Neutral Citation: [2016] IEHC 308

THE HIGH COURT

2015/221/MCA

BETWEEN:

AJAY MARWAHA

Appellant

– and –

RESIDENTIAL TENANCIES BOARD

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 7thJune, 2016.

Part 1: Background

1. Following complaint by the landlord, an adjudicator appointed by the Residential Tenancies Board determined, after a hearing on 9th December, 2014, that Mr Marwaha had been served with a valid notice of termination on 29th October, 2014, arising from the non-payment of rent. The adjudicator directed that Mr Marwaha vacate the premises within 28 days of the adjudication. He also directed the payment of (a) certain outstanding rent and (b) an amount by way of damages for breach of the rent-payment obligation.

2. Mr Marwaha appealed this adjudication to a Tenancy Tribunal. Following a hearing of 15th May, 2015, the Tribunal, in a determination order of 3rd July, 2015, rejected the appeal, concluded that the notice of termination of October 2014 was valid, and directed that Mr Marwaha vacate the premises within 28 days and pay certain outstanding rent. It is against this determination order that Mr Marwaha brings the within s.123 appeal. His grounds of appeal are eight-fold. Thus he maintains that:

> (1) the Residential Tenancies Board (he equates the Board and Tenancy Tribunal) failed to act in accordance with s.121 of the Act of 2004;
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> (2) the decision was made against the weight of evidence;
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> (3) the Residential Tenancies Board failed to take into account that he had been a tenant dwelling in his apartment for more than 10 years;
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> (4) no tribunal acting reasonably could have made the decision that it did, having regard to the evidence;
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> (5) the Board failed to take into account that no physical evidence of service of the notice of termination was produced before it;
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> (6) the Board failed to take into account that no witness was produced who was present while delivering the termination documents;
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> (7) the decision overruled the Act of 2004, as amended [sic]; and
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> (8) as the court understands this ground, Mr Marwaha's legal rights as tenant were not respected in accordance with law.

Part 2: Some Applicable Law

A. General.

3. Before considering the various grounds of appeal raised by Mr Marwaha, the court turns first to consider various cases to which it has been referred by counsel for the Board in order more clearly to identify what a s.123(3) appeal embraces, those cases being *Canty v. Private Residential Tenancies Board* [2007] IEHC 243, *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48, *Tully v. Private Residential Tenancies Board* [2014] IEHC 554, and *Doyle v. Private Residential Tenancies Board* [2015] IEHC 724.

B.Canty v. Private Residential Tenancies Board

4. This was a s.123(3) appeal in which Laffoy J.made the following observation as to the role of the court on appeal, under the heading "Item 13":

> *"In effect, what the applicant is asking the court to do is to review the decision of the Tribunal on the merits. As counsel for the Board point out, that is not permissible on an appeal under s.123(3). On an appeal under that provision it is not open to the court to set aside a finding of fact made by the Tribunal unless there was no evidenceto support it. Counsel for the Board referred the court to the dictum of Finlay C.J. in O'Keeffe v. AnBordPleanála [1993] 1 IR 39 (at p.72) in which he stated:*
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> *"I am satisfied that in order for an applicant for judicial review to satisfy a Court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the Court that the decision-making authority had before it no relevant material which would support its decision."*
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> *That passage, in my view, certainly outlines the appropriate principle in the judicial review context. Perhaps more apposite for present purposes is a statement of Kenny J., speaking for the Supreme Court, in Mara (Inspector of Taxes) v. Hummingbird Limited [1982] 2 ILRM 421 in reference to findings of fact in a case stated by an appeals commissioner*

under the Income Tax Act, 1967. Having pointed out that a case stated consists in part of findings of fact on questions of primary fact, Kenny J. stated that the findings on primary facts should not be set aside by the court unless there was no evidence whatever to support them. That statement was approved of by the Supreme Court in the context of an appeal under s.300(4) of the Social Welfare (Consolidation) Act, 1981 in Henry Denny& Sons (Ireland) Limited v. Minister for Social Welfare [1998] 1 I.R. 34 (at p.47)."

