THE HIGH COURT

JUDICIAL REVIEW

[2018/820 J.R.]

BETWEEN

GBOLAHAN AYENI

APPLICANT

AND

RESIDENTIAL TENANCY BOARD

RESPONDENT

AND

KATHLEEN SCREENEY AND KEITH SCREENEY

NOTICE PARTIES

JUDGMENT of Ms. Justice O'Regan delivered on the 21st day of May, 2019

Introduction
1. This is the applicant's application for a judicial review effectively seeking to quash the decision of the respondent of the 20th June, 2018.

2. The decision was dispatched on 20th June. In accordance with s.123 (8) of the 2004 Act and case law (in fact identified by the applicant) *Halbherr v. RTB* [2018] IEHC 595, it is the date of the decision that triggers time limits in respect of an appeal.

3. Following the dispatch of the Decision it would have been received on or about the 21st June, 2018, the date the applicant left the jurisdiction and did not return until the 10th September, 2018 - this is the reason the applicant affords in respect of the requirement for an extension of time.

4. The action relates to 16, Applewood Grove, Swords, Co. Dublin being property occupied by the applicant but within the ownership of Keith and Jacqueline Screeney, the landlords, who are not participating in this judicial review process.

Application
5. The statement of grounds is undated but it does appear that the process of seeking an extension of time was commenced in or about the 3rd of October (the date of the grounding Affidavit); ultimately the documents were filed on the 11th of October, 2008.

6. The preceding background was that the applicant's mother died on the 9th of May 2018 and on the 10th of May 2018 he booked his tickets (to go to his country of origin for the purposes of the burial of his mother), leaving on the 21st of June and returning on the 10th of September.

7. Prior to his leaving, on the 23rd May, 2018, he emailed the respondent seeking the decision. He did not at that stage or at any other time advise the respondent that he would be outside of the jurisdiction between the 21st of June and the 10th of September, 2018 nor did he attempt to arrange to secure the decision via email or some other mechanism. Indeed, he says that it is possible that the decision arrived to his home before he left on the 21st of June but he cannot say one way or another.

Background
8. The matter came before the respondent in the following circumstances:-

On the 18th of September 2017 the notice parties applied for a dispute resolution in accordance with the Residential Tenancies 2004 Act in respect of rent arrears and alleged over holding. There was an adjudication hearing on the 24th of October, 2017 and following same a report issued on the 29th of November, 2017. The landlord notice parties appealed that decision on the 7th of December, 2017 and thereafter in January, 2018 the parties were asked to advise the tribunal as to dates that they would not be available for the hearing of the landlord's appeal. In response to this query the applicants wrote by email on the 15th of January, 2018 to the effect that:

> *"Please take note that I am unavailable from the 24th of January, 2018 to the first week of March, 2018 inclusive. Therefore, please schedule the pending appeal hearing accordingly."*

There is nothing in that email to suggest that if the respondent gave notice to the applicant of a date during that period up until the first week of March it would not come to his attention until after the first week of March. For example, the applicant could have been involved in alternate judicial review proceedings, he could have been involved in jury service, he could be working - there are several reasons why the applicant would not be available but yet would receive any correspondence dispatched to him. He did not advise the respondent in his email of the 15th of January that any communication sent to him prior to the first week in March would not be received until effectively he returned to the jurisdiction. He did not mention leaving the jurisdiction.

9. The undated statement of grounds came before Judge Noonan on the 12th of November, 2018 when an order was made that the application would be on notice and that the landlord would be incorporated as a notice party.

10. It is interesting that there was a further order of Judge Noonan on the 6th of December, 2018 where it was mentioned that the leave and extension of time were the issues that were on notice - during the currency of the hearing the applicant sought to assert that leave subject only to an extension of time had been granted. That is not the case and indeed it does not accord with para. 7 of the applicant's affidavit of the 20th of February, 2019 where it is acknowledged that both leave and extension of time were on notice.

