Neutral Citation: [2015] IEHC 812

THE HIGH COURT

2015 No. 248 NCA

BETWEEN

JOHN KEON

APPELLANT/TENANT

AND

MARK GIBBS (IN HIS CAPACITY AS RECEIVER OVER CERTAIN ASSETS OF JOE McNAMARA) AND THE PRIVATE RESIDENTIAL TENANCIES BOARD

RESPONDENTS

JUDGMENT of Mr. Justice Baker delivered on the 21st day of December 2015

1. This judgment concerns the approach of the court to an application to extend time to appeal a decision of the Private Residential Tenancies Board (hereinafter "the Board") under the provisions of Order 84C of the Rules of the Superior Courts.

2. Application was brought by notice of motion dated the 19th August, 2015 for an order extending time for service and lodgement of a notice of appeal against an order made by the Board on the 23rd June, 2015. The application is contested by the first named respondent, the second respondent, the Board, having taken no part in this application.

Background

3. The appellant holds an apartment premises at 14 Dun na Carraige, Salthill, County Galway (hereinafter "the Premises") under letting agreement made on the 6th June, 2012 between Joe McNamara as landlord of the one part, and the appellant of the other part, for the fixed term of two years from the 6th June, 2012, at the monthly rent of €400.00, payable in advance.

4. On the 12th April, 2006 the landlord had mortgaged the premises to IIB Home Loans Ltd., since renamed KBC Bank Ireland Ltd., (hereinafter "the "Bank") as security for the loan advanced to purchase the Premises.

5. By deed of appointment made on the 4th October, 2012 the Bank appointed the first named respondent, Mark Gibbs, as receiver over all of the assets secured by the mortgage, including the Premises. I will refer to Mr. Gibbs as "the Receiver".

6. The Receiver notified the tenant of his appointment on the 5th October, 2012 and directed that rent be paid to him from November, 2012 onwards. The tenant did make three payments of rent on 5th November, 2012, on 7th December, 2012 and on 8th February, 2013, but has not paid the whole or any part of the rent thereafter.

7. The Receiver advised Mr. Keon he intended to sell the Premises at a meeting on 15th March, 2013, and would require vacant possession for that purpose. The Receiver was relying on a clause in the letting agreement that expressly provided that "in the event of the house being sold" the landlord was entitled to give the tenant one month's notice to vacate.

8. Mr. Keon at that meeting informed the Receiver that the Premises has been sublet to students, and asked that the tenancy continue, so they could remain in possession until they finished their exams in May, 2013. The evidence of the Receiver is that Mr. Keon agreed to deliver up possession on 12th May, 2013, but did not do so.

9. The Receiver served a Notice of Breach of Obligations of Tenancy in statutory form on the 9th January, 2014, on the stated grounds that the tenant had failed to pay rent for the period of thirteen months to that date, and that he had unlawfully sublet the Premises without the consent of the landlord.

10. On the 22nd of January, 2014 the Receiver served a fourteen day warning notice in accordance with s. 67(3) of the Residential Tenancies Act, 2004 (hereinafter "the Act of 2004") demanding rent, and thereafter on the 10th February, 2014 served a notice of termination giving 28 days' notice in accordance with s. 34 of the Act of 2004.

11. The tenant did not vacate the Premises, and employed solicitors who corresponded with the Receiver *inter alia* for the purposes of seeking information with regard to his appointment.

12. On the 26th March, 2014 the Receiver referred the matter to the Board for dispute resolution. The hearing before the adjudicator was conducted on the 15th July, 2014 at which the tenant and the Receiver each appeared in person, and the landlord was represented by solicitors.

13. The adjudicator found that the tenant was overholding, that arrears of rent in the sum of €6031.50 was then owed in respect of the tenancy, and awarded the Receiver damages of €800.00 for non payment of rent, and damages of €400.00 for unlawful subletting.

14. The tenant appealed by notice under s. 100 of the Act of 2004 on the 26th August, 2014, and a hearing date was set for the 22nd May, 2015. Mr. Keon was represented by Mr. Toal B.L. and the Receiver by his solicitor. The tenant sought an adjournment, which was refused. Thereafter the matter proceeded to hearing, and the Tribunal delivered a determination on the 26th June, 2105, by which it directed that the tenant deliver up vacant possession of the Premises within fourteen days, and pay the sum of €9,992.50 in respect of arrears of rent and €1,000.00 in damages, such sums to be paid by specified instalments.

