

## THE HIGH COURT

[2016 No. 180 MCA]

BETWEEN

JACEK SNOCHOWSKI

APPELLANT

AND

AN BORD UM THIONÓNTACHTAÍ PRÍOBHÁIDEACHA CÓNAITHE (THE PRIVATE RESIDENTIAL TENANCIES BOARD)

FIRST RESPONDENT

AND

MCGINLEY CONSTRUCTION LIMITED

SECOND RESPONDENT

**JUDGMENT of Mr. Justice Eagar delivered on the 13th day of March, 2017**

1. This is a judgment in respect of a notice of motion seeking:

(1) A decision by way of appeal on a point of law pursuant to s. 123(3) of the Residential Tenancies Acts 2004 – 2015 (the Act) and O. 84C of the Rules of the Superior Courts 1986 (the Rules) (as amended) that in its Tribunal decision (dated the 11th April 2016 and issued to the appellant on the 22nd April 2016) of an appeal of a determination of one of its adjudicators (dated 21st December 2015) the first respondent erred in its interpretation and/or application of Part VI of the Act and in particular in its interpretation and/or application of s. 75, 83, 100, 104 and 105 of the Act.

(2) Declarations that the first respondent's Tribunal had no lawful seisin of the said appeal and that the decision it purported to make on the 11th April 2016 is void.

(3) An order reinstating the adjudicators determination of the 21st December 2015.

(4) An order that the second respondent pay €10,000.00 to the appellant.

(5) An order for interest.

2. The appellant and the second named respondent entered into a tenancy agreement in respect of the dwelling at 65 Alexander Place, East Road, Dublin 3 on the 21st September 2014. The tenancy was not registered with the Residential Tenancies Board. The second named respondent served a notice of termination on the appellant on the 21st October 2015 on the grounds that there had been difficulties with other tenants residing at the dwelling. The appellant in his capacity as a tenant applied to the Residential Tenancies Board pursuant to s. 76 of the 2004 Act for dispute resolution services by an application form received by the first named respondent on the 19th November 2015. An application lead to the notice of termination served on the 21st October 2015 by the second named respondent was invalid.

3. An adjudication hearing took place on the 21st December 2015. The appellant was in attendance but there was no appearance on behalf of the second named respondent. The hearing proceeded in its absence and the adjudicator determined that the notice of termination served on the 21st October 2015 by the second named respondent was invalid on the grounds that he did not comply with the statutory provisions of the 2004 Act. The adjudicator further determined that the second named respondent be liable to pay the sum of €10,000.00 in damages to the appellant being damages of €6,570.00 for the consequences of unfairly terminating and evicting the appellant from the dwelling together with €3,000.00 for serving an invalid notice of termination on the appellant together with €430.00 in respect of the unlawfully retained security deposit by the second named respondent.

4. The second named respondent appealed the determination of the adjudicator to a Tenancy Tribunal (the Tribunal) pursuant to s. 100 of the 2004 Act. It was alleged by the second named respondent that he did not receive notification of the adjudicating hearing and that was the reason there was no appearance before the adjudicator. In documentation submitted to the first named respondent and furnished by the second named respondent to the appellant in advance of the Tribunal hearing, the reasons for termination of the Tribunal were set out in full by the second named respondent. The Tribunal hearing was convened and a hearing took place on the 11th March 2016. The appellant was in attendance and was represented by solicitor and counsel. The second named respondent was represented by Daniel McGinley.

5. The appellant made a preliminary objection at the outset of the hearing that the Tribunal had no jurisdiction to deal with the second named respondent's appeal on the grounds that the tenancy was not registered with the first named respondent. It was submitted that the second named respondent had no right to be heard as the tenancy had not been registered.

6. On being satisfied that it had jurisdiction to deal with the appeal made by the second named respondent the Tribunal proceeded with its hearing. Direct evidence was given by Daniel McGinley to the effect that the reason for termination of the tenancy was due to the difficulties the appellant was having with other tenants at the dwelling. Mr. McGinley also submitted that he did not carry out an illegal eviction and that the appellant vacated the dwelling with outstanding rent arrears. On legal advice, the appellant did not give sworn testimony to the Tribunal.

