Neutral Citation [2016] IEHC 471

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 325 J.R.]

BETWEEN

PETER NOWAK AND AGNIESZKA NOWAK

APPLICANTS

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The applicants seek leave to apply for judicial review in order to quash a determination of the Private Residential Tenancies Board dated 12th February, 2016 in an application between the applicants and their landlords, Andrea Hogan and Sinead Rossiter (necessary parties, not joined by the applicants), which fixed a market rent for their tenancy and deal with other related matters. The determination was communicated to the first named applicant under cover of a letter dated 19th February 2016, which he says was received on 22nd February, 2016.

2. On 7th April, 2016, the name of the board was changed to the Residential Tenancies Board.

3. The application was filed in the Central Office on 10th of May, 2016, within time. After an initial consideration of the papers, I directed that the respondent be put on notice. In that context I received further affidavit from the respondent sworn by Kathryn Ward and filed on 18th July, 2016.

The applicant's affidavit of 15th July, 2016.
4. The applicant also sought to put in further evidence and swore an affidavit on 15th July, 2016 which begins as follows: *"I, Peter Nowak, A DISCIPLE OF THE LORD JESUS CHRIST of [address] aged 18 years and upwards MAKE OATH and say as follows…".*

5. The Central Office declined to accept this affidavit, on the grounds that it did not comply with rules of court.

6. Order 40, r. 9 provides in pertinent part that "*Every affidavit shall state the description and true place of abode of the deponent*". This reflects an approach going back to that pursuant to the Rules under the Supreme Court of Judicature (Ireland) Act 1877 (see Wylie *Judicature Acts* (1881) under O. XXXVI, r. 5 (p. 432)). The term "description" means "occupation". *Spaddacini v. Treacy* (1888) 21 L.R. Ir. 553 is an interesting decision, involving the description and abode of two plaintiffs, the first a struck-off solicitor resident in Stillorgan Castle (now St. John of God's) describing himself as "Esquire" and the other a grocer describing himself as a "gentleman". Albeit in the context of a statutory requirement to specify trade, profession or occupation, Porter M.R. held that "gentleman" was not a sufficient description of a person (such as a grocer) who actually had an occupation. He observed that "*No one has suggested that 'human being' would be the proper description"* (at p. 559). Of course he had not met someone of Mr. Nowak's inventiveness.

7. To my mind, fanciful descriptions such as "*a disciple of the Lord Jesus Christ*" do not constitute a description (in the sense of occupation) envisaged by O. 40, r. 9. If such a mode of description were permitted, one could not stop the next deponent describing themselves in the opening of an affidavit as a "Guardian reader" or the one after that as a "keen golfer", and so on. No *reductio* is however required because we are firmly in *absurdum* from the off. It is hard to know which the applicant's affidavit trivialises more, religion or court procedure.

8. The Central Office was entirely correct in refusing to accept this affidavit. The solicitor who took it should not have allowed it to be sworn in that form. I trust that the message will get through in order to avoid a repetition.

9. The applicant did not in fact seek to submit a revised affidavit despite knowing that the affidavit was unfiled. However in ease of the applicant I have nonetheless read this unfiled affidavit.

10. I should also mention that despite commencing the application as "Peter Nowak", the applicant appeared to seek to change the title to read "Piotr/Peter Nowak". Even if he uses two names, the proposed formulation is not appropriate for the title to legal proceedings.

The leave application
11. I have carefully considered the application in accordance with the Supreme Court decision in *G. v. D.P.P.* [1994] 1 I.R. 374. Four grounds are set out for the relief sought.

12. Firstly it is alleged that *"the determination/decision making process suffered (sic) a breach of the internal tribunal procedures and was in contravention of provisions of the Residential Tenancies Act, 2004"*. This appears to be a reference to an adjournment of the hearing which had been granted by the Tribunal on 15th June, 2015. Even if that adjournment was in some way contrary to the Tribunal's procedures, that does not give rise to arguable grounds to quash the ultimate decision following a resumed hearing.

13. Secondly the statement of grounds alleges that *"there was no reasonable, rational evidential basis upon which the respondent could have reached the decision to the effect as set out in the determination dated 12th February, 2016"*. It is clear from para. 29 of Mr. Nowak's affidavit that essentially he disagrees with the merits of the Tribunal decision. As regards the market rent fixed by the Tribunal he says "*I believe [this] is too much what (sic) this property would command at that date in the light of the state and condition of the property",* referring to the market rent with effect from 1st October, 2014. It is alleged in the affidavit that a finding

regarding non-entitlement or reimbursement of expenses was "erroneously" made, that points in the applicant's favour were not upheld and that the Tribunal should not have determined an issue regarding non-payment of rent. With the exception of the last allegation (which is not however pleaded in the statement of grounds), these complaints relate to the substance or merits of the decision and not to its legality (see *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) per Clarke J. at paras. 3.8 to 3.15). No facts have been put forward rendering it arguable that "*there was no reasonable, rational evidential basis upon which the respondent could have reached the decision*".

14. The third ground for the relief sought is "bias and prejudice of the members of the Tribunal". There are no facts deposed to which would support the arguability of a serious allegation of this kind.