Merits
11. Insofar as time is concerned the applicant is relying on the fact that it was outside of his control that his mother died on the 9th

of May, 2018 and he was outside of the jurisdiction until the 10th of September, 2018. This however does not address that the papers before me are replete with emails from the applicant to the respondent and the applicant could easily have requested the respondent to communicate with him by email or make some further arrangements with the respondent. Also the applicant could have made some arrangements within his home as to the transmission of any document which came into the home while he was outside of the jurisdiction. He says that it was only on his return and on cleaning the house on the 16th of September that the letter from the respondent was discovered. The applicant suggests that his mother's death and being outside of the jurisdiction are good and sufficient reasons to extend time. In this regard o.84, r.20 of the Rules of the Superior Courts deals with judicial review and o.21 goes on then to provide that:

> *"Leave to apply for judicial review should be made within three months from the date when the grounds of the application arose."*

By virtue of r.21, sr, 2, the grounds first arose when the Decision was made.

12. It is common case that leave has not yet been afforded however, I would be satisfied that once the application first came before Judge Noonan that it was then opened and that was the conclusion of the period for which leave might have been made, in respect of the documents then before the Court.

13. The applicant in his affidavit suggests that the papers were taken by Judge Noonan on the 5th of November, 2018 to consider and it was subsequently on the 12th of November that an order was made directing that the leave application would be made on notice and accordingly for the purposes of this extension of time the period under review is the 20th of June, 2018 to the 5th of November, 2018. The three-month period therefore would have elapsed in or about the 20th of September 2018, ten days after the applicant returning from his mother's funeral. However, it took another almost two months after his return before the application was made before Judge Noonan.

14. Under order 84, rule.21, sr.3 the court may on application for that purpose extend the period within which the application for leave to apply for judicial review may be made but the court shall only extend such period if it is satisfied that there is good and sufficient reason for doing so and the circumstances that resulted in the failure to make application for leave within the period mentioned were outside of the control of the applicant or could not reasonably have been anticipated by the applicant.

15. The relevant grounds must be set out in an affidavit for or on behalf of the applicant. In this regard some grounds were afforded in the applicant's initial affidavit. However, the substantial grounds were recorded with exhibits in an affidavit on the 20th of February, 2019. The applicant asserts that the affidavit of the 20th of February, 2019 is to be read in conjunction with the statement of grounds. However, if this is the case then the extension of time period moves from the 5th of November, 2018 to the 20th of February, 2019, with no explanation forthcoming for the delay for the period following the Applicants return to Ireland on the 10-9-18.

16. Insofar as the leave application proper is concerned, it has been submitted by both parties that the Supreme Court's decision in *G. v. D.P.P.* [1994] 1 IR 374 covers the matter and in that case the Supreme Court stated that in order to secure leave for judicial review the applicant must make out a prima facie case to satisfy the court that the applicant has sufficient interest, that the facts averred to support a stateable ground for the reliefs sought, that on those facts an arguable case can be made that the applicant is entitled to the relief sought, that the application has been made promptly and within the time period provided by o.84 and finally the only effective remedy which the applicant could obtain would be an order by way of judicial review.

17. In fact, an appeal was available to the applicant under section 123 of the 2004 Act and that was for a 21-day period (dealt with by Mr. Justice Meehan in *Halbherr* aforesaid). Therefore 21 days from the 20th of June, 2018 the appeal period ran out. Mr. Justice Meehan noted in that decision that there is no provision for an extension of time.

18. The applicant himself suggests that the only effective remedy is judicial review because by the time he returned to the jurisdiction the appeal period had expired.

19. I am not satisfied that an alternative remedy was not available to the applicant but rather that the applicant by reason of management or potentially mismanagement of his affairs when he was outside of the jurisdiction did not know of the decision and did not arrange to appeal the matter, notwithstanding that he knew the decision was imminent and had been pressing for same in emails of the 24-4-18 and 23-5-18.