15. The Determination Order of the Tribunal was sent under cover of letter dated 26th June, 2015 with the standard note which contained the following statement:

> "This Determination Order shall, on expiry of the period of twenty-one days from the date of issue, become binding on the

parties concerned, unless an appeal is made by any of the parties directly to the High Court on a point of law before then, pursuant to s. 123 (3) of the Residential Tenancies Act, 2004".

16. By letter dated the 24th July, 2015 the tenant, through a new firm of solicitors, purported to lodge a notice of appeal directly with the Board. The appeal was purported to be made on a document entitled "appeal application form", which in form and in effect is almost identical to the statutory document submitted by the tenant in August, 2014 by way of appeal from the decision of the adjudicator and which formed his appeal to the Tribunal.

17. The Board pointed out in an email of 29th July, 2015 that a finding of the Tribunal could not be appealed other than to the High Court.

18. No further step was taken by the tenant to avail of the correct mechanism for appeal until approximately two weeks later, when on the 12th August, 2015 his solicitors wrote to the Receiver indicating that Mr. Keon intended seeking to appeal the determination order to the High Court, and that he was also considering an application for judicial review of the decision.

19. On the 19th August 2015 this application was brought by motion to extend time for service of a notice of appeal.

20. On the 3rd September, 2015 Binchy J. refused the tenant leave to apply for judicial review of the decision of the Tribunal.

Procedure for appeal

21. Order 84C of the Rules of the Superior Courts, inserted by S.I. 14 of 2007, provides the procedures to be adopted for appeals from decisions of statutory bodies, and O. 84C r. 2(5)(a) prescribes a notice period of 21 days, subject to any provision to the contrary in the relevant enactment. Section 123(3) of the Act of 2004 provides in relation to a Determination Order issued by the PRTB that "any of the parties concerned may appeal to the High Court within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law". Subparagraph (8) defines the "relevant period" as 21 days beginning on the date of issue of the Determination Order to the parties.

22. Appeals are by way of notice of motion and the court has power to extend the period for bringing of an appeal pursuant to O. 84C r. 5(b) as follows:

> "within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

23. I turn now to consider the test to be applied by the court in considering the application to extend time.

The test in O.84C r.2(5)

24. As is apparent from the words of the sub rule, the court has a discretion to extend the time to appeal, but the discretion is constrained by a requirement that there be:

> a. good and sufficient reason for extending that period and
>
> b. that the extension of the period would not result in an injustice being done to any other person concerned in the matter.

25. The common law test to be met by an applicant seeking to enlarge time to appeal was established in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] 1 I.R. 170 where the Supreme Court identified a three stage test that requires an applicant to show:

> a. That he or she had a bona fide intention to appeal within the relevant time period;
>
> b. that there was an element of mistake, and mere error of procedure is not sufficient for this purpose, and
>
> c. that there is an arguable ground for appeal

26. One question that arises for consideration in this case is the extent to which the principles elucidated in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* inform the court's discretion in extending time under O. 84C r. 2 (5).

27. Neither counsel has identified any decision which establishes the test to be met by an applicant for an extension of time to lodge an appeal in respect of a decision of the Board, but certain other authorities have been identified with regard to the meaning of the special provisions of O. 84C.

28. Hedigan J. in *Chesnokov v. An tÁrd-Chláraitheoir* [2015] IEHC 497 was considering an appeal against a refusal to register the appellant's birth pursuant to the Civil Registration Act of 2004. Hedigan J. considered that, although at first glance the appeal seems to be out of time, that on the correct characterisation of the correspondence, it was not. Thus he did not have to consider the question of the interplay between the Eire Continental Trading Company Ltd v. Clonmel Foods Ltd test and the apparently separate test identified in O. 84C.

29. In *Little v. FSO and Another* [2011] IEHC 137 McMahon J. was considering an appeal against the decision of the Financial Services Ombudsman and took the view that s. 57 CL (3) (b) of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, conferred upon him a wide discretion to consider what he regarded as "exceptional circumstances" arising from the fact that the appellant was out of the country, unfamiliar with email and other telecommunication and technologies which might have eased communication with his solicitor, none of which was denied by the Ombudsman, and held that the time for bringing the appeal should be extended. McMahon J. did consider the matter in the light of the test in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* but concluded that in the particular statutory context of s. 57 CL (3) of the Act of 1942, he had a discretion to consider matters outside those identified in O. 84C.

