

BETWEEN:**JERRARD NESTOR****APPELLANT****-AND-****RESIDENTIAL TENANCIES BOARD FORMERLY PRIVATE RESIDENTIAL TENANCIES BOARD****RESPONDENT****JUDGMENT of Mr. Justice Twomey delivered on the 8th day of May, 2018.****Summary – thousands of euro in legal costs to appeal an award of €910**

1. The Appellant, ("Mr. Nestor") has appealed the Determination Order dated 27th September, 2016 (the "Determination Order") of the Respondent (the "RTB"), which decision determined that Mr. Nestor had unlawfully terminated a tenancy agreement for a premises in Galway. The Determination Order was issued after Mr. Nestor had appealed the earlier decision of the Adjudicator appointed by the RTB and made on the 15th June, 2016 which also found against Mr. Nestor.

2. The Determination Order concerned a premises at 134 College Road, Galway. The RTB determined, *inter alia*, that the Notice Party ("Mr. Tabuka") was a tenant of Mr. Nestor's at this premises and that his tenancy was unlawfully terminated by Mr. Nestor. The RTB ordered that Mr. Nestor pay back the deposit of €400 to Mr. Tabuka less €90 in respect of unpaid rent (€310 net) plus €600 as damages for the unlawful termination of the tenancy agreement and wrongful withholding of the deposit. Accordingly, a total of €910 was ordered by the RTB to be paid by Mr. Nestor to Mr. Tabuka. It is this award which is now being appealed to the High Court, notwithstanding the significant legal costs attached to High Court litigation.

3. Mr. Nestor is a lay litigant and he is appealing the Determination Order. Since Mr. Nestor has already appealed the decision of the Adjudicator to the RTB, the only appeal left to him is on a point of law to the High Court under s. 123(3) of the Residential Tenancies Act, 2004, which appeal is now before this Court.

4. It is important to note that this is not an appeal on the merits of the RTB's decision. The first appeal from the Adjudicator to the RTB is an appeal on the merits and that appeal considered in general terms whether the Adjudicator made the right decision and that appeal is a *de novo* hearing of the dispute. In contrast, this appeal is an appeal on a point of law. This means that the RTB is entitled to get the decision wrong on the merits or more accurately, an appeal on a point of law means that this Court cannot reverse the decision of the RTB simply because this Court might have reached a different decision on the fact. This is because an appeal on a point of law is a much more limited appeal than an appeal on the merits. In this appeal on a point of law, this Court is concerned only with the much narrower issue of whether an error of law was made by the RTB or whether there was no evidence for the decision reached by the RTB, as distinct from whether the right decision was reached.

5. This judgment deals first with whether the decision of the RTB should be overturned on a point of law. Secondly, and irrespective of whether the appeal is successful or not, it deals with the broader and arguably more significant issue that this appeal of an award of €910, which is subject to the jurisdiction of the High Court, leads to the completely illogical situation where it costs many thousands of euro in legal costs to appeal a matter worth €910.

6. There were two substantive grounds of appeal raised by Mr. Nestor, which will now be considered in turn.

A. RTB has no jurisdiction as premises are landlord's dwelling?

7. First, Mr. Nestor claims that the premises in question which Mr. Tabuka occupied is Mr. Nestor's dwelling, as distinct from a self-contained unit, and so the RTB did not have the jurisdiction to deal with the dispute between Mr. Tabuka and Mr. Nestor under s. 3(2)(g) and s. 4(2) of the 2004 Act.

8. This would appear to be a valid argument on the facts as presented by Mr. Nestor of the layout of the dwelling and indeed it is possible that if Mr. Nestor had raised this argument at the hearing before the Adjudicator or at the appeal before the RTB, which appeal is a *de novo* hearing, Mr. Nestor might have been successful on this point.

9. However, one does not have numerous bites of the cherry if one is unhappy with a decision made by an administrative body, such as the Adjudicator under the 2004 Act or the RTB on an appeal of that decision. The only basis upon which one can appeal a decision of the RTB is on a point of law. The argument being put forward by Mr. Nestor is not a point of law argument, since it is a new ground of challenge to the jurisdiction of the Adjudicator and the RTB which was not raised previously.

