

**THE HIGH COURT**

**[2015 No. 229 MCA]**

**IN THE MATTER OF SECTION 123 (3) OF THE RESIDENTIAL TENANCIES ACT, 2004**

**BETWEEN**

**LOUIS HENNESSY**

**APPLICANT**

**AND**

**PRIVATE RESIDENTIAL TENANCIES BOARD**

**RESPONDENT**

**AND**

**JOHN MCSTAY, RECEIVER OVER CERTAIN ASSETS OF DURKAN HOMES (IN RECEIVERSHIP)**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Baker delivered on the 5th day of April, 2016.**

1. The applicant is a tenant of residential premises situated at Capard, Bray Road, Cabinteely, Co. Dublin ("the Premises") which he has occupied as tenant since 2006 with his wife and children. He brings this application by way of appeal from the determination of the Tenancy Tribunal ("the Tribunal") made on the 19th June, 2015, and issued on 29th June, 2015, by which the Tribunal determined that a notice of termination served by his landlord was valid.

2. The respondent is the Private Residential Tenancies Board ("the PRTB"), the body established by the Residential Tenancies Act, 2004 ("the Act of 2004") to determine disputes between landlords and tenants of residential premises.

3. The notice party was, on or around the 10th November, 2011, appointed receiver over certain assets of Durkan Homes, including the Premises, and served a notice of termination on the 11th June, 2014, specifying the date of the 3rd October, 2014, as the date on which the tenancy was said thereby to be determined.

4. This judgment is given in the appeal by the applicant pursuant to s.123 (3) of the Act of 2004, and is concerned with the net legal question of what must be contained in a valid notice of termination served under the provisions of the legislation, when a tenancy is terminated because a landlord intends to sell the premises the subject matter of the tenancy.

**Background**

5. It was accepted that the applicant has resided in the Premises with his family as tenant since 2006, and that he has the benefit of a so-called Part 4 tenancy. On the 1st June, 2012, the receiver served a notice of termination on the stated ground that he intended to sell the Premises. The dispute as to the validity of the notice of termination was submitted for dispute resolution before an adjudicator of the respondent, who on the 4th February, 2013, determined that the notice of termination was invalid. The frailty noted in that adjudication is also found in the notice of termination the subject matter of this appeal, namely that the notice of termination did not specifically say that the landlord intended to sell within three months of the termination of the tenancy.

6. The applicant entered into a new letting of the Premises on the 3rd April, 2013, and on the 11th June, 2014, the receiver served a notice of termination in respect of that tenancy, in identical or broadly identical terms to that the subject matter of the adjudication made on the 4th February, 2013.

7. The tenant submitted the dispute as to the validity of the second notice to the respondent, and on the 2nd December, 2014, an adjudicator determined that the notice was valid. The applicant lodged an appeal to that finding which was heard by the Tribunal on the 27th May, 2015, and it is from its determination of the 29th June, 2015, that this appeal is brought.

**Grounds of appeal**

8. The applicant claims that the Tribunal erred in law in its analysis of the provisions of ss.34 and 62 of the Act of 2004, and in coming to a determination that the termination notice dated the 11th June, 2014, was effective to terminate his tenancy in the Premises. In particular it is asserted that the notice served on the 11th June, 2014, was not valid and did not comply with the requirements of s.34 (a) (ii) of the Act and para. 3 of the Table to that section. There is also a plea that the notice is not valid in that it does not conform to the requirements of s.62 of the Act, and in particular ss.62 (1) (d) and 62 (1) (e).

9. Section 123(3) of the Act of 2004 provides for an appeal to the High Court on a point of law. It has been established in a number of cases, including in *Tully v. Private Residential Tenancies Board and Anor* [2014] IEHC 554 and my judgment in *Doyle v. Private Residential Tenancies Board* [2015] IEHC 724, that the High Court will show a degree of deference to the PRTB as an expert administrative tribunal which performs its functions with a high degree of expertise. However, the point raised by the applicant is a legal one in the pure sense, in that it is grounded on an argument that the statutory requirements as to the contents of a notice of termination were not met. I consider that the appeal raises an issue of law which may properly be determined by the High Court pursuant to s.123 (3) of the Act of 2004, and the question raised is a question of pure law involving a matter of statutory interpretation. I turn now to examine the requirements of the legislation.