30. Neither judgment is sufficient authority on the nature of the test and, as the particular requirements of O. 84C require a consideration of what is "good and sufficient reason", I turn now to deal with that element of the test.

"Good and sufficient reason"

31. Some authorities have been identified with regard to the phrase "good and sufficient reason" in similar applications. Denham J. in *S. v. Minister for Justice and others* [2002] 2 IR 163, referring to Section 5(1)) of the Illegal Immigrants (Trafficking) Act, 2000 which gave the court a jurisdiction to extend the time if "there is good and sufficient reason" for doing so, regarded the extent of delay to be *"an important factor in considering the application".* She also identified some of the elements in the test explained in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* as relevant, namely the requirement that the intended appellant formed the intention to appeal within the time, and took the view, also present in Eire Continental Trading Company Ltd v. Clonmel Foods Ltd, that mistake by legal advisors would not prima facie be a good and sufficient reason.

32. In general Denham J. regarded the obligation on the part of the applicant to show:

> "circumstances must exist to excuse such a delay and to enable the matter to be considered further".

33. The same statutory test had been considered earlier by the Supreme Court in *G.K. and Others v. Minister for Justice* [2002] 2 I.R. 418, where the court considered inter alia the application for an extension of time to apply for judicial review in respect of the decision of the respondents to refuse refugee status. Hardiman J. described the power to extend time as a "special statutory jurisdiction" which he said was sui generis, but considered that elucidation could be drawn from the established jurisprudence in relation to other powers of a cognate nature.

34. I consider that the judgment of the Supreme Court is persuasive and on point, and while its decision was given in a statutory scheme which is not in pari materia to the provisions of O. 84C, there is sufficient similarity in purpose in that each relate to the tests to be applied by the court in extending time to appeal, and I do not consider that any real difference in approach is warranted, especially as the language in the respective provisions is identical.

35. I consider that the court in engaging the special provisions of O. 84C must look to the reason for the delay and to the other factors that might lead it to a view that there is good and sufficient reason to extend time. This requires analysis of the explanation offered for the delay, but also whether it can be said that there are sufficient reasons to permit the extension. The requirements are cumulative, and it seems to me that it is not intended that the court would look exclusively to whether the reason for the delay is good, but whether in all the circumstances there is a sufficient reason to extend time. Thus the mere fact that an intended appellant was out of time by mere days is not of itself determinative. A particular focus of the argument before me was whether the court in hearing the application to extend time must have regard to the nature of the appeal, and I turn now to consider that question.

The prospect of success in the appeal

36. Counsel for the tenant argues that O. 84 r. 2(5) replaces the Eire Continental Trading Company Ltd v. Clonmel Foods Ltd test, although he accepts that the decision of the Supreme Court, and the authorities which further explained the principles, are relevant and may provide guidance. He argues that as the Rules do not expressly make reference to the question of the prospect of success in the appeal the court ought not to embark on an enquiry into the nature of the appeal at this stage.

37. Hardiman J. in *G.K. and Others v. Minister for Justice* held that the court hearing an application for an extension of time was required to consider the merits of the substantive case. The applicants had contended that the phrase "good and sufficient reason" excluded any consideration of the merits of the substantive application, and that if the delay between the expiry of the statutory time and the making of an application to extend was not excessive, that they were entitled to an order extending the time. Counsel for the applicant makes a similar argument and relies in particular on a decision of the English High Court in *Bovale Ltd v. Secretary of State for Communities and Local Government and Another* [2009] 3 A.C 340, a judgment which I do not find persuasive in that it considered the power of the court to vary or alter a practice direction.

38. The respondents contended that the phrase included a consideration of the merits, albeit it was conceded that an elaborate consideration was not required. Hardiman J. agreed, and drew by analogy from the common law rules, starting with *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd*, the third limb of the test which requires the Court to consider whether the intended appellant has an arguable case on appeal. He also noted that this requirement exists on applications to stay proceedings on the grounds of delay and made the point that:

> *"By parity of reasoning, the fact that a case was apparently unarguable must also be relevant".*

39. He regarded the argument from those analogous applications to be persuasive, but considered that the imperative contained in the provisions of s. 5 (1) of the Act of 2002, which permitted the court to extend the time for "good and sufficient reason", "still more clearly" permitted the court to consider whether the substantive claim is arguable. He went on to say, in a paragraph with which I agree, as follows:

> *"If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in particular circumstances. The statute does not say that the time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of fourteen days'. A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used 'good and sufficient reason for extending the period' does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case.*
>
> *On the hearing of the application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."*

40. Denham J. in *S. v. Minister for Justice* quoted that paragraph with approval.

41. I consider the approach of the Supreme Court in these two cases to be unanswerable and directly on point. Accordingly in considering the application for extension of time to appeal, I am of the view that all of the circumstances of the case must be considered including whether the intended appellant can show arguable grounds of appeal. However, the provisions of O. 84C contain an additional element which in my view makes the requirement to look to the merits of the appeal even more obviously necessary, and I turn now to consider that element.