15. It appears that during the hearing the applicants objected to the chairperson of the Tribunal on the grounds that she "*had been a member of a Tribunal involving the same parties some years previously"* (section 4 of the decision). This is not even arguably a basis for contending that objective bias exists or that the decision should be quashed.

16. Finally the applicant relies on "*fraud by the Private Residential Tenancies Board*". This appears to be a reference to the fact that the Board sent a notification of the adjournment of the hearing on 15th June, 2015 due to a family emergency affecting the landlords' agent at a time prior to an email from the chairperson of the Tribunal from that date granting the adjournment. Apparently the applicant made a complaint to the Garda Bureau of Fraud Investigation in relation to this alleged discrepancy (para. 24 of the grounding affidavit). The applicants also previously applied to the High Court for injunctive relief restraining the adjourned hearing pending the outcome of the investigation of the fraud complaint. This injunction was not granted (see para. 26 of the grounding affidavit). The pleadings in that application were not furnished to me. On the material furnished by the applicants, the allegation of fraud appears to be, at the most charitable, a huge overreaction and certainly not an arguable basis to quash the decision.

17. In the circumstances no arguable ground for challenging the validity of the decision has been shown. On the contrary, the proceedings appear to me to be frivolous and vexatious particularly when put in the context of a campaign of litigation by the applicants to which I will refer later.

The decision has been appealed

18. In any event, the decision in question is appealable to the High Court on a point of law pursuant to s. 123(3) of the Residential Tenancies Act 2004 within 21 days from the date of issue of the determination.

19. In fact as appears from Ms. Ward's affidavit at para. 19 onwards, the applicants did appeal the decision on 10th March, 2016. This is not a case where a decision is formally appealed to preserve the position and the appeal parked pending judicial review. The applicant has actively moved the appeal on. The appeal appeared in the non-jury directions list on 13th June, 2016 when the applicants were directed to identify their full grounds of appeal. It returned on 27th June, 2016 when the applicants indicated they had filed a further affidavit setting out their grounds of appeal. It was back again on 18th July, 2016, when the respondent requested an adjournment but the applicant wanted the matter dealt with. This latter element is not formally deposed to but Mr. Nowak accepts that this is the case.

20. It is simply not open to a party to both actively appeal and challenge on judicial review the same decision. The applicant's conduct in progressing the appeal disentitles them from proceeding with this application. To proceed as the applicants have done is to engage in legal frivolity.

21. In any event, if I am wrong about that, the appeal is a "*more appropriate method of procedure*" warranting refusal of leave as envisaged by Finlay C.J. in *G. v. D.P.P.* at p. 378.

The conduct of the applicants

22. The present judicial review application is the fifth High Court action instituted by the applicants. As well as this action, they have issued proceedings challenging three determinations of the respondent including the one duplicitously challenged here: the three appeals are in proceedings record numbers 2016 No. 100 MCA, 2016 No. 173 MCA and 2016 No. 225 MCA. In addition, they issued the already-referred to unsuccessful injunction proceedings, record No. 2016 No. 294 MCA, which resulted in an order for costs against the applicants made by Noonan J. on 19th October, 2015. There is no evidence that this has been satisfied. The respondent fairly characterises the approach taken as a decision "*to appeal each and every determination made by the respondent if an order is not made in their favour"* and a "*tactic employed by the applicants to delay proceedings for as long as possible and to frustrate the proceedings before the respondent"* (affidavit of Ms. Ward at para. 33). Apart from the frivolity and grandiosity that is manifest on the face of the present application, the approach of throwing out serious and unsubstantiated allegations of bias, and of responding to an adjournment application (prompted by the human exigency of a family emergency) with a complaint to the Garda Bureau of Fraud Investigation, does little for the reputation or credibility of the applicants.

23. The courts are not a playground in which litigants can amuse themselves at will. The State in all its manifestations may have enough time and patience to weather the efforts of frivolous litigants, but in an underlying private law context such as this, such conduct has a significant downstream effect on private persons such as the landlords in this case. For the court to bask in self-congratulatory patience for quirky insouciance on the part of applicants such as these (especially given the considerable effort made, and courtesy to the court shown, by the first named applicant) would be to play the role of a judicial free-rider; taking the feel-good benefit of immediate indulgence towards an applicant while shifting the social cost in dealing with the resultant mess to unheard private parties. Despite the natural preference for erring on the side of limitless indulgence, the balance of justice in such a situation calls for a more direct approach. I will hear the parties on whether any order should be considered limiting the applicants from engaging in future frivolous applications.

24. For the foregoing reasons I will order:

> (i) that the Residential Tenancies Board be substituted as respondent in place of the Private Residential Tenancies Board, that the name of the first named applicant be stated as "Peter Nowak" in the title to the proceedings, and that Andrea Hogan and Sinead Rossiter be added as notice parties, lest the matter proceed in any other forum;
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> (ii) that the application for leave be dismissed; and
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> (iii) that the parties be heard on whether any order should be considered limiting the applicants from engaging in future frivolous applications.