10. As is clear from the judgment of Baker J., in *Doyle v. Private Residential Tenancies Board* [2015] IEHC 724, even if this Court agreed with Mr. Nestor, and he may well have a perfectly valid point, this Court is not permitted to decide this appeal on this ground proposed by Mr. Nestor, since it is new evidence that was not before the RTB.

11. While Mr. Nestor may feel personally aggrieved that this ground, which might have been successful, is not considered by this Court, there are perfectly good policy reasons for this approach, namely that there would be a considerable growth in the number of appeals to the High Court (at a considerable cost to the taxpayer), if this was permitted. The Oireachtas by enacting the 2004 Act has put in place a specialist and relatively cost-efficient body compared to the courts, namely the Adjudicator and RTB, to hear all the evidence and deal with all the grounds of the parties, so that court intervention should only be required in rare instances where they had been an error made on a point of law and not, as Mr. Nestor might like, to hear new grounds not advanced before the Adjudicator or the RTB.

12. As previously noted, the grounds for successfully appealing a decision on a point of law are very restricted and since the failure of the RTB to consider a ground which was not raised by Mr. Nestor, is not a challenge on a point of law, this Court rejects this ground of challenge by Mr. Nestor. It is to be noted that it is completely understandable that the grounds for an appeal should be so restricted, since Mr. Nestor has already had one appeal of the initial decision of the Adjudicator and one cannot have endless appeals on the merits of a decision.

B. No binding tenancy agreement with tenant?

13. The second ground of challenge by Mr. Nestor is that he did not have a tenancy agreement with Mr. Tabuka despite the RTB's finding to that effect. His argument is that he had simply a *proposed* tenancy agreement with Mr. Tabuka, which was subject to a pre-condition that was never satisfied by Mr. Tabuka, namely that Mr. Tabuka, although he paid a deposit (€400), he failed to pay four weeks' rent in advance to Mr. Nestor (€360). On this basis, Mr. Nestor argues that the RTB did not have jurisdiction to deal with this dispute, since there was no tenancy agreement in existence.

14. This ground is different from the first ground since it is not a new ground of challenge, as the same argument was made by Mr. Nestor before the RTB. As is clear from *Doyle v. Private Residential Tenancies Board*, it is of no assistance to Mr. Nestor if this Court agrees with his argument that he only had a *proposed* tenancy agreement with Mr. Tabuka. This is because under s. 123(3) of the 2004 Act, it is an appeal on a point of law, not an appeal on the merits. If this was an appeal on the merits, it is quite possible that this Court might have reached such a conclusion on the evidence.

15. However, as is clear from *Doyle v. Private Residential Tenancies Board*, the role of this Court is not to decide the case on its merits, but rather to decide whether there was *any evidence* before the RTB upon which it could have reached the conclusion that there was a tenancy agreement between Mr. Nestor and Mr. Tabuka.

16. As this Court cannot decide this appeal on the merits, it is also not the function of this Court to prefer the evidence of Mr. Nestor over that of Mr. Tabuka, or *vice versa* and this is why this Court did not accede to Mr. Nestor's application to have this hearing adjourned when Mr. Nestor discovered that Mr. Tabuka would not be providing evidence to this Court. There is no need for Mr. Tabuka, or any other person, to provide evidence on an appeal on a point of law.

17. This Court must therefore simply consider whether there was any material which would constitute evidence upon which the RTB could rely for its conclusion that there was a tenancy agreement between Mr. Tabuka and Mr. Nestor.