Prejudice to any other person

42. The statutory provisions of s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000 do not contain any additional requirements

such as is found in O. 84C, where the court must, in addition to considering whether there are good and sufficient reasons, also consider whether prejudice will be done to the other party. Denham J. in *S. v. Minister for Justice*, did indeed refer to the fact that the State was not prejudiced by the delay, and this was one factor that influenced her decision, but she did so in the context of identifying likely prejudice as an element in her discretion rather than a matter to which she was mandated to have regard.

43. The inclusion of this extra element of the test, not found in the statutory provisions with regard to which Hardiman J. delivered his judgment in *G.K. v. Minister for Justice*, and also not present in the legislation governing the Financial Services Ombudsman with which the judgment of McMahon J. is concerned, creates an additional element which must be considered. This it seems to me adds further weight to the argument, already clear from the judgment of the Supreme Court in *G.K. v. Minister for Justice*, that the applicant for an extension of time must show an arguable ground of appeal, as injustice would almost always be done to a respondent where the time for appeal to be extended without the court, at least, requiring that the appeal be more than vexatious or frivolous or prima facie unlikely to succeed, and it will almost always cause prejudice, and be burdensome, to a party to be required to meet an appeal which is not arguable.

44. The additional requirement is one that in my view imposes a further hurdle on an applicant for an extension of time such as is not found in the authorities identified to me relating to the other statutory appellate provisions considered in that case law, or in the cases which establishes the common law test.

45. Counsel for the intended appellant argues that the "other person" in respect to whom consideration must be had must include any person with an interest capable of being adversely affected by a decision, so that a consideration of an injustice to the intended applicant must be present. He refers to the decision of Cain v. Francis and the linked case of *McKay v. Hamlani & Anor*, two decisions of the English Court of Appeal reported at [2009] 2 All E.R. 579, which related to the jurisdiction of the court to override a time limit in personal injury or fatal accident claims and the principles that should guide the court's discretion in that exercise. The court under the relevant section of the English legislation had what was regarded by the court as an unfettered discretion to consider whether an extension of time should be granted and regarded the length of the delay being a factor, albeit not a deciding factor.

46. Those judgments of the Court of Appeal of England and Wales do not assist me in my deliberations, as I do not consider that the discretion conferred on the court under O. 84C to be unfettered, as it is constrained by the matters expressly provided in the rule itself. Further, those decisions were based on a special statutory jurisdiction, and the appellate court considered itself constrained in its approach as the matter of an extension of time was one for the discretion of the trial judge. Therefore it offers me little assistance in the question at hand.

47. I consider that counsel for the intended appellant is incorrect in this submission, and in my view the "other person" must be taken to mean any person other than the person making the application. The express language of O.84C r. 2(5) does not require that injustice not be done to *any* of the persons involved, and the construction urged ignores entirely the word "other" in the rule. It seems to me what was intended by the new rules was to require the court to balance the interests of justice, and in that exercise the interest of the intended respondent to the appeal are to be regarded as an element that must inform the discretion of the court and in respect of which the court must be satisfied that no injustice is done.

48. The type of prejudice that might arise will fall along a wide spectrum. There will be cases where there is no prejudice, except of course the fact that the judgment at first instance may be delayed in enforcement, or even where the winning party might feel that the result was likely not to be upheld in whole or in part on appeal. On the other hand, there may be cases where it is clear that the appeal is tactical, or where a respondent is unwell, elderly, or has limited recourses such that the prospect of an appeal causes personal or financial hardship. There may be individual litigation prejudice where evidence is lost through death or the unavailability of a witness.