**The Act of 2004: the Part 4 tenancy**

10. The Act of 2004 is set out in a number of Parts, each containing chapters of varying lengths. Part 4 sets out a scheme by which certain tenants of residential premises enjoy the benefit of a degree of statutory security of tenure. A tenant who has been in occupation of a residential dwelling for a continuous period of 6 months enjoys the benefit of protection as outlined in Chapter 2 of

that Part, primarily the right to continue in possession as tenant for the period of four years from the commencement of the tenancy, or until the expiration of a period of notice, whichever is the later. A tenancy continued by virtue of the provisions of s.28, after the initial period of six months, is described in s. 29 as a "Part 4 tenancy", and a tenant holding under such a tenancy may remain in possession as tenant unless the tenancy is lawfully determined in accordance with the requirements of Chapter 3.

11. Chapter 3 of Part 4 identifies the extent of the protection offered to a person holding under a Part 4 tenancy, and provides that such tenancy may not be terminated by the landlord save in accordance with s.34, and for the reasons therein identified.

12. Essential to the scheme of the legislation is that a landlord may terminate a Part 4 tenancy for certain identified reasons, but may do so only by notice by which is cited one of these reasons said to justify termination. It is convenient to set out here the relevant parts of s.34:

"34.—A Part 4 tenancy may be terminated by the landlord—

(a) on one or more of the grounds specified in the Table to this section if—

(i) a notice of termination giving the required period of notice is served by the landlord in respect of the tenancy, and

(ii) that notice of termination cites as the reason for the termination the ground or grounds concerned and, in the case of paragraph 4, 5 or 6 of that Table, contains or is accompanied by the statement referred to in that paragraph.

13. The section contains a Table setting out the grounds on which the tenancy may be terminated within the statutory period of protection, the relevant part 3 of which reads as follows:

"3. The landlord intends, within 3 months after the termination of the tenancy under this section, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling."

14. It will be apparent from the provisions of s.34, that a Part 4 tenancy cannot be terminated by a landlord save on notice given expressly for one of the reasons identified in s.34, and the relevant reason must be cited in the notice of termination. Further, a tenant is entitled to continue in occupation for the statutory period unless the landlord can show that one of the six grounds identified in the Table to s. 34 exists.

15. I turn now to consider the separate requirements of s.62.

#### **Part 5 of the Act of 2004: the form of the notice of termination**

16. Part 5 of the Act of 2004 sets out the formal and procedural requirements for termination of a tenancy. That Part makes provision for termination in respect of all residential tenancies, and not merely of those to which Part 4 applies and from which they derive the benefit of statutory security of tenure. Section 57 sets out as follows:

"57.—The purpose of this Part is to specify the requirements for a valid termination by the landlord or tenant of a tenancy of a dwelling, whether the dwelling is—

(a) one to which this Act applies but to which Part 4 does not apply (by reason of the operation of section 25), or

(b) one to which both this Act and that Part applies (in which case those requirements are in addition to the requirements of that Part with regard to the termination of a Part 4 tenancy or a further Part 4 tenancy)."

17. Section 62 is contained in Part 5 of the Act, and deals with notice periods and other procedural requirements to terminate a tenancy protected by the legislation. Section 62 sets out the requirements for a valid notice of termination as follows:

"(1) A notice of termination to be valid shall—

(a) be in writing,

(b) be signed by the landlord or his or her authorised agent or, as appropriate, the tenant,

(c) specify the date of service of it,

(d) be in such form (if any) as may be prescribed,

(e) if the duration of the tenancy is a period of more than 6 months, state (where the termination is by the landlord) the reason for the termination,

(f) specify the termination date, that is to say, the day (stating the month and year in which it falls)—

(i) on which the tenancy will terminate, and

(ii) on or before which (in the case of a termination by the landlord) the tenant must vacate possession of the dwelling concerned, (and indicating that the tenant has the whole of the 24 hours of the termination date to vacate possession),

and

(g) state that any issue as to the validity of the notice or the right of the landlord or tenant, as appropriate, to serve it must be referred to the Board under Part 6 within 28 days from the date of receipt of it.

