accordingly a further notice dated the 11th August, 2015, was served.

4. The defendants referred the matter to the P.R.T.B. and an adjudicator was appointed to deal with it. By letter dated the 22nd October, 2015, which has been put before the Court, the P.R.T.B. wrote to the solicitors for the plaintiff landlord advising that the first defendant had sought dispute resolution in respect of the tenancy at the premises in question. The letter stated, *inter alia*: "This dispute concerns alleged invalid Notice of Termination." This, it appears, was the only issue in respect of which complaint was formally made to the P.R.T.B..

5. By letter dated the 23rd October, 2015, the solicitors for the landlord served a further notice of termination.

6. The matter came on for hearing before the adjudicator appointed by the P.R.T.B. on the 4th November, 2015. The landlord was not present, but was represented by his solicitor. The defendants represented themselves. The adjudicator suggested to the parties that they might try and resolve their dispute by agreement. This is a procedure envisaged by the Act, under s. 97.

7. The agreement which was signed on that day provided that: the tenants would vacate the premises on Friday 3rd June, 2016, which was some seven months later; that they would continue to pay the rent of €1,600 monthly until vacating the premises, less one month's rent in November, 2015; and that the landlord would refund the deposit of €2,000 on their exiting the premises, less any just deductions. The agreement also provided that the tenants were entitled to reimbursement in respect of the purchase of one oven. The agreement stated that it represented "full and final settlement of all issues outstanding at today's date between the parties including any allegations in relation to maintenance of the premises." It recorded that the parties had been made aware of the 21 days cooling off period and that after that period, had elapsed, there was no appeal.

8. In accordance with the Act, a decision reached by agreement cannot be adopted by the adjudicator until a period of 21 days has elapsed. As is clear from the terms of the agreement itself, this was explained to the parties. At the conclusion of 21 days, the adjudicator prepared a report to which was annexed the agreement.

9. On the 26th January, 2016, in accordance with the procedures envisaged by the Act, the adjudicator's determination was the subject of a determination order by the P.R.T.B. itself.

10. On the 10th May, 2016, the defendants wrote a four-page letter to the P.R.T.B., some three weeks before they were due to leave the premises, saying that they did not have legal advice when they signed the agreement and that they signed it under duress. They requested the Board to re-open the matter. In the course of the letter, they raised a number of issues, which were also dealt with in the affidavits in these proceedings, referred to below.

11. The Board replied by letter dated the 7th June that it did not propose to reopen the hearing.

12. The defendants did not vacate the premises on the 3rd June, 2016. They have not, as a matter of fact, paid rent since June, 2016. That, it has become clear, is for reasons which have to do with a simple inability to pay because of circumstances in which they find themselves and is not in any way due to wilful default of any kind.

13. The present proceedings were issued by notice of motion in August, 2016, grounded upon an affidavit sworn by the plaintiff landlord. Affidavits of reply were sworn by each of the defendants. A further affidavit was then sworn by the solicitor for the plaintiff, who had been present at the P.R.T.B. hearing on the 4th November, 2015. Further affidavits were sworn by each of the defendants by way of reply to the solicitor's affidavit.

14. The matter came on for hearing before the Circuit Court and by order dated the 7th December, 2016, the Court granted the reliefs sought by the landlord. A notice of appeal was filed on the 7th December and the matter came on for hearing before this Court on the 23rd January, 2017. A stay on the Circuit Court order had been granted until the 6th January. This Court, before Christmas, extended that until the 23rd January 2017, on which date the hearing took place.

15. In their letter to the P.R.T.B. dated the 10th May, 2016, and in their affidavits on this motion, the defendants allege certain matters by way of background to the P.R.T.B. hearing on the 4th November, 2015. In the first instance, they draw attention to the fact that the second defendant has had very serious health problems for many years. I do not think it is necessary to ventilate these personal matters publically, but I have carefully considered all of those medical problems, which are obviously very serious, very severe, and cause debilitating pain. These conditions, she avers, have rendered her unable to pursue her career of playing the piano, composing, and teaching voice, and are also exacerbated by stress. Further, because her daughter, the first defendant, has been acting as her part-time carer, she herself has been unable to find suitable employment. These factors explain their inability to pay rent as of June last year. Secondly, the defendants complain of the plaintiff's behaviour towards them generally, over a long period of time, which they describe as bullying and intimidating. Thirdly, they say that the premises were in a state of serious disrepair but that the plaintiff was always unwilling to make repairs. In this regard, the Court's attention is drawn to an HSE report, which shows a considerable state of disrepair and I note also that this report had been submitted to the P.R.T.B. with their application.