18. In this regard, it is relevant to note that the following five pieces of evidence were relied upon by the RTB for its decision, and none of this evidence was disputed by Mr. Nestor:

- (i) Mr. Tabuka and Mr. Nestor signed a tenancy agreement which provided for a term of 6 months, the payment of a deposit of €400 and the payment of rent of €90 per week, which rent was never paid by Mr. Tabuka,
- (ii) Mr. Tabuka paid Mr. Nestor a deposit of €400 in respect of the premises,
- (iii) Mr. Nestor provided Mr. Tabuka with a key to the property and allowed him access to the property,
- (iv) While it is disputed that Mr. Tabuka ever slept in the property, it is accepted that he occupied the property at a certain stage and was asked to vacate it by Mr. Nestor after less than a week of occupancy,
- (v) Mr. Nestor sought to deduct €90 from the deposit to take account of the fact that he had lost one week of rent that he could have had from another party if Mr. Tabuka had not occupied the property for a week.

19. As previously noted, Mr. Nestor claims that he never had a tenancy agreement with Mr. Tabuka and the evidence he relies upon for this conclusion is that it was a pre-condition of the alleged tenancy agreement that Mr. Tabuka pay four weeks' rent in advance, which Mr. Tabuka never did.

20. Again, this is a plausible argument by Mr. Nestor and if this Court were hearing this appeal on the merits, it is possible that it would have concluded that no tenancy agreement came into existence. However, it is relevant to note that the signed tenancy agreement was not produced in evidence before this Court, nor was it before the RTB, although Mr. Nestor alleges that he provided it to the Adjudicator.

21. In any case, as is clear from *Doyle v. Private Residential Tenancies Board*, the sole role of this Court on a point of law appeal is to determine whether this Court can conclude that there was *no evidence* before the RTB which supported its finding that there was a tenancy agreement between Mr. Nestor and Mr. Tabuka.

22. It seems clear to this Court that, whether this Court agrees with the RTB or not with its finding, it is the case that the foregoing evidence constitutes evidence which supports the RTB's conclusion that there was a tenancy agreement in place between Mr. Nestor and Mr. Tabuka. This Court has particular regard to:

- the fact that an agreement was signed providing for a six month tenancy,
- the fact that Mr. Tabuka paid Mr. Nestor a deposit,
- the fact that Mr. Nestor handed over the keys to the premises to Mr. Tabuka,
- the fact of Mr. Tabuka's occupancy of the property for up to a week.

23. Therefore, this Court cannot say that there was *no evidence* for this conclusion. Accordingly, this ground of challenge is also rejected by this Court. For this reason, Mr. Nestor is unsuccessful in this appeal.

Illogical to risk thousands of euro to appeal an award of €910

24. However, while deciding this substantive point of appeal before this court, it became clear that the most significant issue arising out of this appeal is that under the appeal system in place for decisions of the RTB, it is likely to cost an appellant such as Mr. Nestor several thousand euro in legal costs to appeal a case with a value of €910, which to this Court defies all logic.

25. This is because the appeal of the RTB decision under s. 123(3) of the 2004 Act is not to the District Court or the Circuit Court, but to the High Court. The hearing of the appeal in this case took circa two hours (i.e. a half-day hearing in the High Court). This means that the costs of appealing the award of damages of €910 by the RTB are likely to be many thousands of euro, since High Court litigation is so expensive. In this Court's view this is the most significant issue arising out of this appeal.

26. This is because whether Mr. Nestor is successful or not in his appeal, it must be observed that there is something illogical with a system where it costs several thousand euro to appeal an award of €910. It means that while a landlord or tenant has an appeal in

principle from a decision of the RTB, in practice very few people would risk having thousands of euro awarded against them in legal costs, if they lose, on a chance that one might recover €910. It seems to this Court that the appropriate court for appeals of decisions of the RTB is a court where the costs are commensurate with the money at stake, in this case that would be the District Court. However, the 2004 Act provides that appeals on a point of law from the RTB are made to the High Court without, it seems, any fixed costs for appeals such as these, and so one is left in a situation where an appellant risks several thousand euro in costs in order to appeal an award of €910.