(2) Subsection (1) is without prejudice to Chapter 4 and section 81 (3) (which specify additional requirements in respect of a tenancy that has been sub-let)."

18. As can be seen, s.62(1)(e) requires that if the duration of the tenancy is a period of more than 6 months, i.e. if the tenancy is a Part 4 tenancy and has the benefit of the protection contained in that Part, the reason for the termination must be stated.

## The arguments

15. The notice of termination in respect of which this appeal is brought was served on the 11th June, 2014, and expired on the 3rd October, 2014. The relevant reason for the termination identified in the notice is as follows:

"I require vacant possession of the above property as I intend to sell the property"

19. The appellant argues that the notice of termination was defective in that it failed to expressly state that the landlord required vacant possession because he intended to enter into a contract for sale within three months of the date of termination. The landlord did sell the Premises and the evidence is that a sale closed in and around the 15th December, 2014. No issue arises in regard to that fact. No challenge was made to the length of notice or to the other contents of the notice of termination, and it is common case that the notice was in writing signed by the landlord and did specify the date of service and the termination date.

20. The appellant argues that the provisions of s.34 expressly provide that a notice of termination sent in reliance on the fact that the landlord intends to sell a premises must of a matter of statute state that he intends to sell within three months of termination, and that this construction is necessary to give full effect to the statutory protection afforded to residential tenancy under the legislation. It is argued in the circumstances that the notice was not in accordance with the requirements of ss.62 (1) (e) and 62 (1) (e) of the Act of 2004. It is asserted in simple terms that for a notice of termination to be valid for the purposes of terminating a Part 4 tenancy it was required as a matter of law not merely to state, as the notice in the present case did state, that the landlord intended to sell the premises, but that it must state that he intended to sell the premises within three months of the termination of the tenancy.

21. The respondent argues on the other hand that the requirements are directory and not mandatory, and that the notice served by the receiver in the present case sufficiently identified the reason for termination. The respondent argues that the reason given in the notice of termination was that identified in part 3 of the Table to s.34, and that the tenant could not have had any doubt that this was the reason justifying termination.

22. Counsel agree that the matter is one to be determined in accordance with the principles of statutory interpretation.

## Discussion

23. The Act establishes the entire rights and obligations of the landlord and tenant of residential premises, and the common law requirements regarding the contents and form of a notice to quit have no application. The scheme is intended to make compliance a wholly statutory measure. This has the effect that from the point of view of statutory interpretation one must look first to the language in the relevant provisions, and then, if necessary for the purposes of interpretation, to the scheme or purpose of the Act and/or the relevant section or part.

24. It is clear that the intent of the Act of 2004, in particular the provisions of parts 4 and 5 are to provide a degree of security of tenure to a tenant of residential premises. This is also apparent from the long title of the Act of 2004 which recites the purpose of the Act as the wish to make provision :

"...in accordance with the exigencies of the common good, for a measure of security of tenure for tenants of certain dwellings."

25. The security of tenure is not absolute, however, and a landlord may terminate a Part 4 tenancy for one of the reasons identified in s.34, by which is limited the power of a landlord to terminate, and these reasons justifying termination must be seen as the sole grounds on which termination can validly occur.

26. Laffoy J. in *Canty v. Private Residential Tenancies Board* [2007] IEHC 243 expressed the view that the provisions of the Act of 2004 for the valid termination of a Part 4 tenancy are "very technical and confusing", and although she made that observation in the context of the requirements of a valid termination notice where there was an alleged non-payment of rent, her description seems to me to be appropriate in respect of the other provisions providing for termination now under consideration in this appeal. The matter does not lend itself to an obvious answer. The difficulty in interpretation is regrettable, as another other recited aim of the legislation was to provide an inexpensive and speedy means by which disputes between parties to a residential tenancy would be resolved, and the Board was established for that purpose. All disputes between landlords and tenants of residential premises are now dealt with before the Board.

