

THE HIGH COURT

[2016 No. 310 MCA.]

BETWEEN

SUSAN NOONE

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

RICHARD ROE

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of October, 2017

1. Does the High Court have jurisdiction to enlarge the time for bringing an appeal to this court from a determination order made by the respondent (the RTB)? That is the essential preliminary issue that arises on this appeal which if resolved against the appellant disposes of the matter.

Background Facts

2. The appellant is the tenant of a rented dwelling at 35 Mount Drinan Avenue, Swords, County Dublin of which the notice party is landlord. A notice of termination was served by the notice party on the appellant on the 19th January, 2016, alleging a breach by the appellant of the terms of the tenancy. The appellant did not vacate the premises on the expiry of the notice and the notice party accordingly applied to the RTB for dispute resolution services. The RTB referred the dispute to adjudication and a hearing took place before an adjudicator on 17th May, 2016. The adjudicator issued a determination which was appealed to the Tenancy Tribunal before which a hearing took place on the 28th July, 2016.

3. The Tenancy Tribunal made a determination order on the 23rd August, 2016, which was issued on 26th August, 2016. This determined that the notice of termination was valid and directed the appellant to vacate the premises within 91 days of the date of issue of the order. The order further directed payment of arrears of rent.

4. On 23rd September, 2016, the appellant issued the within notice of motion seeking to appeal on a point of law to this court from the determination order of the Tenancy Tribunal.

Relevant Legislative Provisions

5. Section 123 of the Residential Tenancies Act, 2004, insofar as relevant to these proceedings, provides as follows:-

"(2) A determination order embodying the terms of a determination of the Tribunal shall, on the expiry of the relevant period, become binding on the parties concerned unless, before that expiry, an appeal in relation to the determination is made under subsection (3).

(3) 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.

(4) The determination of the High Court on such an appeal in relation to the point of law concerned shall be final and conclusive...

(8) In this section 'relevant period' means the period of 21 days beginning on the date that the determination order concerned is issued to the parties."

6. As the brief chronology above shows, this appeal was brought more than 21 days from the date that the determination order issued.

7. Order 84C of the Rules of the Superior Courts, insofar as it is relevant to this appeal, provides as follows:

"1. (2) Where any enactment provides for an appeal to be made to the High Court or to a judge of the High Court from a decision or determination made or direction given by a person or body, other than a court, which person or body is authorised by any enactment to make such decision or determination or give such direction (in this Order referred to as 'the deciding body'), and provision for the procedure applicable is not made either by the enactment concerned or by another Order of these Rules, the procedure set out in the following rules of this Order shall apply, subject to any requirement of the relevant enactment....

2.(5) Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued -

(a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or

(b) 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.”

The Arguments

8. The first relief sought in the appellant’s notice of motion is an extension of time pursuant to O. 84C r. 2(5)(b). The appellant proceeded on the basis that O. 84C applied having regard to the fact that this court (Baker J.) expressly applied it in *Keon v. Gibbs* [2015] IEHC 812. Accordingly the appellant submitted that this court was bound to apply O. 84C on the same basis.

9. The RTB on the other hand submitted that the 21 day time limit in s. 123 was an absolute one which was clear in its terms and accordingly O. 84C has no application insofar as extension of time is concerned. A number of authorities were cited in that regard by counsel for the RTB. She submitted that insofar as *Keon* appeared to decide that the extension of time provision in O. 84C was applicable to appeals under s. 123, *Keon* was wrongly decided. Furthermore, counsel submitted that *Keon* proceeded on the basis that both the parties and the court assumed that O. 84C applied and no argument was ever addressed to the court to the contrary.

10. In that latter regard, counsel for the appellant made the point that the RTB was a respondent in the *Keon* case and ought not now be permitted to argue for a position contrary to that adopted by it in *Keon* to persuade this court that it ought not be followed. However, during the course of the hearing, I was informed by counsel for the RTB that although it was named as a respondent in *Keon*, it had not been served with the motion seeking an extension of time and therefore did not participate in the hearing. Indeed, at para. 2 of her judgment, Baker J. noted that the Board took no part in the application.

11. Having regard to the arguments that were raised by the RTB on the hearing of this application, I invited the parties to make further submissions in relation to the circumstances in which a court would be entitled to depart from a recent decision of a court of equal jurisdiction in the context of what might be described as the line of authorities commencing with *Re Worldport Ireland Ltd* [2005] IEHC 189. The parties duly furnished me with further submissions on this issue and I reserved judgment.

12. Before that judgment was delivered however, the Court of Appeal delivered judgment in an appeal from the decision of Baker J. in *Keon* which appeared to me to be of potential significance in the context of the issue arising in this case. Accordingly I issued a further invitation to the parties to make any additional written submissions they wished to in the light of this development, an invitation which was accepted by both parties by way of the submission of further written argument.