20. Moving to the grounds on which the applicant is seeking judicial review in the first instance he is stating that the respondent did not have authority to deal with the dispute between the parties and he says this for three separate reasons:-

> 1) He says that the tenancy was created in mid-August 2003.
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> 2) He says he received an email of the 24th of September, 2018 from within the RTB Disputes Resolution section to the effect that if a tenancy began before 2004 it would be outside the remit of the RTB and,
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> 3) He says that he made an arrangement with the landlord in anticipation of the coming into effect of the Residential Tenancies Act that that Act would not affect their relationship.

These grounds are not arguable because:-

> 1) S.3.1 of the 2004 Act says that the tenancies which would be the subject matter of the 2004 Act can be created either before or after the coming into force of the Act.
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> 2) The email of the 24th of September, 2018 was post the hearing and did not in fact have the impact of altering s.3(1).
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> 3) Insofar as the assertion that there was an agreement between the parties that the Residential Tenancies Act would not affect them there are two difficulties from the applicant's point of view in that regard. First of all it was never raised before the tribunal and secondly the applicant in fact sought to have litigated within that dispute an assertion that he was entitled to a set off. This assertion and in fact the complaint that he did not get a set off within the decision as to outstanding rent is inconsistent entirely with his assertion that there was an agreement between the parties.

21. A further ground is to the effect that the respondent did not abide by its own prior decisions. In this regard the applicant has exhibited two pages one from each of the asserted decisions not followed and it is not at all possible to know the background to

those determinations. This argument is wholly unmeritorious and is not arguable, having regard to what was before the Respondent.

22. A further argument which the applicant seeks to litigate is the fact that he was directed to pay the outstanding rent of in excess of €13,000 or a portion thereof within 14 days whereas he had an entitlement to appeal for a 21 day period. In the second affidavit on behalf of the respondent of Ms. Fogarty of the 12th March 2019, it is asserted that no rent has in fact been paid nor any arrears of rent and this affidavit of Ms. Fogarty was responded to by a further affidavit of the applicant of the 3rd of May 2019 and he does not deny that he has not paid the money or indeed any rent in the meantime. The impact of such non-payment is to the effect that there was no prejudice to the applicant by reason of the fact that he was directed to pay within 14 days and it supports the assertion by the respondent to the effect that a third party is prejudiced by the affording of an extension of time namely the landlords who have not received their arrears of rent or in fact ongoing rent notwithstanding that the applicant remains in occupation of their property.

23. The applicant suggests that the respondent deliberately refused to take relevant matters into consideration and it appears from oral arguments and indeed the subsequent affidavits commencing with the affidavit of the 20th of February, 2019 that the matter that the Tribunal apparently did not take into account was the fact that the applicant would be unavailable from a period to mid-March.

24. In my view it is unsustainable to say that the applicants did not take this into account having regard to the email dispatched as previously outlined and the fact that the date for the hearing was set was the 15th of March, 2018.

25. The balance of the grounds relied upon to seek the order of certiorari are very general in nature and are to the effect that the Tribunal acted profoundly unfairly in the manner in which it reached its decision; it violated the doctrine of fair procedure; it ran contrary to Article 13 of the ECHR and Article 47 of the Charter of Fundamental Rights; that the Tribunal was greatly biased and if one has regard to all of the foregoing apparently the order should be deemed null and void.

26. In submissions the Respondent asserts that such grounds are in defiance of Order 84 rule 20(3) and therefore such grounds are insufficient. The Applicant asserts that the affidavits on behalf of the respondent should not be admitted and the case should proceed without reference to them because of an assertion on behalf of the applicant as to a want of form or compliance with o.40 of the Rules of the Superior Courts as to the deponent's place of address and as to the date, time and place of when and where the affidavit was sworn.

27. In a judgment of the Court of Appeal of Ms. Justice Irvine on the 18th of February, 2016 an extension of time was sought. However, it is clear that the court took the view that the asserted defects were as to form only and did not prejudice the applicant nor indeed was any prejudice claimed.