49. In summary, I consider that a court hearing an application for extension of time under O. 84C must have regard to the following factors: -

> (a) the reason for the delay and whether a justifiable and sufficient excuse has been shown noting too that in general, and having regard to the test enunciated in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd,* and considered also by the Supreme Court in S. v. Minister for Justice, that a fault on the part of a legal adviser is not generally regarded as a sufficient excuse or reason for a failure;
>
> (b) the length of the delay, noting that a short delay can relatively easily be excused;
>
> (c) there is no express requirement that an intending appellant should have formed the intention to appeal within the relevant time, but this can be a factor;
>
> (d) whether the appeal is arguable, or to put it in the negative, whether the attempt to engage the appellate process is arguably vexatious, frivolous or oppressive to the other party; and
>
> (f) whether the extension of time is likely to cause prejudice to the other party, which can include litigation prejudice, where the passage of time has resulted in the loss of evidence or witnesses, but also a more general prejudice that an extension of time delays the conclusion of litigation and prevents the winning party from recovering on foot of the judgment or order, and circumstances where an appeal may be merely tactical, or is unlikely to succeed

Application to the facts: the reasons for the delay

50. The application is grounded on the affidavit of John Geary, solicitor, on behalf of the tenant. No affidavit of the tenant himself is provided. Mr. Geary did not act for the tenant before the Tribunal, but says that after the Board issued its Determination Order on 23rd June, 2015, he was "later" instructed by the appellant. He does not identify a date when this happened, and whether he was instructed within the 21 day period. It is clear that on 24th July, 2015, after the expiration of the 21-day period, he attempted to lodge an appeal directly to the Board instead of the High Court.

51. Mr. Geary in his affidavit says that the appellant was "suffering from a disability which prevented him from dealing with his affairs at the time" and exhibits a medical certificate which shows that the tenant has been under the care of his general practitioner and being treated for depression since 29th May, 2015, and that due to the medication prescribed, he was not in a position to deal with his affairs. The letter rather elusively does not confirm that as of 23rd July, 2015, the tenant was unable to deal with his affairs and contained the even more elusive comment: -

> "He has requested this note to state this and confirm he continues to be under my care and on ongoing medication for the present."

52. No affidavit from the doctor is furnished, and while the certificate is short and does identify that Mr. Keon continues to be under his care, it does not state the nature of his ongoing treatment and medication, and whether it might prevent him currently from dealing with his affairs.

53. To a large extent, however, it seems to me that the doctor's note is irrelevant as Mr. Keon did have the benefit of legal representation at the hearing before the Tribunal and at the hearing of the motion before me, and there is no suggestion in the only evidence that I have, namely in the two affidavits of Mr. Geary, that he did not consider his client competent to give him or counsel instructions. I do not consider that the evidence before me points to an inability on the part of Mr. Keon to deal with the matter before the adjudicator, or before the Tribunal, nor is there any credible evidence that he was unable to lodge an appeal or instruct his solicitor to do so within the statutory time limit.

54. What is clear, however, from the affidavits of Mr. Geary is that he purported to lodge an appeal by the wrong process. The letter issued by the Board identified clearly the form of the appeal, and I reject any assertion on the part of counsel for the tenant that the Board encouraged Mr. Geary in his error, which was after all an error of law made by a professional. It also bears noting that Mr. Geary attempted to appeal to the deciding body itself, a matter that could not appear to any legally trained person to be appropriate in any appellate jurisdiction.

55. It is also clear that the Board in its email of 29th July, 2015 pointed out the mistake, and there is what I take to be a significant gap between the receipt of that email and the letter of 12th August, 2015, sent by Mr. Geary to the Receiver, by which the Receiver was notified that the tenant intended to appeal the determination and for that purpose to seek an order of the High Court. No explanation is offered for the delay between 29th July, 2015, and 12th August, 2015, and this is particularly significant as the letter sent by the solicitor for the tenant to the Receiver was sent after the tenant had received a letter from the Receiver of 11th August, 2015, requiring him to vacate the premises by 13th August, 2015, and informing him that the Receiver would change the locks the following day, 14th August, 2015. I am compelled to the conclusion that the solicitor for the tenant was instructed to engage with the Receiver in a meaningful way only after the threat of repossession, and I consider that the attempt to appeal was made with a view to preventing the Receiver obtaining possession on the nominated day. The particular date is also of significance in that the tenant is not in personal occupation of the Premises, and rather sublets them to students, and I consider it probable in the circumstances that the tenant sought to prevent the Receiver taking possession so as to be in a position to offer a letting to students for the college year commencing in September 2015.