16. The application before the Circuit Court, which is on appeal to this Court, is brought pursuant to s. 124 of the Act. Section 124 of the Act is very specific about the grounds on which a determination of the P.R.T.B., which includes a determination which incorporates an agreement, can be challenged. Section 124 of the Act provides as follows:-

> "(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." (emphasis added)

The italicized text makes it clear that enforcement of a determination is and that 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.

17. As regards the events before the P.R.T.B. on the 4th November, 2015, which fall to be scrutinised according to these tests, there is a degree of conflict of evidence on the affidavits. Having considered those carefully, I find that the following events are likely to have occurred, on the balance of probabilities;

> (a) It has been averred and has not been challenged that the adjudicator started by saying that the applicant appeared to be entitled to recover the property and that it might be appropriate for them to consider resolving matters by agreement. This is significant because it indicates that the adjudicator was indicating that she was likely to rule in favour of the applicant on the strict legal issue of the notice of termination's validity.
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> (b) The adjudicator pointed out that if the defendants had put in a claim for damages before the P.R.T.B., this could have been dealt with up to a maximum of €20,000.
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> (c) The adjudicator said that in the absence of any claim for damages having been made, she could not adjudicate on a claim for damages on that day;
>
> (d) That an agreement could be reached on all issues between the parties, but if so, this would have to be in full and final settlement of all issues, and this would preclude a claim for damages being made in the future;
>
> (d) What was on the table for the defendants on that date was either (i) that the notice of termination would be ruled on, and would likely be ruled to be valid, in which case they would have to vacate by the 4th December 2016; or (ii) they could get an extra 7 months in the house by agreement together with a minor agreement on reimbursement for the purchase of a new oven.

18. A number of matters have been raised by the defendants on affidavit. I have considered each of these and I separate them out in the following way. The first issue is whether they entered into the agreement under pressure or duress. The second is the issue of legal advice. The third is what I take to be effectively an allegation that there was a misunderstanding by the adjudicator of how the Act operates. Fourthly, in issue is the refusal of the P.R.T.B. to re-open the case on receipt of their letter. Finally, an issue was raised as to whether the adjudicator was wrong not to adjourn the proceedings to enable the defendants to make a formal claim for damages.

Whether the defendants entered into the agreement under pressure or duress

19. I have no doubt that the defendants did feel under pressure to enter this agreement, because their options were limited, as described above, namely that the options on the table on that date were that either the notice of termination would be ruled to be valid, in which case they would have to vacate by the 4th December, 2016, or they could effectively buy themselves a period of time, up to seven months, by agreement. However, I think that the core of this pressure came from the circumstances in which they found themselves, namely, that the landlord wanted them to vacate the premises of which he was lawful owner, and from which he was legally entitled to evict them by the 3rd December, 2016. Whether he was bullying and intimidating in the months or years prior to this date, a matter on which I make no finding of fact, has little to do with this fundamental situation. There is a fundamental imbalance in the position of a landlord and tenant which stems from the harsh realities of life; a landlord is entitled to evict a tenant if he wishes to do so, provided he gives adequate and lawful notice. This is so, no matter how long the tenant has been in the property, no matter how well integrated into the area, and no matter how sick he or she is, or how difficult it would be for him or her to move out of the premises.

The issue of legal advice

20. The P.R.T.B. proceedings are relatively informal and it is not necessary to have a lawyer, but indeed, it is worth noting that many litigants before these courts on a daily basis are also unrepresented. Sometimes they enter into settlements and agreements and it has never been accepted that any such agreements entered into are invalid for the simple reason that the parties have not been legally represented. To so find would have very far reaching consequences and I am also conscious that the first named defendant, who represented herself in these proceedings, did so in a very intelligent and articulate way and I am not satisfied that the absence of a lawyer rendered the proceedings so fundamentally procedurally flawed that the Court is entitled to intervene. I should say also that even if the defendants had a solicitor advising them at the time, it is difficult to see what difference it would have made to the fundamental problem facing them, which is the one described above.