5. Notably, counsel in *Canty* clearly considered that the s.123 procedure was akin to a judicial review whereas Laffoy J., consistent with a trend in the case-law which the court returns to in its consideration of *Tully* later below, thought it had more in common with a case stated. The form and nature of appeals, including s.123 appeals and, to a lesser extent, the difference between them and judicial review applications, was subsequently considered by Clarke J. in *Fitzgibbon*, on which see below.

C. Fitzgibbon v. Law Society of Ireland [2014] IESC 48

6. In his judgment in *Fitzgibbon*, a case in which a solicitor was challenging certain sanctions imposed on her by the Law Society, Clarke J. analysed in some detail the nature of a de novo appeal, an appeal on the record, an appeal against error, and an appeal on a point of law. The reader is referred to that judgment for the nuances of Clarke J.'s analysis. Table 1(overleaf)seeks to identify in summary form the principal differences that Clarke J perceives to arise between the various categories.

7. Clarke J. does not seek in *Fitzgibbon* to engage in the *"difficult but important task"* (para.8.1) of defining the precise boundaries of judicial review. Even so, it is perhaps notable that the only critical difference he expressly identifies between an appeal on a point of law and judicial review is that *"[I]t must be assumed that, by conferring a right of appeal, the Oireachtas intended that some greater review is permitted than that which would have applied, in the context of judicial review"*(para.8.2). In practice, it does seem that the boundary between on the one hand (in an appeal on a point of law) identifying an error of law in the determination or process of determination of a first-instance decision and, on the other hand (in a judicial review application) considering the procedural or substantive lawfulness of a challenged decision, is oftentimes blurred. It is not for nothing that what is ostensibly a judicial review application regularly looks and sounds, at hearing, like an appeal on a point of law. In effect, if not in substance, the two are often similar. Indeed, the lesson that this Court respectfully takes from Clarke J.'s comprehensive analysis in Fitzgibbon is that, given the sometimes nuanced differences that he identifies between various forms of appeal, and the oftentimes elusive distinction in practice between an appeal on a point of law and a judicial review, the law in this regard might helpfully be simplified.Is there perhaps a case for merging appeals against error, appeals on a point of law and judicial review into an omnibus avenueto relief, leaving but three clear-cut categories of appeal, all readily understood and offering clear remedies: de novo appeals, appeals on the record, and an omnibus appeal against error, suitably defined? Perhaps. But that issue is for another place and time, and in truth is not a matter that can properly be resolved by the courts. For the purposes of this judgment, suffice it to note that the observations of Clarke J. in Fitzgibbon succinctly identify the law as to how to this Court is to proceed in this appeal.

D. Tully v. Private Residential Tenancies Board

8. *Tully* was another s.123(3) appeal. It is of interest because in that case Keane J., following a consideration of applicable case-law agreed, at para.20, with, inter alia, the observation of McKechnie J. in *Deely v. The Information Commissioner* [2001] 3 I.R. 439. 452, that *"There is no doubt but that when a court is considering only a point of law, whether by way of restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles."* Keane J. also agreed with the approach taken by Laffoy J. in the above-quoted extract from her judgment in Canty that, by reference to the decision in Mara, it was more correct to treat an appeal on a point of law as akin to a case stated than a judicial review (as appears to have been contended by counsel in that case). Indeed Keane J., at para.20, refers to Canty as being *"in common with the present case [Tully] …an appeal by way of case stated under s.123".*

9. It is clear from Keane J.'s analysis in *Tully* that there is aline of case-law that considers a case stated to be akin to an appeal on a point of law. As to the separate matter of the distinction between (a) an appeal on a point of law and(b) a judicial review, which Keane J. did not have to consider,this Court would refer to the points made above and would but add that(i) the fact that a case stated would be treated as akin to an appeal on a point of law, and (ii) the border between an appeal on a point of law and a judicial review is uncertain in principle and oftentimes unrecognisable in practice, would not have as its necessary result in logic or in law that (iii) a case stated is akin to a judicial review.That is an association fallacy which can quickly be disproved by means of Euler's science.