Discussion

13. In our adversarial system, litigation is party led. The court is normally asked to reach a decision based on competing arguments advanced by the opposing parties. Where those parties are legally represented at any rate, the court will normally proceed on the assumption that in opting between opposing arguments, the parties have themselves fully researched and considered the applicable legal principles. In the normal course of events, the court will not consider issues that have not been raised by the parties nor as a general rule will it have the resources to do so.

14. On occasion of course, the court may of its own motion raise an issue of concern which needs to be addressed and invite further argument on that issue, as indeed occurred here. Slightly different considerations can apply in the case of litigants in person where their ability to assist the court in reaching the correct conclusion is naturally more limited than that of professional lawyers.

15. In *Keon*, it is evident from a reading of the judgment of Baker J. that from the outset, both parties proceeded on the assumption that the court enjoyed jurisdiction under O. 84C to extend the time to bring an appeal from a decision of the Board. The controversy in that case was concerned only with whether or not the appellant had brought himself within the terms of the order. This is clear from the first paragraph of the judgment:

“[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.”

16. Neither party addressed in any way the terms of s. 123(3). Indeed the section is not even mentioned in the judgment save in a quotation from a “standard note” from the tribunal referenced by the court at para. 15.

17. It is clear therefore that the issue with which I am concerned is one which was neither raised by the parties nor considered by the court in *Keon*. The court was not invited to carry out any analysis of s. 123(3) nor did it do so. In such circumstances, I do not think that the judgment of Baker J. can be regarded as authority for the proposition that s. 123(3) does not contain an absolute time limit. True it is that the underlying premise of the judgment is that it does but I do not think that can be determinative of the issue I have to decide.

18. Indeed, it is evident from the judgment of the Court of Appeal delivered by Hogan J. (at [2017] IECA 195), that the Court of Appeal was very much alive to this difficulty.

19. In the High Court, Baker J. refused the application to extend time on the merits so that ultimately, the question of jurisdiction became somewhat moot or academic. The issue clearly did arise in argument before the Court of Appeal which appears to have adopted a pragmatic approach as explained by Hogan J.:

“[20.] As I have already indicated, the appellant has sought to appeal this decision on its merits. But before considering this question, it is, however, necessary to examine at least in passing a jurisdictional issue which was not directly addressed in the High Court. This was in large part because as counsel for the receiver, Mr. Mooney, informed us, his client wanted that Court to consider simply the merits of the application to extend time rather than address a jurisdictional question which – depending on the way it was resolved – might, in turn, raise a separate constitutional issue.

[21.] It was on this basis, therefore, that the Court determined at the outset of the appeal in an *ex tempore* ruling delivered by Finlay Geoghegan J. to proceed with the merits of the appeal to extend time and that it would only finally determine the jurisdictional issue in the event that it proved necessary to do so. In view of the clear conclusions which I have reached (and which I will detail presently) that the appellant has not presented any arguable grounds of appeal so that it would, in any event, be inappropriate to extend time, it is unnecessary to reach any concluded view on this jurisdictional issue. I feel nonetheless that it is important to draw attention to this jurisdictional issue as it may assume an importance in any subsequent case.”

20. Hogan J. went on to express some very helpful views on the jurisdictional issue under s. 123. While these observations were

clearly made *obiter*, I have found them to be of great assistance and I respectfully adopt and agree with them. Thus, Hogan J. continued:

"[24.] Perhaps the first thing to note is that there is nothing in s. 123 of the 2004 Act which indicates that this statutory time limit might be extended under any circumstances. It is true that in *Law Society of Ireland v. Tobin* [2016] IECA 26 this Court held that it enjoys an inherent jurisdiction to extend time where the relevant statutory provision permitting an appeal did not expressly provide for such a power. This, however, was in the context of an appeal from the High Court to this Court, where the right of appeal is constitutionally guaranteed by Article 34.4.1 unless regulated or excepted by law. ...

[25.] The present case is quite different, since - unlike the position in *Tobin* - the right of appeal to the High Court from the Tribunal is entirely dependent on statutory vesture. If, however, the Oireachtas has not provided for a power to extend time in this particular context, an issue must arise as to whether there is such a power at all under any circumstances, no matter what good reason for the delay may be advanced by any putative appellant.

