

THE HIGH COURT

[2015 No. 391 MCA]

BETWEEN

GRIGORE MUNTEANU

VERA MUNTEANU

APPELLANTS

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 28th day of June, 2016

1. This is an appeal under s. 103(3) of the Residential Tenancies Act 2004 as amended by s. 57 of the Residential Tenancies (Amendment) Act 2015. S. 123 (3) reads:

"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".

Section 123 (4) states:

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

2. Section 123 is contained in Chapter 9 of the Residential Tenancies Act 2004, as amended under the heading "Determination Orders and Enforcement Generally" and is limited to appeals from determinations of the Tribunal.

Application to extend time

3. The facts are to a large extent agreed between the parties. The second named appellant appeared on behalf of herself and her husband. She stated that they had been tenants of 33 Horan Hall, Belgard Square, West Tallaght, since 2008. In January, 2012 they signed a new tenancy agreement. The original landlords were Catherine Whelan and Martin Wickham but a receiver, Ken Tyrell, was appointed over the property on 27th May, 2014.

4. Mr. Tyrell authorised Aramark Property to act as agent for the receiver in the collection of rental income from the properties, and to act as the property manager with immediate effect.

5. Aramark Property served notice of termination on the appellants by letter dated 23rd February, 2015. The termination date of the tenancy was 15th June, 2015.

6. It was common case that the first appellant had a stroke on 27th January, 2015, about a month before the notice of termination was served. The Court had medical reports in relation to the treatment and medication of the first named appellant.

7. In the notice of termination, it was made clear that any issue as to the validity of the notice, or the right of the landlord to serve the notice must be referred to the Residential Tenancies Board under Part VI of the Residential Tenancies Act 2004 within 28 days from the receipt of it. The appellants applied for dispute resolution services on 3rd June, 2015 and requested to extend the time limit for the referral of a dispute relating to the validity and the right of the landlord to serve a notice of termination. As the appellants had failed to lodge their complaint within the statutory timeframe, the respondent refused to accept their application for dispute resolution services. The appellant subsequently applied to the respondent for an extension of time for the referral of their dispute pursuant to s. 88 of the Act.

8. Section 88 of the Act of 2004 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.

...

(4) 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."

9. The respondent was not satisfied that the appellants had established good reasons to extend the time, and the respondent refused to accede to their application.

Circuit Court Proceedings

10. On 24th June, 2015 the landlord applied to the respondent for dispute resolution services, alleging that the appellants were over-holding since the 15th June, 2015.

11. Concurrently, the appellants applied to the Circuit Court pursuant to s. 88 of the Act for an extension of time for the referral of the appellants' dispute on 16th July, 2015. The application was to be heard before Judge Lindsay on 19th October, 2015. On that occasion, the respondent outlined that the first named appellant's application was moot in circumstances where the notice of termination in question served on 23rd February, 2015 was now the subject matter of a dispute before the respondent, by virtue of the landlord's application for dispute resolution services. Judge Lindsay took into account the submission of the respondent that the Tenancy Tribunal would be determining whether the notice of termination served on 23rd February, 2015 was valid or not. The subject matter to be heard before the Tenancy Tribunal thus mirrored the complaint of the appellants before that court, and the appellants could challenge the validity of the notice of termination at the hearing before the Tenancy Tribunal. The Circuit Court was thus satisfied that there was no necessity to hear the merits of the appellants' extension of time application in circumstances where the notice of termination, the subject matter of the appellants' complaint before the court, was now before the respondent for determination by reason of the landlord's application for dispute resolution services. The court was therefore satisfied that the application for an extension of time was moot.

Tenancy Tribunal Hearing

12. An adjudication hearing took place on 29th July, 2015. The dispute before the adjudicator was in relation to over-holding. The applicant's landlord was the receiver and the respondent tenants were the appellants. The second named appellant and the receiver's agent, Michelle O'Sullivan were in attendance. The adjudicator advised the parties present that she would compile a report containing her proposed determination, which would be furnished to the Board. She indicated that the Board would issue this report to both parties, and then issue a determination order, if the proposed determination in the adjudicator's report was not appealed by either party within 21 days of the date of receipt of that report by the parties. She also indicated that if the matter was appealed, there would be a full re-hearing of the case in front of a three person Tribunal.