E.Doyle v. Private Residential Tenancies Board

10. Doyle was yet another s.123(3) appeal. Baker J., in her judgment in that case, refers, at 4, to *"[t]he distinction between an appeal on a point of law created by a statutory appeal mechanism and a judicial review [being]…one in respect of which there is some judicial authority, but the authorities point to some difficulty in defining the exact line of demarcation between them".* Baker J. then proceeds to consider, inter alia, Fitzgibbon, Mara, Deely, and Canty. When it comes to Fitzgibbon, Baker J. refers to the above-quoted observation of Clarke J. in which he propounds that it must be assumed that, whenit confers a right of appeal on a point of law, the Oireachtas intends that some greater review is permitted than that which would have applied, in the context of judicial review. Addressing this aspect of matters, Baker J. elaborates as follows, at 8:

> *"19. I consider that this dicta points to the proposition that when the Oireachtas provides a statutory right of appeal on a point of law, it must have intended some greater degree of court involvement with the decision than the perhaps more constrainedapproach taken by a court on judicial review. The distinction does allow a court hearing an appeal on a point of law to set aside a decision within the jurisdiction where perhaps the evidence was sufficient to support a finding but where the decision was vitiated by legal error. It may also not involve an element of curial deference in a suitable case.*
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> *20. The appeal on a point of law, then, gives a wider scope to a court to reverse or vary a decision of the body at first instance, and while that is not to say that the court will set aside a finding of fact, more important for present purposes, it does suggest that a court hearing a statutory appeal may set aside a finding which arises from an incorrect interpretation of the law or of legal documents, including contractual documents which bear on the dispute, or a mixed question of law and fact."*

11. The court notes Baker J.'s reference to *"the perhaps more constrained approach taken by a court on judicial review"* and the implicit suggestion which this observation appears to entail that, in reality, a judicial review can be as rigorous as an appeal on a point of law, with the result that it is not always easy to distinguish clearly between the practical operation of the two. That aside, as can be seen from Table 1, all of the above-quoted text is consistent with Clarke J.'s observations in Fitzgibbon, except as regards the additional gloss as to curial deference.

12. In this last regard, i.e. when it comes to the issue of curial deference, there appears to be a divergence between the obiter

observations of Clarke J. in *Fitzgibbon* and those of Baker J. in *Doyle*. When Clarke J., in *Fitzgibbon*, considers an 'appeal against error' he spends some time emphasising the need for curial deference by reference to such 'old reliable' precedents in this regard as the observations of Hamilton C.J. in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34, 37-8, and those of Keane C.J. in *Orange Communications Ltd. v. Director of Telecommunications Regulation* [2000] 4 I.R. 136, 185. When he then moves on to an 'Appeal on a Point of Law', Clarke J. states, at para.7.4 of his judgment, 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."* Thus Clarke J. appears to envision a heightened degree of curial deference in the context of an appeal on a point of law whereas Baker J. appears to contemplate that a lower degree of curial deference may, at least sometimes, be merited. The issue presenting between their judgments in this regard does not arise for resolution in the within case. This Court would but note that no notion of curial deference requires that a judge ever operate as a judicial jobsworth, sheathing the sword of justice within the scabbard of deference.

F. An Attempted Synthesis of Principle
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

14. These principles do not fall to be applied in a vacuum; nor do they give the court some free-wheeling authority to embark upon a consideration of the Tenancy Tribunal's determination. Rather they fall to be applied by the court in the context of the various grounds of appeal raised by Mr Marwaha, to which the court now turns.

Part 3: Mr Marwaha's Grounds of Appeal

A. General.
15. The bulk of Mr Marwaha's submissions at the hearing of this appeal comprised a re-threshing of the facts that he raised before the Tenancy Tribunal concerning how he has been, by his reckoning, unfairly 'picked upon' by his landlord. These are matters that – however regrettable their occurrence, if they in fact occurred – the court cannot consider in an appeal of the present nature. The court turns therefore to the grounds mentioned in Mr Marwaha's notice of appeal.

