THE HIGH COURT

[RECORD NO. 2017/208/MCA]

BETWEEN

PATRICK KELLY

APPELLANT

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

EUGENE O' REILLY

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 6th day of November 2018

Issues

Introduction
1. This is an application by Mr. Kelly, the appellant, pursuant to the provisions of s. 123 of the Residential Tenancies Act, 2004 being an appeal from the respondent's decision of the 23rd June 2017 wherein the respondent held that the notice of termination served by the notice party, the landlord, of the 21st of December 2016 was valid.

Proceedings
2. The claim comes before the court by way of a notice of motion of the appellant of the 6th July 2017 in which he seeks an order pursuant to s. 123 declaring the notice of termination in question to be invalid. Within the notice of motion the appellant sets out the grounds relied on. During his oral submissions, the appellant asserted that eleven issues arose between the parties. However, those eleven issues were raised by him in written submissions as opposed to the notice of motion itself, which is the relevant document before the Court.

3. In Para. 1 of the grounds of appeal, a judgment of Barrett J in *Marwaha v. Residential Tenancies Board* [2016] IEHC 308 - Para 13 is cited to the effect that the High Court must set aside a determination if its conclusion shows that it was wrong in some view of the law adopted by it and that principle is not contested by either the respondent or the notice party.

4. The appellant then goes on to say that the conclusion within the determination is such that the tenancy tribunal adopted a wrong view of the law; (a) he refers to the wrong view being adopted as to a "further Part 4 tenancy" and what the respondent understood that to be; (b) he complains as to the application of the provisions s. 62(1) (e) of the 2004 Act; (c) the respondent says that paras. 34 and 35 of *Hennessy v. Private Residential Tenancies Board* [2016] IEHC 174, a judgment of Ms. Justice Baker, were not applied. Finally, he says s. 42 of the 2004 Act was reviewed wrongly.

5. In Para. 2 he says that the tribunal failed to have regard to s. 46(1) of the 2004 Act (which provides that the terms of a further Part 4 tenancy are as per the previous tenancy) and he complains that the tribunal failed to have regard to s. 43 (which provides for effective rolling four year tenancies).

6. In Para. 3, he states that because there was an incorrect statement of the law comprised within the notice of termination, the notice of termination is not valid.

7. There are a number of affidavits sworn by the appellant; two of which are more substantial than the other two. One is the grounding affidavit of the 12th July 2017 and the other is in response to the affidavit filed in support of the statement of opposition by the respondent.

8. The commencement of the tenancy was on the 20th October 2012 and it relates to Apartment 4, Eden Way, Main Street, Rathcoole, Co. Dublin. There were apparently three successive one – year letting agreements. On the 21st December 2016, the notice party served a notice of termination which expired on the 19th of April 2017.

9. On the 31st December 2016, the appellant made an application for dispute resolution to the respondent complaining that the termination notice was not served and that no reason was effectively given. There was an adjudication hearing on the 6th March 2017 where it was held that the notice was valid.

10. Thereafter, the appellant appealed this matter to the respondent and at that stage the appeal was in relation to the two issues aforesaid however in the appeal to this Court the issue of service is not raised.

11. The hearing took place before the respondent on the 23rd May 2017 and an order issued on the 23rd June 2017, again finding that the termination notice was correct.

Preliminary Issue
12. A preliminary issue has been raised by the appellant in relation to the fact that he claims that the statement of opposition and the grounding affidavit were not served until after the return date being the 9th October 2017, notwithstanding that the Rules of Court provide that the statement of opposition should be served before this stage. He claims he is entitled to the benefit of the rules and on that basis, he suggests that the application he brings before the court should be deemed undefended.

13. The respondent says on the 29th September 2017 there was effective postal service of the documents on the appellant and also asserts that an order or direction was made by Noonan J. on the 9th October 2017 pursuant to the provisions of O. 84 c (7) of the Rules of the Superior Courts entitling the respondent to serve the appellant on that date personally. The appellant acknowledges personal service on the 9th October, 2017 but denies that Noonan J. made such a direction on the morning of the return date.