56. Accordingly, I am not satisfied that a good or sufficient explanation for the delay in lodging the appeal is shown, nor that Mr. Keon formed an intention to appeal within the relevant time. However, that finding is not determinative and I turn now to consider the nature of the appeal.

The grounds of appeal

57. The grounding affidavit of Mr. Geary identifies nine grounds of appeal which may be grouped as follows: -

> (a) The Tribunal erred in coming to its determination and failing to apply its "own rules" in relation to the admissibility of documents, namely that documents intended to be relied on by the parties be furnished no less than ten days prior to the hearing of the appeal.
>
> (b) That the tenant was denied his Constitutional rights of access to the court, and that the Tribunal erred in refusing to adjourn the matter on the application of the tenant, resulting in an imbalance or inequality of representations.
>
> (c) That the Tribunal fell into "an error of jurisdiction", this being very broadly pleaded at ground (iv) and not further particularised.
>
> (d) That the registration of the tenancy by the receiver was an attempt to "collapse" the tenancy rather than being done with a view to the "preservation of the tenancy" which it is argued is the purpose of the legislation.
>
> (e) That the hearing before the Tribunal was improperly conducted by the Tribunal members who wrongly interrupted counsel, and whose interruptions and procedural failures are described as "an effrontery" to the rule of law.
>
> (f) That no document was provided by the Receiver in support of his appointment, that no "proof of ownership" was adduced, nor was there any evidence of the "identity of the actual owner".

58. In the first place, I note that these grounds, except perhaps (f), are more properly matters for judicial review and I have regard to the fact that on 3rd September, 2015, Binchy J. refused the *ex parte* application by the applicant for judicial review in proceedings bearing record number 2015 No. 205 J.R. Those pleadings were not put before me by the tenant, and I consider that points to the possibility that the grounds advanced were identical, or broadly similar, to those purported to be advanced on the appeal. I note from the order of Binchy J which was before me, that an order of *certiorari* was sought on the grounds the order of the Board was arrived at in "such a manner as to result in the denial of the applicant of his legal and Constitutional rights", and that the Act 2004 was inconsistent with the Constitution and/or was operated and applied in a non-constitutional manner. There was further an application for a declaration that the proceedings before the adjudicator and the Tribunal were required to be conducted in accordance with natural and constitutional justice.

59. It seems to me that several of the grounds now sought to be advanced by way of appeal overlap with the judicial review application, and in particular ground (b), (c) and (e) are such and will, for that reason, fail. I consider that the applicant has improperly failed to adduce the pleadings which were before Binchy J.

60. Furthermore, because the alleged error in jurisdiction, (c) above, has not been particularised in the documentation before me, there is insufficient information on which I can make any judgment that the appeal on that ground is likely to succeed.

61. Accordingly, it seems to me that the primary ground or grounds on which the tenant wishes to appeal are the grounds relating to what he, in general, calls the "admissibility of documents" or matters with regard to the proof of the appointment of the Receiver and/or the entitlement of the Bank to appoint the Receiver over the assets of the landlord.

62. I am fortified in this view by the submissions made by counsel who appeared for the tenant before the Tribunal, and who also

appeared in the application before me. Counsel for the tenant informed the Tribunal that he received a hard copy of the landlord's mortgage on the day before the hearing, although he had received an electronic copy "earlier in that week". He sought an adjournment to consider the documentation, but nowhere made a suggestion that the soft copy received in advance of the hearing was anything other than a true copy of the original. Further, his argument related to the entitlement of the Bank to appoint a receiver but not the appointment itself. That aspect of the matter was argued for some time before the Tribunal which, having arisen to consider the matter, determined that it was satisfied that it had sufficient evidence to satisfy itself that the Receiver was validly appointed. The Tribunal had previously been referred to s. 110 of the Act of 2004 that issues of title are outside the remit of the Tribunal. Note might also be had of s. 108(5) of the Land and Conveyancing Law Reform Act 2009 which provides protection to any person dealing with the receiver such that a person is not required to look behind that appointment.

63. It is noteworthy and highly significant in my view that the tenant did pay rent to the Receiver for a period of three months, that his landlord, Mr. McNamara had shown him a letter wherein it was stated that Mr. Gibbs had been appointed as Receiver and that his landlord had "openly questioned" how this might have occurred, but the doubt was not particularised in the pleadings or hearing before me. The Tribunal noted that no evidence was adduced by Mr. McNamara, the landlord, and rejected the attempt by the tenant to adduce hearsay evidence of any conversations with him. This was an entirely correct approach. It must be noted also in that context that the appeal to the High Court from a decision of the Tribunal is an appeal on a point of law, and the High Court may not engage with the factual questions raised by the tenant in his application, and the Tribunal having expressed the view that it had sufficient evidence to conclude that the Receiver was properly appointed, and noting the statutory provisions in the Act outlined above, that point of appeal cannot succeed as no point of law is engaged.