28. Likewise it is a matter of form only that forms the basis of the within objections and no prejudice has been asserted. Added to that is the fact that it is a matter for the discretion of the court under o.40, r.15. Accordingly, I am satisfied that the affidavits can be considered properly before the court.

29. In oral submissions and indeed in the subsequent affidavits, not initially before the court when the matter was put on notice, the applicant has complained that the rent review was invalid and therefore there should not have been an order as to the arrears of rent. However, it is clear that during the currency of the exchange between the parties before the Tribunal the dispute as to arrears of rent was being addressed and the landlord notice parties stated that the rent increase to €1,100 per month was the subject matter of an application for rent subsidy which the landlords signed to assist the applicant. When the applicant was asked as to what rent subsidy he received he indicated that he would not divulge that information, it was privileged, and therefore it was not divulged to the Tribunal. The Tribunal then came to the conclusion that they were satisfied on the evidence of the landlords that the rent was increased from the 1st of January, 2015 to €1,100. There is nothing at all that is irrational about this portion of the Decision and indeed it is not even asserted that it is irrational and accordingly there was ample evidence before the Tribunal to come to such a decision. I am satisfied that it is not arguable in the light of the content of the transcript that the Tribunal acted outside the scope of its remit in determining the increase of rent.

30. Insofar as the Applicant complains that there was no set off given to him in the decision, in fact there was some set off afforded to the applicant and the Tribunal clearly resolved that some monies would be set off and some would not be allowed. Again that was entirely within the remit of the Tribunal and any complaint that the balance of the monies were not the subject matter of set off goes to the merits as opposed to the legality or lawfulness of the decision.

31. The applicant states that potentially the two prior decisions that he wishes to raise to the court were two prior decisions as between the within landlord and tenant. In respect of the second decision the application was withdrawn by the landlord and in the first decision the adjudicator made no finding in relation to the alleged set off money or rent review or validity of the notice to quit. The applicant says that under s.100 of the 2004 Act the landlord should have appealed this decision rather than commencing again. This matter was not raised before the Tribunal and as mentioned previously the applicant's own behaviour does not support this insofar as he sought during the hearing before the Tribunal set off in respect of the monies he says should not be before the tribunal. As he did not make that argument before the Tribunal he cannot raise that argument now.

32. The applicant complains that some documents were not seen by him before the communication of the 14th of February, 2018 being the date on which he was advised of the hearing on the 15th of March, 2018. However, from a perusal of his emails before the hearing of the 15th of March, and indeed a perusal of the transcript there was no complaint made by him in respect of this matter. Furthermore, it is clear from his own affidavit and the transcript that a few days before the hearing he submitted additional documentation himself and further documentation was submitted and accepted by the Tribunal from the applicant on the date of the hearing.

33. The applicant states that the transcript is not accurate. He has had almost two months to put before the Court an accurate transcript of the proceedings before the Tribunal - that is as between the affidavit of Ms. Fogarty being her second affidavit of the 12th March, 2019 when the transcript was exhibited and the applicant's final affidavit of the 3rd of May, 2019. In any event if one looks at the applicant's supplementary affidavits he says that prior to the hearing he made certain applications for an adjournment, as to why the second named notice party was not present and as to the cross-examination of the second named notice party. However, there is nothing during the currency of the hearing raised by the applicant in this regard and it is the hearing which formed the basis of the decision, therefore his arguments would have to be made before the hearing as opposed to informally in advance of the hearing.

Conclusion

34. By reason of all of the foregoing matters having taken into account the merits of the case, the availability of an alternative remedy and the limited reason given for failure to move within the three-month period I am satisfied having regard to *G. v. D.P.P.* and the provisions of o.84, r.20 & 21 that the period of time should not be extended in the instant matter. The applications for leave and an extension of time are refused.