A. Failure to Comply with Section 121?
16. Section 121(1) requires, so far as relevant to these proceedings, that an adjudicator's adjudication and a Tenancy Tribunal determination shall be committed to writing by the Board and issued to the parties concerned. Section 121(2) makes provision as to what a determination order shall contain. Section 121(3)-(8) makes incidental provision. The Board has complied with these provisions, evidence has been put before the court that the requisite documentation was despatched, and patently Mr Marwaha has received the documentation as that documentation formed the basis of his appeal to the Tenancy Tribunal and his appeal to this Court. So, as a matter of fact, s.121(1) has been complied with and no point of law presents.

B. Determination Against Weight of Evidence.
17. Having regard to the bases identified above in which the court could now interfere with the Tenancy Tribunal's determination, there is no basis presenting. It is not that there is some basis there which the court is rejecting: there is no basis presenting. The Tenancy Tribunal identified that there was a non-payment of rent, looked to the substance of the notice of termination, found (correctly as it happens) that the notice was valid in law, and proceeded accordingly.

C. Failure to take Account of Length of Tenancy?
18. The duration of Mr Marwaha's tenancy is, with every respect, an irrelevance in the context of the within proceedings. Because the Tenancy Tribunal was satisfied that Mr Marwaha was in breach of his rent-payment obligations, a 28-day notice of termination fell to be served, and was.

D. Evidence Did Not Support Determination?
19. See the court's answer to B.

E. Absence of Evidence of Service?
20. Under s.6(1)(b) of the Act of 2004, notice of termination may be served by leaving it at the address at which the addressee ordinarily resides. As a matter of prudence, a landlord might wish to send a notice of termination by post and retain a certificate of postage. But there is no requirement that this be done. The issue of service was raised before the Tenancy Tribunal; it accepted the evidence of the landlord's agent that good service of notice had been effected under s.6(1)(b). This it was entitled to do; there was a sound evidential basis for it to do so;and there is no error of any nature arising in this regard.

F. No Witness to Service?
21. See the court's answer to E.

G. Decision Overruled Act of 2004?
22. The court does not know what this means. If it is intended to suggest that there was some error in law on the part of the Tenancy Tribunal, the court does not see any such error presenting.

H. Legal Rights as Tenant Not Respected?
23. The Tenancy Tribunal considered the termination of Mr Marwaha's tenancy to be lawful. There is no point of law presenting as regards this or any other aspect of the Tenancy Tribunal's determination.

Part 4: Joining the Landlord
24. Before proceeding to its final conclusion, the court would note that it appears contrived and contrary to natural justice that the landlord who owns the property in which a tenant dwells, and who has a direct interest in the outcome of an appeal such as this, should be reduced, as here, to the status of uninvolved spectator in the well of the courtroom while, but a few feet away, the Residential Tenancies Board and the tenant joust before the judge. As the court has, in this case, reached a conclusion that is adverse to Mr Marwaha, and doubtless welcome to the landlord, the fact that the latter is not a notice-party has no practical consequence here. Nor has the failure to join the landlord had any bearing on the court's reasoning. Even so, it is not appropriate that the landlord was not joined to these proceedings.

Part 5: Conclusion
25. Mr Marwaha impressed the court as a soft-spoken gentleman. He considers himself to have been treated unfairly, perhaps even with some discourtesy, and it is to be regretted that he feels this way. The lot of a tenant is not an easy one,and likelyany of us who have lived in rented premises have tales galore to recount. The court trusts that the extra time it has allowed Mr Marwaha between its indication at the end of the hearing as to what its decision would be, and the delivery of this reserved judgment, has facilitated him in finding alternative accommodation. However, the court must do right by law and, in fairness to the Residential Tenancies Board, andindeed to the landlord affected, Mr Marwaha has identified no basis on which this Court could make any order upsetting the determination of the Tenancy Tribunal.As a consequence, thecourt must regretfully reject Mr Marwaha's appeal.