14. None of the foregoing is on affidavit before the Court and there is clear contention between the parties.

15. I intend to resolve the matter by having regard to O. 122, r. 7 of the Rules of the Court which provides that the court has power to enlarge time fixed by the rules where it considers this necessary. I note that the appellant in fact responded to the affidavit in support of the statement of opposition and in those circumstances I am satisfied that if in fact it was not the case, which I cannot determine, that Noonan J. did not direct service on the 9th October, I now for the avoidance of doubt am enlarging time for the service of the statement of opposition and the affidavit under O. 122 r. 7 of the Rules of the Superior Courts to 5 p.m. on the 9th October 2017, for the purpose of resolving the preliminary issue.

Substantial Issues

16. In dealing with the issues as to the application of the Residential Tenancies Act it is noted as a preliminary that it is a long Act and at times somewhat difficult to follow. However, for the purposes of the case before the Court, there are a number of sections which are relevant, namely:-

> (a) Section 28 (1) provides that: - "Where a person has, under a tenancy, been in occupation of a dwelling for a continuous period of 6 months then . . . ."

inter alia the period of entitlement to occupation will last for four years. This additional period involved in the four year term will be part and parcel of the tenancy which gave rise to the full four year period and this is clear by looking at s. 30 and 31 of the Act. S. 28(2) (a) provides that the period of four years is from the commencement of the tenancy or the relevant date being the commencement of the Act and in these circumstances as the Act commenced well in advance of the date of occupation, the 20th October 2012 is the commencement date. The occupation referred to can be under a series of two or more tenancies which was the case in the instant matter (see s. 31).

> (b) Section 30 provides that this tenancy as such is a continuation of the prior agreed tenancy between the parties. The wording is significant in my view in that it refers to occupation and it refers to a continuation (which is also relevant).
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> (c) Such a tenancy can then be terminated under Chapter 3 of Part 4 of the Act - s. 34 provides for the manner in which termination might occur including by virtue of a notice of termination to be served prior to the end of the relevant four year period. It provides for the furnishing of grounds of termination, within the table, depending on the timing of the service of the notice of termination. In this case termination occurred under s.42 rather than s. 34. I note from the Tribunal note or background to its decision that both parties accepted that the further tenancy contemplated under s. 41 of the Act commenced on the 20th October 2016 - this was not a matter in dispute between the parties.
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> (d) Under s. 41, it is provided that if a Part 4 tenancy continues to the expiry thereof without a notice of termination under s. 34 or s. 36, then on the expiry a new tenancy shall by virtue of the section come into being. There is a lot of controversy between the parties as to a "new tenancy", insofar as the appellant says that the provision provides for identifying him as a new tenant, or in the alternative he suggests that when you read s. 41 it seems to artificially suggest that the commencement of occupation by him must be deemed to have been the 20th October 2016. On a reading of the section, I do not accept such an interpretation. The section does not make any reference to a new tenant as is asserted by the appellant, nor does it make any reference to the date of occupation or any contrived alteration in the date of occupation. Under subs. 3, the commencement date of this further tenancy which is to be known as a "further Part 4 tenancy" is the expiry of the prior Part 4 tenancy. This further Part 4 tenancy will continue unless it is determined in accordance with s. 42. S. 42(1) provides that not later than six months from its commencement, the landlord may serve a notice of termination in respect of a further Part 4 tenancy and the period of notice to be given if this method is employed is specified as 112 days. S. 42(3) provides that this means of termination is in addition to the provisions of s. 34. Accordingly, one can terminate a further Part 4 tenancy under the provisions of s. 42 which mechanism is not constrained by the provisions of s.34 provided an entitlement to avail of s. 42 arises.
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> (e) S. 57 deals with the scope and interpretation of Part 5. S. 57 provides that the purpose of this part is to specify the requirements for a valid termination and at subs.(b) it clearly identifies that compliance with Part 4 and Part 5 are necessary. In this regard in considering the complaint made by the appellant in his notice of motion that the provisions of paras. 34 and 35 of Baker J.'s judgment in Hennessy were not complied with, those paragraphs in fact say one and the same thing as s. 57 (b), which is, you must comply with Part 4 and Part 5. There seems to have been some misunderstanding between the parties in that the respondent during the currency of oral submissions agreed that Part 4 and Part 5 had to be complied with. In the events s. 42 must be complied as must Part 5.
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> (f) Chapter 2 of Part 5, which incorporates s. 62(1) is headed "What a valid notice of termination must contain". The requirements of A to D of subs. 1 do not give rise to any difficulty. Subs. E is in issue between the parties. S. 62(1) (e) provides that if the duration of the tenancy is a period of more than six months, the landlord must state the reasons for the termination. What was the period of this further tenancy? We must refer back to s. 41(4) (b). The period commenced the 20th October, 2016 and as I have already said, this was a matter of agreement between the parties. It expired on the expiry date of the notice. Under s.41 (4) (b) if the notice of termination was served within the first six months the tenancy continued to the expiry of the notice. The notice expired on the 19th April, 2017 which accordingly is a period of either six months certain or one day less than six months. In either case, numerically it is not a period of more than six months. I am satisfied in those circumstances that the notice of termination did not require an incorporation of the reasons identified in s. 62(1) (e) of the 2004 Act.