7. The Tribunal made a determination that an unlawful termination of the tenancy had taken place and awarded the appellant the sum of €2,496.05 to be paid within twenty-eight days by the second named respondent being €2,500.00 damages for unlawful termination of the tenancy less €433.95 in rent arrears having deducted the entire of the justifiable retained security deposit of €430.00. The Tribunal duly notified the first named respondent of its determination on the 11th April 2006 pursuant to s. 108 of the 2004 Act and the first named respondent proceeded to make a determination order in accordance with section 21. It is from this determination order that these proceedings arise.

8. The point of law on which the application is made is that the first respondent erred by dealing with the second respondent's appeal for the following reasons:

(1) The second respondent was the appellant's landlord but had not registered the tenancy in accordance with its obligations under Part VII of the Act and in particular in accordance with its obligations under s. 134 of the Act.

(2) The appellant had a dispute with the second respondent concerning the dwelling he was renting from the second respondent.

(3) The appellant referred the dispute to the first respondent who scheduled the dispute to be resolved by adjudication on the 21st December 2015.

(4) The appellant received notification and the date and the location of the adjudication and appeared on that date at the location, however, no one appeared on the second respondent's behalf. Nevertheless, the adjudication went ahead and the adjudicator heard evidence from the appellant alone.

(5) The adjudicator published her determination on the 5th January 2016, thereby resolving the dispute between the appellant and the second respondent.

(6) The second respondent disputed the adjudicator's determination and on or about the 22nd January 2016 appealed against it to the first respondent's Tribunal."

9. On or about the 11th February 2016 the first respondent notified the appellant and the second respondent that it would conduct a hearing on the 11th March 2016 to consider the second respondent's appeal. On the 11th March 2016 at the hearing of the appeal, the appellant submitted as a preliminary matter that the first respondent was precluded by law from dealing with the second respondent's appeal. Section 83(2) of the Act states:-

"The Board shall not deal with a dispute in relation to a tenancy referred to it under this Part by the landlord of the dwelling concerned if the tenancy is not registered under Part VII."

The first respondent rejected the appellant's submission and in doing so relied on s. 75(4)(a) of the Act which states:-

"References in this Part (dispute resolution) may to a party, without qualification, are references to a party to the dispute or disagreement concerned."

10. The point at issue is whether or not the appeal by the second named respondent to the Tenancy Tribunal amounted to "a referral" of a matter for dispute resolution. The court sets out what it believed to be the statutory context of the question of law raised before this Court.

11. A dispute is defined by s. 75 of the 2004 Act as follows:

(75)(1) References in this Part to the referral of a matter to the Board for resolution are references to the referral of the matter for the purposes of mediation, a determination by an adjudicator or a determination by the Tribunal under this Part (or more than one of those things) being carried out or made in relation to it.

(75)(4) References in this Part to a party, without qualification, are references to—

(a) a party to the dispute or disagreement concerned,

(b) in the case of proceedings referred to in section 23 to recover rent or other charges where the landlord or the person alleged to owe the rent or other charges is deceased, the personal representative of the landlord or that other person,

(c) the personal representative of the landlord or the tenant in any other case where, if the matter were a cause of action (within the meaning of the Civil Liability Act 1961), it would have survived for the benefit of, or against, the estate of the landlord or the tenant,

(d) in the case of a complaint mentioned in section 76(4), the licensee and the landlord, and

(e) in the case of a complaint mentioned in section 77:

(i) the complainant, and

(ii) the landlord of the dwelling concerned."

Under the heading of rights of referral by parties to tenancy and certain other persons s. 76 states:-

(1) Either or both of the parties to an existing or terminated tenancy of a dwelling may, individually or jointly, as appropriate, refer to the Board for resolution any matter relating to the tenancy in respect of which there is a dispute between them.

(3) The landlord may refer to the Board for resolution any matter relating to a dwelling in respect of which there is a dispute between the landlord and another, not being the tenant but through whom the other person claims any right or entitlement.

Section 83 of the Act provides that:

(1) Subject to subsection (3), the Board shall not—

(a) deal initially with a dispute referred to it under this Part, or

(b) allow any other procedure under this Part to be followed in relation to a dispute referred to it under this Part,

if the fee of the specified amount prescribed by rules under section 109 in relation to that initial dealing or the following of that procedure has not been paid to it.

(2) Subject to subsection (3), the Board shall not deal with a dispute in relation to a tenancy referred to it under this Part by the landlord of the dwelling concerned if the tenancy is not registered under Part 7.