27. There are a number of provisions in the legislation that must be considered. In the first place, by virtue of s.34 (a) (ii) a notice of termination served on the basis of three of the six statutory grounds must be accompanied by a written statement containing a high degree of specificity as to the factual nexus surrounding the matter giving rise to termination. Where the landlord requires the dwelling for his or her own occupation or that of a member of his or her family, where the landlord intends to renovate or refurbish the premises, or where the landlord intends to change the use of the premises, the Act expressly requires that the notice of termination be accompanied by a statement specifying certain matters therein set out. In the case where a landlord requires a dwelling for the purposes of his occupation or that of his family, the notice must be accompanied by a written statement stating the identity of the intended occupant and the expected duration of that occupation. A similar requirement that a written statement accompany a notice of termination in the case of the other two specified grounds is provided in the subsection.

28. The section does not require that in the case of a notice of termination served on the ground that the landlord intends to sell the premises, that the notice be accompanied by a statement setting out details of such proposed sale. Section 34 requires the notice to cite the reason for termination, and there is no requirement that in the case of a notice of termination served because the landlord intends to sell the premises that the notice of termination be accompanied by a statement setting out the particulars of the intended sale. The reason for this may be that whilst the landlord must intend to enter into an enforceable agreement for the transfer of the premises within three months of the notice of termination, he may not always have negotiated a contract for sale at the time of the service of the notice, and in most cases the contract will not yet be entered into. The legislature must have regarded it as unnecessary to require the landlord to identify the purchaser, the intended or agreed sale price, the auctioneer with carriage of sale, or other matters of fact surrounding the sale. It is sufficient if the notice states that the reason is the intention to sell within the statutory period. The omission of a requirement that details of the sale be specified in a written statement accompanying the notice of termination does not mean however, that the notice must not correctly state the reason for termination, and do so with sufficient accuracy and specificity.

29. Counsel for the respondent points to this difference as being a statutory basis justifying the conclusion that the section does not mandate a particular a form of notice of termination in the case of a tenancy that is terminated on account of an intention by the landlord to sell the premises. The legislation makes provision for the fixing by legislation or statutory instrument of a statutory form of

notice, but none such statutory form has yet been promulgated, and the matter is free of authority.

30. I consider that counsel for the respondent is correct and the requirements of s.62 do not mandate a particular form of the notice of termination. Section 62 merely requires that the reason for the termination be identified. In the absence of such a prescribed form, the requirement is that the tenant be sufficiently informed of the reason for termination. The matter comes to be considered in the context of the dicta of Henchy J. in the State (Elm Developments Ltd.) v. An Bord Pleanála [1981] I.L.R.M. 108, where he distinguished between a strictly mandatory statutory requirement and a directory requirement, and that the latter is satisfied if the requirement is met in substance and not necessarily in accordance with the exact language of a provision. I adopt the following statement of Henchy J. in that decision as follows:

*"Whether a provision in a statute or a statutory instrument, which on the face is obligatory (for example, by the use of the word "shall") should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory instrument, the court will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."*

31. I consider that the requirements of s.62 are mandatory in the sense that a notice of termination is valid only if it is in compliance with the express requirements of that section, and states the reason for the termination. However, the fact that no particular form of notice is mandated, of itself is not sufficient to resolve the question. The interplay between the provisions of Part 5, as the source of the formal requirements of the content and form of a notice of termination, and Part 4 must also be considered and in particular whether Part 5 is to be seen as the sole repository of the statutory requirements with regard to the form of a notice of termination. At first reading it might seem to be the case, as argued by the respondent, that Part 4 is concerned with security of tenure, and Part 5 with the form of a notice, and I turn now to examine this proposition

32. It is clear that the purpose of s.34 is to identify a series of exceptions to the right of the tenant to remain in occupation as tenant for the statutory period of protection, but also to afford certain identified and limited grounds on which the tenancy may be terminated by the landlord.