17. Insofar as the arguments made by the appellant are concerned, I have already identified what he has complained of in his notice of motion. In addition he has furnished written submissions of the 19th of December 2017 and oral submissions to this Court on the 4th of October 2018 when the matter was heard. He suggests that in the "Finding of reasons" section of the document furnished by the Tribunal, along with the decision, there is a clear error in law and he suggests that the Tribunal interpretation in s. 41 of a new tenancy should not to be followed because it makes no sense that he would be considered to be a new tenant or his occupation would have commenced on the 20th October 2016. He says that reasons are required in the notice of termination and even if not required, then the fact that reasons were given by the landlord, which were incorrect and have been acknowledged in the decision of the respondent as being incorrect, the landlord should be bound by those reasons and because they are incorrect the notice should be considered invalid.

18. In the decision of the respondent, as was stated in the notice of motion of the appellant, there was a statement that "the notice of termination dated the 21st December 2016, is not rendered invalid for failure to give a reason in accordance with law." I have to agree with the appellant that this wording is difficult, and somewhat awkward or ambiguous at best. The sentence appears in Finding

no. 2 of the penultimate page of the document furnished to the appellant and the determination does not repeat such wording, but merely states that the notice of termination is valid. In finding that the notice of termination was not rendered invalid, the tribunal found that the landlord was permitted to terminate without stating a reason.

19. I do not find any error of law in relation to that position of the respondent's decision, because on a proper interpretation, subpara. E did not apply.

20. The tribunal noted the amendments to the 2004 Act by s. 42 of the Planning and Development Act. Some argument was raised in oral submissions by the appellant in this regard and in his table of alleged issues between the parties queries whether or not the tribunal was entitled to note this fact. I see no error of law in the tribunal noting an amendment that did not apply to the notice of termination under consideration. The Tribunal merely noted the amendment and concluded that the provision was not applicable to the notice of termination under consideration.

21. The tribunal decision goes on to provide that the notice of termination contained an incorrect statement of the law and such a reason or any reason does not render the notice invalid when no reason is required and is superfluous. The decision stated that it creates no prejudice. The appellant makes a good argument that either the inclusion of the incorrect statement can invalidate the notice of termination or cannot. The decision suggests on the one hand the incorrect statement contained within the notice of termination is superfluous and can be ignored whereas the grounding affidavit in support of the statement of opposition suggests that if a prejudice arose perhaps it could be considered. The affidavit grounding the statement of opposition is not the impugned document before the Court, and notwithstanding the difficulties highlighted by the appellant in relation to it, I am satisfied that there is a correct statement of the law within the decision to the effect that such a reason or any reason does not render the notice invalid when none was required and was superfluous.

22. At Para. 4 at the beginning of the final page it is stated that the tribunal finds that this is not to be construed as to mean that a reason be provided in determination of a further Part 4 tenancy if given during the first six months. I am satisfied that notwithstanding the difficulties that might have arisen in respect of the difficult statement identified under the heading of Finding No. 2, and the grounding affidavit nevertheless there are no errors within the decision which might be considered to be errors of law.