In this case the second named respondent did not refer the dispute in relation to the tenancy to the Board but the plaintiff tenant did. An adjudication followed of which the second named respondent claimed he was not notified and when he became aware the result of the adjudication he appealed it under s. 100(1) of the Residential Tenancy Act 2004 as follows:

"100-(1) One or more of the parties may appeal to the Tribunal against a determination of an adjudicator under section 97(4)(a).

(2) Such an appeal shall be made within 21 days from the date the Board serves on the party the report and statement referred to in section 99(3)."

12. Counsel on behalf of the appellant said the appellant's case is one of statutory interpretation. The issue is whether or not the respondent's appeal was a referral of the dispute to the Tribunal and he submitted that it was. He said that having regard to s. 83(2) because the landlord had not registered the tenancy that referral was an unlawful referral of the dispute to the Tribunal. He further said that it was precisely what the Oireachtas had in mind which was rewarding registration and punishing non-registration.

13. Counsel said that the decision makers of the PTRB are required to act in accordance with natural and constitutional justice. Counsel concluded by suggesting that once a complaint is made against a party that party is entitled to natural and constitutional justice which includes the right to be heard and the right of appeal to the Tenancy Tribunal.

14. In effect the applicant is submitting to the court that a landlord who has not registered a tenancy has no right to be heard and he submitted to the court that the appeal to the Tenancy Tribunal amounted to a "referral" of a matter for dispute resolution.

15. Counsel for the first named respondent said that the applicant's submission that the appeals to the Tenancy Tribunal amounted to a referral of a matter for dispute resolution had no basis in the 2004 Act. She stated that under Part VI of the 2004 Act the Board is given jurisdiction to determine certain disputes referred to by landlords and tenants. There are two stages to the dispute resolution at first instance, a matter may be referred to mediation or adjudication and can be further appealed by either party to the Tribunal pursuant to s. 100 of the 2004 Act. She also noted that there was a provision under the 2004 Act for referral to be made directly to a Tribunal for determination. She submitted that throughout the provisions of the 2004 Act referrals used to relate to the initial complaint made. She also submitted that an appeal could not be interpreted as amounting to a referral and a separate complaint and there is no qualification to the right of appeal under s. 100 of the 2004 Act and the decision of the court. There is no mention of a referral in s. 100 of the 2004 Act because it simply refers to the entitlement to "appeal to the Tribunal against a determination of an adjudicator". She submitted that the party who refers a dispute to the Board is the referring party and once a party refers a dispute to the Board a dispute resolution process is set in motion. She submitted that s. 83 clearly permits a tenant to refer a complaint to the Board in the absence of registration but once a tenant has referred such a complaint the Board has jurisdiction to consider and determine it.

16. Counsel on behalf of the first named respondent said that the decision makers of the PTRB are required to act in accordance with natural and constitutional justice. Counsel concluded by suggesting that once a complaint is made against a party that party is entitled to natural and constitutional justice which includes the right to be heard and the right of appeal to the Tenancy Tribunal.

### **Decision of the Court**

17. It appears to the court that in this case the tenant referred the dispute to the Tribunal and the Board. The Board responded by providing for an adjudication hearing which was arranged for the 21st December 2015. There are some issues as to whether or not the second named respondent was aware of this however, on receiving the result of the adjudication the second named respondent having received that adjudication report on the 4th January indicated their intention to appeal the case on the 14th January and the appellant was notified of the hearing before the Tenancy Tribunal.

18. It would not have been open to the second named respondent to refer the matter to the Board as it was not registered. However, the court is satisfied that the second named respondent was entitled to appeal the adjudicator's report as saying that there is no mention in s. 100 of the Act of a referral it is purely an appeal. The court accepts the submission of the first named respondent that the Board must act with due regard to fair procedures and that as well as the appellant, the second named respondent is entitled to fair procedures.

19. It is quite clear to the court that the second named respondent was not entitled to refer the dispute to the Board because the tenancy had not been registered. However, there was no qualification of the right to appeal under s. 100 of the 2004 Act and the appeal to the Tribunal is unqualified.

20. The court also accepts that the decision makers of the PTRB are required to act in accordance with natural and constitutional justice and the second named respondent is entitled to be heard by way of a right of appeal to the Tenancy Tribunal.

21. In all the circumstances the court refuses the leave sought in the notice of motion.