Thousands of euro of taxpayers' funds used in an appeal over hundreds of euro

27. It is not just individual landlords and tenants who are affected by the disparity between the cost of an appeal and the value of the appeal. It is also a matter that affects taxpayers. This is because the RTB is funded by the taxpayer, which means that the taxpayer is expending significant resources to defend appeals even though, if the RTB were a private-sector organisation it would have made financial sense for the RTB to simply concede the appeal and pay Mr. Tabuka the €910 award out of its own resources. This is because it would have made financial sense to pay the €910 to Mr. Nestor rather than incur thousands of euro in costs in fighting the appeal and risk an award of legal costs against the RTB and/or risk the chance that, even if the RTB won, it might not recover its costs from Mr. Nestor (if for example Mr. Nestor did not have the resources to pay the RTB).

28. While this would have been the financially sensible approach (if the RTB were a private-sector organisation), it is important to note that this Court is not suggesting that this would have the correct approach in this case.

29. This case does however highlight a more significant issue, namely that if the value of this case (€910, or indeed anything even close to that figure) is reflective of the value of appeals involving the RTB (and that may well be the case, since residential tenancies deal normally with relatively small monthly amounts of rent which are fractions of the €75,000 jurisdiction of the High Court and fractions of the costs involved), this cannot be a proper use of taxpayers' funds. However, the law as it currently stands is that an appeal to the High Court is what is set down by the 2004 Act and it will remain so, unless the 2004 Act is amended.

Most expensive court chosen for the hearing of RTB appeals

30. It seems to this Court that the 2004 Act does not appear to have been drafted with the public in mind, since it cannot be in a tenant's or landlord's interests that the most expensive, rather than the cheapest, court is chosen for the hearing of their appeals. Undoubtedly it benefits the lawyers who are acting in such cases, since the fees for resolving an appeal in the High Court are many multiples of the fees for resolving an appeal in the District Court, but this approach would not appear to benefit the public or the taxpayer.

31. It also seems to this Court that this situation epitomises some of the flaws in the current system of civil justice, where it does not always appear to have been designed with the financial interests of the users in mind. It seems to this Court that by concentrating litigation in the High Court (and so long as High Court litigation remains as expensive as it currently is), the civil justice system will live up to the well-known adage quoted extra-judicially by Kelly P. in the recent Bar Review (2018) Vol 23 No. 1 at page 1:

"Under the current system, as they say, the only people who can litigate in the High Court are paupers or millionaires".

Yet ironically, s. 123(3) of the 2004 Act, as if oblivious to the foregoing adage, expressly provides that in relation to appeals between landlords and tenants over residential tenancies:

"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." [emphasis added]

Lay litigants may not be aware of the risk of large costs awards against them

32. Mr. Nestor is a lay litigant and this may explain why he may have pursued this appeal to the High Court, as he is legally entitled to do, despite the massive difference between the money at stake (€910) and the thousands of euro in costs which could be incurred by him, if he lost.

33. Unlike losing his case before the Adjudicator or the RTB, where there is no costs order made against a losing landlord or tenant, if he loses his case in the High Court, the landlord/tenant will, save in exceptional circumstances have the huge legal costs of the winning side awarded against him, as well of course of paying his own lawyers (although in this case, Mr. Nestor is a lay litigant).

34. It is possible that if Mr. Nestor had sought legal advice, he would have been advised that while he had an appeal 'in principle' of the RTB decision to award damages against him of €910, the reality was that because of the enormous costs of High Court litigation, it would be foolish for him to pursue the appeal over that amount of money. In this regard, if such advice had been given it would have simply reflected the adage that litigation in the High Court, but not the District Court, is the preserve the very rich (who can afford to pay legal costs to the winning party, if they lose) and the very poor (who do not care if they lose since they do not have the funds to pay legal costs to the winning party).

Conclusion

35. For the reasons set out above, this Court would dismiss Mr. Nestor's application for an order pursuant to Order 84C of the Rules of the Superior Courts against the Determination Order of the RTB.

36. Additionally, it is this Court's view that for the reasons stated above, it is regrettable that the current appeal system for RTB decisions means that this appeal over a sum of €910 had to be heard in the High Court at a cost of many thousands of euro.