13. Michelle O'Sullivan submitted that the receiver, Ken Tyrell, had been appointed on 27th May, 2014 as a receiver of the assets of Catherine Whelan and Martin Wickham, procured by deed of mortgage dated 5th May, 2006 and made between the landlords and KBC Bank (Ireland) Plc. The assets included the dwelling that was the subject of the application. She also stated there was no current fixed term lease agreement, that the current rent was €700 per month and a deposit of €625 had been paid by the tenants. She stated to the adjudicator that the receiver had wished to sell the dwelling, and that she as the receiver's agent had served a notice of termination on the tenants on 23rd February, 2015 by post. The notice had expired on 15th June, 2015. She said the receiver was not prepared to allow the tenants to reside in the dwelling until the end of October, 2015 but would allow them to reside in the dwelling for another month, or for a maximum timeframe of six weeks.

14. The second named appellant gave evidence that she and the first named appellant had not vacated the dwelling when the notice expired. She had understood she had a right to reside in the dwelling for a four year period. She explained that her husband had fallen ill in January, 2015 and that she was looking after him. She therefore required some time to vacate the dwelling, and proposed that she and the first named appellant would vacate the dwelling at the end of October, 2015.

15. The adjudicator explained to the second named appellant that she had to determine the validity of the termination notice, and that if she found the notice to be valid she had to make an order for possession of the dwelling. Her determination was that the notice of termination served on 23rd February, 2015 was valid.

Re-hearing

16. The appellants appealed the adjudicator's determination, and notice of this appeal was received by the respondent on 26th August, 2015. The grounds for the appeal were summarised as:

- a. Unfair hearing.
- b. The peculiarities of the first named appellants' illness/disability.
- c. The appellants' permanent personal care needs.
- d. Particular needs, accommodation and unavailability.

17. It is clear that the grounds of appeal did not appear to challenge the validity of the notice of termination. The respondent scheduled a tribunal hearing and the parties were notified of same by letter dated 8th October, 2015. The tribunal hearing was convened on 13th October, 2015. The second named appellant was in attendance and appeared on behalf of the first named appellant. The receiver was represented by Michelle O'Sullivan and Rachel Cronin (both appointed as the receiver's agents in respect of the tenancy). The tribunal panel constituted John Keaney, the chairman, and Susie Quirke B.L. and Peter Shanley B.L. There was also present a stenographer from Gwen Malone Stenographers who recorded the proceedings. Each of the parties had been given in advance a copy of a document headed, "Tribunal Procedures". At para. 14 of this document it states:

"On finishing the hearing, the Tribunal will not give an immediate decision but will notify the Residential Tenancies Board of its decision in accordance with the specified time limit for doing so. The Residential Tenancies Board will then issue a determination order to the parties reflecting the Tribunal's decision. The determination order may be appealed within 21 days to the High Court only on a point of law. If the 21 days expires without an appeal the order will be binding."

18. Paragraph 16 of the Tenancy Tribunal Procedures provided that any documentation which a party seeks to rely on must be submitted to the respondent 10 days in advance of the hearing so that it can be circulated to the parties. The respondent received the medical report in relation to the first named appellant together with copies of the documents relevant to the Circuit Court procedures. This was forwarded to the receiver's agents in advance of the hearing. There is no requirement that the decision of the tribunal ought be communicated to the Board within a specific time-frame, save the following:

"The Tribunal shall, as soon as practicable after completing its deliberations, notify the Board of its determination in relation to that dispute."

There is thus no time limit specified, save the words "as soon as practicable".

19. A transcript of the hearing of the tribunal was made available to this Court by way of exhibit II, John Keaney's affidavit, sworn on 8th February, 2016.
20. In the course of the hearing, Michelle O'Sullivan had indicated that the renewal of the tenancy on 2nd February, 2012 provided for a tenancy of fixed term for 12 months, however the first and second named appellants disputed the fact that it was for a fixed term.
21. The second named appellant gave evidence that she and the first named appellant had been residing in this address from 2008. In 2012, the landlord asked them to sign them for a new agreement, and that this agreement was for an unlimited period. She denied that the agreement was for a 6 month or 12 month period, she had not understood it to be a fixed term tenancy.
22. She confirmed she had received a letter from Aramark Properties enclosing the notice of termination.
23. She gave evidence that in January, 2015 her husband had suffered a stroke. Thereafter, he was suffering from depression, and she was acting as his carer. She stated that the receipt of the notice of termination had greatly affected her husband's depression. She complained that the adjudicator sought only to confirm the validity of the termination notice. She stated that she was unaware of the means by which to appeal this decision, and made references to appealing the decision to a higher body, on the basis that her and the first named appellants' rights under the Convention of Human Rights had been breached.
24. She was asked by the chairman if she disputed the notice of termination's validity, received by the appellants on the 23rd February. She complained that this point had been raised before the Residential Tenancies Board, but they had refused to grant her an extension of time. The chairman indicated that the extension of time was not relevant, and that it was the action brought by the landlord that was before the Board. The chairman confirmed the second appellant's position, that they did not dispute the validity of the notice of termination by stating the following:

"Just to clarify, your application to-date to be allowed to stay in the property is not because the notice of termination was invalid but because special considerations are to be given to your circumstances and the circumstances of your husband's health, in that we should allow you to stay in the property or the dwelling on that basis."

The chairperson also pointed out that the second appellant had indicated to the adjudicator that the second named appellant had indicated that if she was given time, she would vacate the property by the end of November, 2015. The second named appellant agreed with this and the chairman replied,

"Today is the end of November, or tomorrow is."

The second named appellant then emphasised the issues regarding her husband's medication. She indicated at this point that she would like to extend the tenancy until February, 2016. She was asked by a member of the tribunal in relation to what steps she had taken to secure new accommodation, and she stated that she had identified only one property.

25. Michelle O'Sullivan explained that at the initial adjudication hearing, on behalf of the receiver, she and the other agent had attempted to reach an agreement when the tenant had initially requested an extension until the end of October, 2015. She contacted the receiver but they were not able to agree any terms with the appellant, as at that stage the notice had been issued since February, 2015 and the second named appellant reiterated that they wanted to stay until the end of February, 2016.

26. On 16th November, 2015 the Tribunal notified the respondent of their decision, and their decision was

- i. that the Notice of Termination served on the appellants by the respondent was valid; and
- ii. that the appellants shall vacate and give up possession of the above dwelling within 28 days of the issue of the order;
- iii. the appellants shall pay any further rent outstanding from 30th October, 2015 at the rate of €700 a month; and
- iv. the landlord shall refund the entire of the security deposit of €625 to the appellants on gaining vacant possession of the above dwelling.

A determination order was made by the respondent on 24th November, 2015 in those terms.

Authorities

27. This appeal under s. 123 (3) comes to this Court by way of appeal on a point of law.

28. The Court was referred by the respondent to a number of authorities relating to proceedings that were improperly constituted, and the respondent argues the claim of the appellant is more properly characterised as a claim for judicial review.

29. In *Doyle v. Private Residential Tenancies Board* [2015] IEHC 724, Baker J. stated at para. 13:

"13. The distinction between an appeal on a point of law created by a statutory appeal mechanism and a judicial review is one in respect of which there is some judicial authority, but the authorities point to some difficulty in defining the exact line of demarcation between them. Recently the Supreme Court considered the question in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48 where Clarke J. delivered a concurring judgment by which he offered what he described as "observations" on the distinction between forms of appeal, and considered how to characterise an appeal on a point of law from a statutory body or decision-maker, and distinguish it from other forms of appeal or review. He gave by way an example of an appeal on a point of law from a statutory body the type of appeal in this case, an appeal under s. 123(3) of the Residential Tenancies Act 2004.

14. As Clarke J. pointed out, there is an established jurisprudence as to the meaning of the term "appeal on a point of law" and he referred to the seminal judgment of Kenny J. in *Mara v. Hummingbird Ltd.* [1982] I.L.R.M. 421 which identified a distinction between an appeal on fact or primary facts, and an appeal on a point of law. The latter includes decisions based on an interpretation of documents, and of statutory provisions, which fall squarely within the definition. More difficult to characterise are appeals where a deciding body had come to conclusions on primary facts which no reasonable body could have made, and such decisions are amenable to an appeal on a point of law as the deciding body "must be

assumed to have misdirected himself as to the law or made a mistake in reasoning". The third category of an appeal on a point of law is the more obvious one of where a deciding body has adopted a wrong view of the law.

15. The matter was summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 452 and the four principles stated were quoted with approval by Clarke J. and later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272. They bear repeating here:

"There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-

- (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
- (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
- (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
- d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision..."