33. Section 62 on the other hand sets out detailed provisions as to the contents of a notice of termination, and deals with the form of the notice, rather than the basis or reason for which a notice may be served and a tenancy terminated. Section 62(1)(e) provides that for the purpose of terminating a tenancy which has continued for a period of more than six months, a notice of termination must state the reason for the termination. Clearly, the reason must be one or more of the six reasons or grounds identified in s.34. If not, the notice of termination will not be effective to terminate the tenancy.

34. However, central to interpreting the scheme of the legislation seems to me to lie the fact that s.62 makes it clear that the requirements contained in Part 5 are in addition to and not in substitution for those in Part 4. Thus, in the case of a notice to terminate a Part 4 tenancy the notice must comply both with the requirements of s.62 and those in s.34, and in the case of termination by reason of an intention to sell, that reason must be stated.

35. Section 57(b) provides that the procedural requirements in Part 5 of the Act are in addition to the requirements contained in Part 4 with regard to the provisions relating to the termination of a Part 4 tenancy or a further Part 4 tenancy. Part 5 in other words deals with the notice periods and of the procedural requirements for determination of all residential tenancies, and Part 4 is specific to the requirements for the termination of a Part 4 tenancy, and the Act clearly identifies that in the case of the termination of a Part 4 tenancy, as in the present case, the requirements are cumulative. This has the effect that a landlord who seeks to terminate a Part 4 tenancy must comply with both ss.34 and 62.

36. This has the effect that s.62 is not the sole source of the requirements with regard to what is to be contained in a notice of termination, and while it has the appearance of being so, having regard in particular to the heading in Part 5 which identifies it as containing the procedural requirements for termination, it is clear from the provisions of s.57 (b) that a landlord may terminate a Part 4 tenancy only if he complies with the requirements of ss.34 and 62, and s.62 itself makes it clear that the requirements therein set out are in addition to those of s.34.

37. The reason must therefore be one of the six justifying reasons identified in the Table to s.34. In construing s.34, it cannot be ignored that the time frame of three months within which it is intended to sell is quite short, and in that context a landlord may terminate a tenancy on the grounds of an intended sale only if he has taken some preliminary steps to place a property on the market, as it would not always or perhaps usually be possible for an owner to predict that he or she would make a binding contract for sale within three months of placing the premises on the market. A landlord may not seek to recover possession of premises the subject matter of a Part 4 tenancy merely on account of a general intention on his part to sell the premises, and the intention must be to sell within three months and not merely, for example, to place the property on the market to test the market or to place the property on the market and wait a period of time until the appropriate price is achieved. The intention must be one to enter into a binding contract within three months of the termination of the tenancy, and that intention must exist before a notice of termination can validly be served. That in many cases will involve the requirement that the landlord has identified a potential purchaser, or commenced negotiations towards an eventual sale. Because of the short time frame of three months, it does not seem to me that the Oireachtas intended permitting termination of a Part 4 tenancy merely in anticipation of the commencement of the sale or advertising process. I would not go so far as to say that the intention was that a notice of termination could be served only in the context of an identified sale, but the legislation in my view envisages more than a mere intention to sell, and requires a landlord to have as a matter of fact, and to state, that he intends to bind himself to a sale within three months of termination.

38. Thus, I consider that the operative reason for termination on account of ground 3 in the table to s.34 is not that the landlord intends to sell the premises, but that he intends to bind himself to a contract for sale within three months of termination. There is a difference in emphasis and meaning between the two statements of intent, and that difference is relevant and central to the protection afforded by the legislation. An intention to sell simpliciter is not sufficient to terminate.

#### **Civil and criminal sanction for abuse**

39. I consider that certain assistance may be obtained in the provisions of s.74 of the Act which makes a criminal offence, the service of an invalid notice of termination in certain circumstances. This provision shows the extent of the seriousness with which the Oireachtas regarded the importance of providing security of tenure to the tenants whose tenancy was protected by the legislation.