[26.] The second thing to note is that the High Court proceeded on the basis that Ord. 84C independently conferred a power to extend time. I am not, with respect, convinced, however, that this premise is altogether correct. It is true that Ord. 84C, r. 2(5)(b) does provide for a power to extend time, but this is expressed to be contingent on 'any provision to the contrary in any relevant enactment.' If the proper construction of s. 123(3) of the 2004 Act is that it provides for a strict 21 day time limit which is not capable of extension, then this would amount to a 'provision to the contrary' such as would negative the potential operation of Ord. 84C, r. 2(5)(b). Certainly, if this is the proper construction of s. 123(3), then the scope of that appellate jurisdiction could not be changed or enlarged by Rules of Court: see, e.g., *The State (O'Flaherty) v. O Floinn* [1954] I.R. 295; *Rainey v. Delap* [1988] I.R. 470. A further consideration is that in view of the provisions of Article 15.2.1 of the Constitution (which vests exclusive legislative power in the Oireachtas) then, as I observed in *Gokul v. Aer Lingus plc* [2013] IEHC 432:

'any such change could only be brought by primary legislation enacted by the Oireachtas and could not be done not simply by Rule of Court....'

21. The wording of s. 123(3) and (8) is clear on its face and an appeal must be brought within 21 days of the date that the determination order is issued. By any reckoning, the appellant was outside the 21 day period in bringing this appeal. There does not appear to me to be any ambiguity in the wording of the section which might be said to leave open the possibility of the court having a discretion to extend the time. Had the Oireachtas intended that such a discretion be available to the court, it could have expressly so provided. It is worth noting in that regard that s. 88 of the 2004 Act gives express power to the RTB to extend the time limited by the Act for referral of a dispute to it for resolution. Thus s. 88 provides:

"(1) The Board may, on application to it, extend the time limited by any provision of this or any other Part for the referral of a dispute to it for resolution.

(2) The Board shall not extend the time concerned unless the applicant for the extension shows good grounds for why the time should be extended..."

22. Had the Oireachtas wished to provide for a similar power to extend on the part of the court in the case of an appeal to the High Court, it would presumably have done so in similar terms. The fact that the Oireachtas did not do so must be viewed as not only deliberate but as amounting to a provision "to the contrary" within the meaning of O. 84C r. 2(5)(b) as suggested by Hogan J.

23. In the context of planning legislation, the authorities suggest that time limits must be adhered to in the absence of express provision to the contrary and the court has no power to interfere - see *State (Elm Developments Limited) v. An Bord Pleanála* [1981] ILRM 108 (at p. 111), *Brown v. Kerry County Council* [2011] 3 I.R. 514 and *McCann v. An Bord Pleanála* [1997] 1 I.R. 264.

24. In *Curran v. Solicitors Disciplinary Tribunal* [2017] IEHC 2, the court was required to consider s. 7(12) (b) of the Solicitors (Amendment) Act 1960 which provides for the bringing of an appeal to the High Court from a decision of the Solicitors Disciplinary Tribunal "within 21 days of the receipt by the appellant of notification in writing of the finding". Eagar J. held that the language of this section, similar in its terms to s. 123 of the 2004 Act, was mandatory in nature and did not permit of an extension of time. In finding that the wording of the provision was clear, Eagar J. noted (at para. 22):

"When the legislature chose to extend the availability of an appeal against the decision of no finding of *prima facie* case, it expressly chose to limit this wider right of appeal to a strict time frame, without discretion to extend time."

25. Even if there was any potential conflict between the terms of s. 123 and O. 84C, which I do not believe there is, for the reasons explained by Hogan J. the clear intent of the legislature, evident from the wording of s. 123, cannot be overcome by secondary legislation such as the Rules of the Superior Courts.

26. Although as I have explained, the issue under discussion was not considered by Baker J. in *Keon* and thus it might be said that the decision does not conflict with the conclusion I have reached, insofar as it does, it seems to me that the *Worldport* principles are engaged. In that case, Clarke J. noted (at p. 7):

"Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period."

27. Those views were reiterated by the same judge, this time speaking in the Supreme Court, in *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27 where he said (at p. 2):

"[2.1] The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, by Kearns P. in *Brady v. D.P.P.* [2010] IEHC 231, and most recently by Cross J. in *B.N.J.L. v. Minister for Justice, Equality & Law Reform* [2012] IEHC 74 where *Worldport* was expressly followed.

[2.2] It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing.”

28. Having regard to the fact that the issue now before the court was not the subject matter of any consideration by Baker J. in *Keon*, in my view it may be said that the first and/or second of the *Worldport* principles arise. The fact that the court was not invited to, and did not in fact, consider this issue in arriving at its conclusion seems to me to provide a strong reason why I should not follow the implicit underlying rationale that the court possesses jurisdiction to extend the 21 day period limited by s. 123 of the 2004 Act.

Conclusion

29. For these reasons therefore, I am satisfied that the time limit stipulated in s. 123 of the 2004 Act is an absolute one and the court does not enjoy any jurisdiction to extend it . Thus, as this appeal was not brought within the time limited in that behalf by s. 123 it must accordingly fail *in limine*. In that event, it is unnecessary to consider any of the other issues raised by the appellant. Accordingly, I will dismiss this appeal.