30. At para. 19, Baker J. stated:

" I consider that this dicta points to the proposition that when the Oireachtas provides a statutory right of appeal on a point of law, it must have intended some greater degree of court involvement with the decision than the perhaps more constrained approach taken by a court on judicial review. The distinction does allow a court hearing an appeal on a point of law to set aside a decision within jurisdiction where perhaps the evidence was sufficient to support a finding but where the decision was vitiated by legal error. It may also not involve an element of curial deference in a suitable case."

Appeal on a Point of Law

31. I now turn to consider the points of law suggested by the appellants and whether these points of law are amenable to the process envisaged by s. 123(3) of the Act. The three grounds sought by the appellants are as follows:

- i. The tribunal made a mistake in determining a dispute between the appellant and his landlord/receiver in respect of over-holding.
- ii. The tribunal procedural approach, by excluding substantial evidence, generated a wrongful deprivation of the appellants' life and housing interests.
- iii. The decision of the respondent was out of time for the reason that the tribunal did not communicate it to the respondent until 17 days after the hearing rather than 14 days.

32. In relation to ground 1, the appellants have not identified for this Court any mistake by the tribunal in determining the dispute between the parties in respect of over-holding. The tribunal decision was that the notice of termination served on the appellants by the respondent was valid, and that the appellants shall vacate and give up possession of the dwelling within 28 days of the date of the issue of the order. This was the issue which they had indicated they were going to decide, and no application has been made by the appellants for either judicial review by way of prohibition of this procedure, nor do they seek to quash this procedure. There is no point of law raised in relation to this ground.

33. In relation to ground 2, the second named appellant stated in her affidavit that an unfair hearing took place on 30th October, 2015, set out as follows:

"At the tribunal hearing the chairperson specified that the appeal hearing was a full re-hearing of the dispute referred to concerning over-holding, and [the chairman] invited the parties to make submissions. I say that on behalf of the plaintiff and myself I reiterated the most relevant matters [...] relating to stroke worsening outcomes, increased level of disability, permanent needs for care of the plaintiff, the plaintiff's incapacity to accept new realities, the plaintiff's sequence of suicidal attempts, his diabolical plan to succeed in an attempt in the case of an inevitable forced eviction and unavailability of offers on the rent market."

She further said that the bar imposed on the plaintiff pursuant to s. 80 of the Residential Tenancies Act 2004, and further, under the Circuit Court order adjourning the appeal did not allow the appellants any chance to contest the validity of the notice and the right to the landlord to serve a notice of termination.

34. The appellants refer to s. 80 of the Residential Tenancies Act 2004, which requires a dispute relating to the validity of a notice of termination to be referred to the Residential Tenancies Board within 28 days of receipt of such a notice. It is clear to this Court from the date of the application by the receiver for dispute resolution services on 21st June that the issues raised relating to the time limits on s. 80 were not relevant. This was the reason why the Circuit Court regarded the appeal to be moot, because the dispute resolution services of the respondent had been invoked by the respondent. This is not, in this Court's view, a valid point of law to be adjudicated by this Court.

35. Again, in relation to the tribunal's procedural approach, this was not challenged by way of judicial review by way of prohibition or certiorari and no point of law in my view arises in relation to that ground.

36. The tribunal procedural approach considered the concerns of the second named applicant in relation to the health of her husband and her difficulties in caring for him, and it is the view of the Court that this is not a decision which can be the subject matter of an appeal by way of a point of law.

37. In relation to the third issue, s. 108 of the Residential Tenancies Act 2004 provides:

"(1) Unless it has sooner made a determination of the kind specified in subsection (2), the tribunal shall, on completion of its hearing in relation to the dispute, make its determination in relation to the dispute and notify the Board of that determination."

In these circumstances, the decision of this Court is that no issue arises as to there being a time limit in relation to the tribunal communicating its decision to the Residential Tenancies Board.

38. It is noted by the Court that the appellants had indicated that they would need to remain in the property until February, 2016. This judgment is now being given in June, 2016, and they are now still in occupation.

Conclusion

This Court has substantial sympathy for the appellants on the basis of the first named appellant's health but unfortunately they must find alternative accommodation. The Court must apply the law, in the interest of fairness to the Residential Tenancies Board, and indeed to the landlord affected. The appellants have identified no basis on which this Court could make any order setting aside the determination of the Tenancy Tribunal and the Court regretfully rejects the appellants' appeal.