64. I consider the tenant could not succeed in the argument that the Receiver was not validly appointed, and no stateable argument on that ground was identified.

65. I consider accordingly that the tenant has not made an arguable ground and turn to consider the question of prejudice which to some extent overlaps with the merits of the appeal.

Is there prejudice to the landlord?
66. A curious and unusual element of this application is that the tenant has sought to show that he is in possession of the Premises through a different tenancy, and that he has paid rent to another person. He argues in that circumstance that the Receiver was a "trespasser" and was improperly appointed.

67. The tenant gave evidence to the Tribunal that since he ceased paying rent to the Receiver in January, 2013, after three of the monthly payments were made to him, he thereafter continued to pay rent on foot of a new lease, to a Mr. Charles Allen. In support of this assertion, the tenant furnished a document described as "a property lease", purporting to create a 999 lease of which the landlord was stated to be Radolphus Allen Family Private Trust and the tenant stated to be John Keon. This document purports to have effected a letting of the premises for 999 years from 1st May, 2013, at what was described as a "nominal fee" of €100 per annum. A cursory examination of that document shows that it contains no operative demise.

68. Counsel sought to rely before the Tribunal on this document as evidence of the existence of a superior leasehold interest and that Mr. Keon, was paying rent to that superior landlord. No explanation was offered as how the 999-year term was created by a person other than Joseph McNamara, the freehold owner, and the landlord with whom Mr. Keon had initially dealt. The lands are unregistered freehold lands and in my view, any argument with regard to the existence of an intermediate lease, which might have entitled him to possession, was not borne out by the evidence, and is at best, fanciful.

69. In the case of an application to extend time to appeal a decision of the Board, regard must be had under O. 84C to the interest of the landlord. In this case the landlord has been prejudiced by the actions of the tenant in not paying rent and in failing to deliver up vacant possession of the Premises in accordance with the covenant in that behalf contained in the letting agreement, and following termination for non payment of rent. No rent has been paid now for almost three years, and that is of particular importance in the light of the fact that the intended appellant does not reside in the Premises, but lets it for his own commercial benefit. Furthermore the landlord has asserted, and this is not denied before the Tribunal, that the creation of the sub-tenancy was done without the landlord's consent as was required in the letting agreement. The attempt by Mr. Keon to set up another title is a matter of considerable prejudice to the landlord, and amounts to a denial of his title. It may also be regarded as an act of forfeiture by the tenant. Any delay in concluding the process in that context is prejudicial to the property rights of the landlord.

70. There might be circumstances where the interests of the respondent which come to be considered must be balanced against other interests of the intended appellant, as for example where the intended appellant occupies a residential premises as his principle private residence, but that factor is not engaged in this case. The interest that must be balanced is the interest of the intended appellant to avail of the statutory appeals mechanism by way of an appeal to the High Court, and the proprietary interest of the landlord in the Premises in respect of which he has received no benefit for nearly three years, and where the tenant himself has gained commercial benefit, and denied his landlord's title.

71. I must bear in mind also that section 86 of the Act of 2004 provides that rent shall to continue to be paid pending determination of a dispute before the Board. Clearly in doing so no acknowledgment can be argued to have been made with the regard to the merits of the appeal. This statutory provision guides me in my consideration of whether injustice will be done to the landlord by granting an extension of time to appeal, and the Oireachtas in my view envisaged the continuance of rent as one of the ways that the interest of the landlord can be protected.

Conclusion and summary
72. Thus it seems to me that the interests that are engaged are the proprietary rights of the landlord and the right of the tenant to avail of the statutory appeals mechanism. I am of the view that a court in determining whether to extend the time to appeal must engage the question of whether the intended appellant has an arguable grounds of appeal and I consider that the tenant has not shown any arguable ground.

73. Accordingly I consider that the intended appellant has not made out any good and sufficient reason why he should be permitted to now appeal the decision of the Tribunal and that the interests of the landlord far outweigh those of the tenant to now seek to prosecute an appeal which I consider has no stateable basis at law.