Citation Number: [2008] IEHC 205

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 840 J.R.

BETWEEN

DONAL O'CONNOR

APPLICANT

AND
THE PRIVATE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND
KIERAN CONNELL

NOTICE PARTY

Judgment of Mr. Justice John Hedigan delivered on the 25th day of June, 2008.

1. The proceedings were instituted on the 17th July, 2006, seeking *certiorari* of the decisions of the respondent's adjudicator made on the 14th September, 2005 and of the Tribunal itself made on the 21st December, 2005. The applicant also seeks an order of *certiorari* in relation to the decision of the respondent to allow the notice party an extension of time to make a complaint. Finally, he seeks an order of prohibition on any enforcement of the determination made. The applicant seeks in these proceedings an extension of time to bring this application. In relation to delay, the Court notes that an extension was granted on the application for leave. The application for leave is made *ex-parte* and, of necessity, the Court in question is not able to adjudicate fully on the question of delay because there are no submissions of the respondent heard. This is why the extension of time granted on the application for leave is only a tentative one and must be revisited, if the point of delay is raised by the respondent at the hearing. The respondent is entitled to have their say and to have the matter adjudicated upon. The Court of its own motion may also revisit the issue. The law in relation to delay has been opened to me by counsel for the respondent. In *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301, it is established that the test is an objective one and the applicant bears the onus of proof and must show that there are reasons "which both explain the delay and afford a justifiable excuse for the delay" (per Costello J. at p. 315). I was further referred to the judgment of Mr. Justice Barr in *Solan v. DPP & Wine* [1989] I.L.R.M. 491 and I was referred in particular to the following passage (at p. 493):-

> "In the absence of evidence explaining delay, there is no basis on which the court can exercise its discretion to grant an extension of time for making the applications".

2. The obligation of the Court to enforce time limits is based upon the need to have some finality in those proceedings which may be the subject of judicial review. It is very important that the courts do not readily grant such extension when the issue is raised at the hearing. What reasons are advanced here to explain the delay and/or to justify it? There do not appear to be any grounds advanced, presumably because there are none. The delay here may well be only three weeks but that of itself does not raise any justifiable ground for extending time. Time limits are there for a good reason. The fact the applicant obviously delayed because he was bringing proceedings under s. 123(3) of the Residential Tenancies Act, 2004, is not something he can rely on, if, having accepted their striking out by the Master of the High Court, he decided to proceed another way. Insofar as he challenges the decision to extend the time for the notice party to bring proceedings, it is clear to me that he became aware of that decision by letter of the 25th June, 2005, one year prior to issuing these proceedings. I do not accept the claim that this information was "buried away with other correspondence". It was information clearly available at a time when the applicant was legally represented. For these reasons, I would refuse to extend the time to bring these proceedings. However, I should go further because an important point was raised and argued, i.e. that the applicant should have used an alternative remedy. What are those alternative remedies? Firstly, the Residential Tenancies Act 2004, (the Act of 2007) provides at s. 88, subs. 4 as follows:-

> "An appeal shall lie to the Circuit Court (by the applicant for the extension or, as the case may be, any other party to the dispute concerned) against a decision of the Board under this section to, as appropriate—
>
> (a) refuse to extend the time concerned, or
>
> (b) extend the time concerned,
>
> and, on the hearing of such an appeal, the Circuit Court may, as it thinks fit, confirm, vary or cancel the decision of the Board."

3. Furthermore, the Act of 2004 provides, at s. 123, as follows:-

> "(1) A determination order embodying the terms of an agreement mentioned in a mediator's report under section 95 (4) or the determination of an adjudicator under section 97 shall become binding on the parties concerned on the order being issued to them.
>
> (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.
>
> (5) The High Court may, as a consequence of the determination it so makes, direct the Board to cancel the determination order concerned or to vary it in such manner as the Court specifies and the Board shall cancel or vary the order accordingly; if the cancellation or variation directed to be made relates to a determination of the Tribunal not to deal with the dispute in accordance with section 85, the Board shall, in addition, refer all or part, as appropriate, of the dispute to the Tribunal for determination by the Tribunal and the provisions of this Part shall, with any necessary modifications, apply to that determination."

4. The Act, as one can therefore see, clearly provides for a complete code to deal with disputes relating to residential tenancies. As was submitted to me by counsel for the respondent, it is designed to provide a speedy and cost effective system for the resolution of those disputes. The respondent submits that the code provides, as noted above, for two adequate and alternative remedies in respect of the issues now raised by the applicant. The applicable legal principles are well established and are to be found, most recently in the Supreme Court decision in *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321. There, Denham J. (at p. 325)made reference to the approach taken in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, where O'Higgins C.J. held as follows (at p. 393):-

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

5. I was further referred to the decision of Mr. Justice Barron in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 where he stated as follows (at p. 509):-

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness".

6. In the instant case, these principles must be applied in considering the adequacy of the appeal on a point of law provided for by s. 123 of the Act of 2004. The respondent has submitted that an application of the principles, as outlined in *Tomlinson v. Criminal Injuries compensation Tribunal* makes it clear that the ability to appeal on a point of law provided for by the comprehensive code put in place by the Act of 2004 was the most appropriate remedy for the applicant. The consideration of the adequacy of this appeal mechanism is, of course, one of the factors that the Court is entitled to consider in exercising its discretion and to that extent, I was referred by the respondent to the case of *Stefan v. Minister for Justice* [2001] 4 I.R. 203, where in it was stated as follows (at p. 217):-

> "Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result."

7. It is clear here that the applicant had the opportunity to appeal the Board's decision to extend the time for the notice party to bring his application to it. He did not avail of this when he became aware of it. As I have found, this was when he received the copy letter of the notice party referring to the extension in June, 2005. In short, he had an adequate alternative remedy but did not avail of it. As to this and his other complaints he not only was aware of the alternative remedy provided by s. 123, he actually availed himself of it. When, upon the application of the notice party, the Master of the High Court struck out his proceedings brought under s. 123, the applicant did not appeal. The fact that the applicant may have decided that judicial review was the more convenient remedy cannot avail him here. His claim as pleaded in Court is that:-

> (a) The Board had an obligation to inform him of the notice party's application for an extension of time so he could make observations on that and having failed to do so, its decision to extend was *ultra vires*. This is clearly a point of law.
>
> (b) The decision of the Tribunal was required to be signed by all three members. This is also a point of law.
>
> (c) That the determination order was invalid because a sealed copy was not served upon the applicant and/or that no enforcement can be taken against him as a result thereof. This, also, is a point of law.
>
> (d) That the decision of the Board was out of time because the Tribunal did not communicate it to the Board until fifteen days after the hearing, rather than fourteen days. This point is made on the basis that once the discretionary power of the Board to make such orders is used, the orders so made take on the character of statutory rules binding the Board. This, again, is a point of law.

8. It is clear to me that the entirety of the case made herein by the applicant could have been made by way of an appeal under s. 123, using a procedure specifically designed for that purpose by the legislature and, in this particular case, capable of dealing with each and every one of his complaints. This being so, even were I to have extended the time, I would still have refused the reliefs sought on the basis that there existed an alternative remedy of which the applicant did not avail himself.