The alleged misunderstanding by the adjudicator of how the Act operates

21. It has been argued by the defendants that the adjudicator was wrong to say that she did not have jurisdiction to deal with the issue of damages in circumstances where s. 115 of the Act sets out a full range of reliefs that may be granted, including damages. However, it seems to be that the point being made by the adjudicator was not that she could never award damages, but that she could not do so on that day in the absence of a claim for damages having been made and therefore being formally before her. I am of the view that the adjudicator was correct in this regard. There is a difference between issues which can be dealt with by way of agreement, and issues which can be ruled upon. To put it another way, it is a question of jurisdiction; it seems to me that she was not necessarily wrong in taking the view that she did not have jurisdiction to rule on a claim for damages unless a formal application had been made. The fact that other matters were discussed in the context of the agreement does not in any way contradict that. It is simply that when matters are agreed, the limits on jurisdiction do not apply in the same manner. It also seems to be, on the evidence, that it was explained by the adjudicator that if the parties were to sign up to the agreement it would be in full and final settlement and they would be abandoning any claim for damages in the future.

Refusal of P.R.T.B. to re-open the case

22. It seems to me that there was also a complaint about the failure to re-open the case after the 21 day cooling off period. The defendants have explained the severe pressure under which they were operating during these months and how the second named defendant was severely debilitated. On the other hand, I note that it was not simply a question of missing the time limit by a few days. The letter first intimating a challenge to the decision of the P.R.T.B. was not sent until May, 2016, approximately three weeks before the agreed date for leaving the premises. I am not prepared to find that the decision of the P.R.T.B. to refuse to re-open the case at that stage was somehow in breach of fair procedures or somehow legally invalid.

The failure of the adjudicator to adjourn the case to enable a claim for damages to be made

23. The final matter that was raised was the failure of the adjudicator to adjourn the case. It was argued that, when faced with parties who are unrepresented in circumstances where they had a potentially valid claim for damages, it was up to the adjudicator to adjourn proceedings to enable them to make such a claim so that all matters could be dealt with together in circumstances where she would have jurisdiction to deal with everything, which would have changed, as it were, the bargaining parameters for any agreement. The question of whether or not a case should be adjourned is at the discretion of an individual adjudicator, the P.R.T.B. or any decision making body over which this Court has judicial review-type supervision. It seems to me that this is a decision she made within jurisdiction and one she took in view of whether they understood the options in front of them. It seems to me that it could not be described as a procedural flaw that she did not decide to adjourn the matter; she had the people in front of her on the day and would have had a better view of whether they understood the options and whether they were prejudiced by virtue of a lack of legal advice. This is a decision she reached within her discretion. The courts are traditionally reluctant to interfere with any decisions made within discretion and in the present case I am not prepared to find that the decision was one which was procedurally unjust; it was a decision which she reached validly within her discretion and within her jurisdiction. The other point to be made is that the lodging of a claim for damages was never, in any event, going to affect the termination of the tenancy. At best, and without suggesting that it necessarily would have, such a claim could have led to some damages being awarded which would have offset arrears of rent. It would not have affected the fact that once a valid termination notice had been served, the landlord was entitled to insist on the tenants leaving the premises.

Conclusion

24. As stated at the outset, s. 124 gives a very limited power to this Court to review a decision of the P.R.T.B.. It is not simply the Court taking its own view of what should have happened on the day; there are very narrow procedural grounds for reviewing the P.R.T.B. determination. In my view they are not satisfied here. I do have enormous sympathy at a human level, but I am not entitled to set aside the legal parameters in order to achieve a result that would enable these tenants to live in the premises indefinitely, and particularly in circumstances where they would inevitably be living there rent-free, given their difficult circumstances, which is not a criticism, but merely a reality. The agreement was reached in November, 2015; they had seven months to vacate at that stage; the order of the Circuit Court was made on the 7th December, 2016; and they got a stay over Christmas which was increased until the 23rd January, 2017. In reality, the courts have been as fair and as indulgent as they could possibly be. At the end of the day there is an agreement, which is a valid agreement, which has not been demonstrated to be procedurally unfair or in breach of any of the conditions in s. 124.

25. Accordingly, I will grant the relief sought by the plaintiff and refuse the appeal. I will hear argument as to the length of stay necessary to enable the defendants to assemble their belongings and leave the premises.