40. Furthermore, Chapter 7 of Part 4 of the Act provides in s.54 that the parties to a residential tenancy agreement may not contract

out of the terms of that Part. Section 56 provides for the award of damages for abuse of the termination procedure contained in s.34. Specifically in the case of ground 3, where the notice of termination is served because the landlord intends to sell the premises within three months of termination, there is provision for the award of damages to a tenant when that is not done within the period of three months, and the tenant has vacated the dwelling on foot of that notice, redress is sought before the Board which may, inter alia, make a direction that the landlord pay an amount by way of damages for the deprivation of the tenancy and the right of possession, and/or may make a direction that the tenant be permitted to resume possession of the premises. Again, these provisions make it clear that the Oireachtas considered the statutory protection to be important and that breach of the requirements sounds both in criminal and civil law.

41. While of course a tenant and a landlord can be presumed to know their respective rights under the tenancy agreement, the legislation is intended to be protective of the rights including the right of security of tenure of the tenant, and accordingly, I consider that the purpose of the legislation is fully served only if the notice of intention sets out that the landlord intends to sell within three months of the termination of the tenancy. An alternative approach could lead to potential abuse, in that a landlord may serve a notice identifying an intention to sell, and the tenant may not have a sufficient indication of the intention to sell within the statutory period to be watchful or mindful of the circumstances that might evolve following the tenant quitting possession on foot of the notice. If the notice does not identify that the intention is an intention to enter a binding contract for sale within three months then the legislative intention of the Act of 2004 taken as a whole, may be defeated. A tenant may not be for example in a position to know that the time frame in which such intention must be manifest is the short period of three months after termination. The purpose of the legislation is to permit a landlord to re-take possession only if he can show an immediate intention to bind himself to a sale within three months. In the absence of an express identification of such circumstances, it seems to me that certain risks exist that the tenant will not be alert to the entitlement to seek redress under s.56 of the Act.

42. Accordingly, for the legislation to be fully operative, and to achieve its stated aim of providing a measure of security of tenure for the tenants of residential premises, it seems to me that the notice is required to set out the ground as identified in the Table to s.34 namely, that the landlord intends within three months after the termination of this tenancy to enter an enforceable agreement for sale. Any other notice would merely express the intention of the landlord to sell, and such an intention is not sufficient to trigger the entitlement of the landlord to terminate. The reason for the termination is not that the landlord intends to sell, but that he intends to bind himself to a contract for sale within the statutory period of three months.

43. Accordingly, because I do not consider that the provisions of the legislation must be read such that s.62 is the sole source of the statutory requirement of the contents of the notice of termination, I consider that the notice of termination did not sufficiently identify the express ground on which the landlord relies, namely the ground identified in Part 3 of the Table to s.34. That ground does not entitle a landlord to terminate merely on account of the intention of the landlord to sell, but only should the intention be to bind himself to a contract to sell within the relatively narrow timeframe which is expressed in the legislation.

44. For these reasons, I consider that the determination of the tenancy tribunal was incorrect, and that as a matter of law a notice of termination served on the grounds that the landlord intends to sell the premises must identify that the landlord's intention is an intention in accordance with the statutory scheme, namely an intention to sell within three months of the termination of the tenancy.

45. Therefore, I will allow the appeal and answer the question therein raised as follows: A notice of termination served by a landlord who intends to sell the premises the subject matter of a Part 4 tenancy must contain a statement of the grounds contained in the s.34, namely, that the landlord intends to enter into a binding contract for sale within three months of the termination of the tenancy and to enter into an enforceable agreement for the transfer for full consideration of his or her interest in the premises. Variations may arise if the landlord intends to sell a premises comprising an area greater than that the subject matter of the Part 4 tenancy but that factual situation did not arise in this case. The notice does not require to be expressed in the precise form of the statutory provisions, but the information cited must sufficiently identify that the intention is to conclude a contract for sale within three months.