23. In dealing with the interpretation of the relevant provisions now raised in the 2004 Act, I accept that *Howard v. Commissioner for Works* [1994] 1 IR 101 a decision of Denham J. (as she then was) in 1994 to the effect that "Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, apply the basic meaning of the words. There is well established case law on this aspect of statutory construction."

24. I accept and apply that law which was lately applied by Noonan J. in *Hyland v. Residential Tenancies Board* [2017] IEHC 557, a judgment of the 6th October 2017 when at Para. 17 he said: - "Like any other piece of legislation, the 2004 Act must be interpreted in accordance with well settled canons of construction, the first and most basic of which is that words should be accorded their natural and ordinary meaning."

25. I am also satisfied that a further canon of construction is as identified by David Dodd in "*Statutory interpretation in Ireland*" 2008, where at Para. 145 he states: - "Where the legislature in the text deems it appropriate to expressly cater for particular matters and could have included other matters but did not, then the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision. The maxim operates by indicating the legislature's intention by implication or inference and that maxim is to express one thing is to exclude another."

Decision

26. I am satisfied that it is a correct statement of the law that the decision must be set aside if its conclusion was wrong in some view of the law adopted. I am not satisfied that the conclusion included the clumsy statement previously identified. Rather, it is in the penultimate page of the report of the tribunal that comprises a finding that no reason is required to be produced and the inclusion of an incorrect reason or no reason at all, is not enough to invalidate the termination notice.

27. As a matter of principle, the RTB derives its authority under legislation and one would have to identify a particular section which enabled the RTB to go outside the scope of Part 5 in deciding that a notice of termination which did comply with Part 5 but included something extraneous, be it incorrect or not, renders it invalid if that is not what it said in Part 5.

28. I am satisfied that s. 41 does plainly and unambiguously refer to a new tenancy. It clearly does not refer to occupation, a word previously employed in s. 28 and it makes no reference whatsoever to suggest that as in the instant case, that Mr. Kelly might be considered a new tenant. I am not satisfied that there was any want of correct understanding of the nature of the further Part 4 tenancy by the Tribunal. The fact that this further Part 4 tenancy might be on the same terms as previously existed between the parties is not a new concept within the Landlord and Tenant Law, for example, previously a graft of the old lease terms might be incorporated in situations where a party was in a position to and did secure what is known as a reversionary lease. Further, in the 1980 Act in dealing with a new tenancy, the terms and provisions incorporated in the written document or oral agreement between the parties would be brought forward subject to certain variations within the legislation. That is exactly what occurred here. It was a new tenancy and the commencement date was fixed by statute, the terms and provisions were also fixed by statute having regard to the previous arrangement between the parties. None of that deprives s. 41 of meaning that the further Part 4 tenancy would be considered to be a new tenancy.

29. I am satisfied that paras. 34 and 35 of the decision of Baker J. *Hennessy* were in fact honoured by the tribunal in its interpretation because when one looks at Part 4 and Part 5 there is no reason required by these sections in the instant circumstances in the notice of termination.

30. Insofar as s. 42 is concerned I am satisfied that that is clear and unambiguous in its terms and that the tribunal had regard to same. There is no failure to have regard to the terms or the fact that the four year periods provided for by the legislation are rolling in nature. It is not explained how the fact that they might be rolling in nature could possibly adversely impact on the interpretation of s. 41 and 42 by the respondent. It is noted that the Act does give security for four year terms, possibly successive four year terms, but it is clear that at the end of a four year term a landlord is entitled to terminate if the valid notice is served and a reason must be given under s. 62 (1) (e) where s.62(1)(e) arises (although, as aforesaid, it does not arise in the instant appeal), however, with regard to the nature of the reason, no limitation has been provided by the 2004 Act. The landlord is at large as to what reason he will give under the provisions now before me.

Conclusion

31. I believe the respondent would have been wrong to determine the notice of termination was invalid for a reason extraneous to that provided for by Part 5 of the Act, and therefore that I am satisfied that the decision of the tribunal is valid and properly arrived at and I am satisfied that the notice of termination was given in accordance with the 2004 Act. The appellant's appeal must therefore fail.