THE COURT OF APPEAL

Neutral Citation Number [2024] IECA 27
Record Number: 2023/173
High Court Record Number: 2022/194SP

Costello J.

Allen J.

O'Moore J.

BETWEEN/

JAMES ANDERSON AND

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFFS/RESPONDENTS

-AND-

DAVID FITZGERALD AND HELEN FITZGERALD
AND ALL PERSONS CONCERNED

DEFENDANTS/APPELLANT

JUDGMENT of Mr. Justice O'Moore delivered on the 2nd day of February 2024

1. This appeal is against a decision by the High Court (Simons J.) to refuse an application by the second defendant to adjourn these special summons proceedings. The purpose of the adjournment is to allow the Residential Tenancy Board *("the RTB")* to decide an issue referred to it by the second defendant *("Ms. Fitzgerald")*. Ms. Fitzgerald wants the RTB to fix the terms of a tenancy which she claims to have in a property owned by her brother (the

first named defendant, David Fitzgerald) in County Clare. That is property which the plaintiffs in these proceedings want to have sold. They wish to do this because, it is claimed, Mr. Fitzgerald (as of August 2022) owed the second plaintiff ("Pepper") just over €280,000. In October 2021 the first named plaintiff *("Mr. Anderson")* was appointed receiver over Mr. Fitzgerald's property *("the Property").* It is claimed that the monies owed to Pepper are secured on the Property.

2. In the current action, the plaintiffs seek orders for possession of the Property against Mr. Fitzgerald and Ms. Fitzgerald. In defending these proceedings, Ms. Fitzgerald has delivered an affidavit in which she claims a tenancy in the Property. That position is not accepted by the plaintiffs. Unless Ms. Fitzgerald withdraws the claim that she is lawfully entitled to possession of the Property as her brother's tenant, then this issue will have to be decided in the current proceedings.

3. Before this court, the following propositions were accepted by counsel for Ms. Fitzgerald: -

(1) the High Court has jurisdiction to decide whether or not Ms. Fitzgerald is entitled to occupy the property as tenant;

(2) the RTB cannot itself determine whether or not a tenancy exists.

4. The second of these concessions arose from the acceptance of the fact that the RTB cannot determine its own jurisdiction, and that the only jurisdiction which the RTB has is in respect of tenancies. Regardless of any concession on the part of counsel for Ms. Fitzgerald, this is the view to which the High Court judge had come. At paras. 26 and 27 of his judgment he found: -

"26. Both of these provisions presuppose the existence of a valid tenancy (albeit that the tenancy may since have terminated). The RTB has jurisdiction to determine a 'dispute' between a landlord and a tenant, including a dispute in relation to the termination of their tenancy. The RTB does not have jurisdiction to determine exclusively the question of jurisdictional fact as to whether a valid tenancy ever existed.

27. It is a principle of administrative law that an inferior Tribunal, such as the Residential Tenancies Board, does not have jurisdiction to determine its own jurisdiction."

5. This finding of the trial judge has not been appealed. The closest Ms. Fitzgerald goes in this regard is at para. 3 of the Grounds of Appeal, which reads: -

"(3) The learned Judge erred in law failing to defer to the statutory entitlement of the Residential Tenancies Board pursuant to the Residential Tenancies Act, 2004, and a particular section 84 thereof, to consider fully if the Board would or would not deal with the Defendant/Appellants Residential Tenancies Board application for adjudicationd. (sic)"

6. Stating that the trial judge should have allowed Ms. Fitzgerald to see whether or not the RTB would assume jurisdiction (which the trial judge found it did not have) is not the same thing as saying the trial judge was wrong in finding that the RTB had no entitlement to decide its own jurisdiction (by conclusively determining whether or not a tenancy either had existed or continued to exist).

7. Nowhere in the written submissions on behalf of Ms. Fitzgerald do her lawyers engage with the finding of Simons J., which I have already quoted. Instead, it is stated (at para. 32 of the written submissions): -

> *"32. The Appellant's application before the RTB is in accordance with section 76 of the Act. It is submitted the RTB did not decide jurisdiction."*

The submissions go on (at para. 34): -

> *"34. The actions of the Respondents and Appellant clearly reflect that a valid Part 4 tenancy was in place. Consequently, any dispute in relation to the said tenancy was in the first instance a matter for the RTB and was properly before the RTB prior to the hearing of the Motion to adjourn."*

In other words, far from disputing the High Court judge's finding that the RTB did not have jurisdiction to determine the issue of tenancy or no tenancy, Ms. Fitzgerald contends that her status as a tenant was not something that was decided by the RTB at all, and that the RTB should instead have been given the opportunity to determine the terms of that tenancy as *"a valid Part 4 tenancy was in place."* Of course, a reference under s. 76 of the Residential Tenancies Act, 2004 can only be made by parties *"to an existing or terminated tenancy…"*; s. 76(1).

8. The proposition put forward on appeal, therefore, by Ms. Fitzgerald is a quite extraordinary one that both this court and the RTB should simply act on the assumption that there was or is a valid tenancy in place because (she says) all the evidence points in that direction. Because of this working assumption, the RTB is to assume jurisdiction over the objections of the plaintiffs. On the same premise, the court is asked in effect to stay proceedings brought by plaintiffs, one of whom is owed a considerable amount of money by

the first defendant and the other of whom has been put in place as receiver to recover debts which Mr. Fitzgerald has yet to dispute in the current proceedings.

9. Were the RTB and the court to proceed in the manner demanded by Ms. Fitzgerald, it would involve a truly exceptional denial of due process to the plaintiffs. Both Mr. Anderson and Pepper are entitled to have the appropriate body decide upon the fundamental issue as to whether or not Ms. Fitzgerald in fact enjoys a tenancy in respect of the Property. Staying the current action, so that questions of landlord and tenant rights are sent over to a body which does not have jurisdiction to decide this basic issue, would be quite surreal.

10. It is clear that the application as run before this court was quite different to the application as run before the High Court. At para. 2 of his judgment, the learned High Court judge summed up the central issue as follows: -

> *"2. The adjournment application presents the following issue of principle: whether jurisdiction to determine the validity of the supposed tenancy lies with the High Court or with the [RTB]. The resolution of this issue requires consideration of the nature of the RTB's statutory jurisdiction under Part 6 of the Residential Tenancies Act, 2004."*

As already noted, this central issue of principle was decided by the learned High Court judge, and that determination not appealed.

11. What is left before this court is, therefore, a series of rather disjointed arguments which have failed to persuade me that the High Court judge erred at all, let alone erred in a manner that would justify review by this court. In order to consider the appeal in detail, it is first necessary to describe Ms. Fitzgerald's motion. It will then be necessary to consider the individual grounds of appeal.

The Motion

12. The special summons commencing these proceedings was issued on the 27th October, 2022. In it, it is asserted that the Property was charged by Mr. Fitzgerald in favour of the then lender, ACC Bank plc, in order to secure advances made by ACC to Mr. Fitzgerald.

13. It is further pleaded that there was a series of transfers of the loan and security, ultimately leading to Pepper being registered on the 12th September 2019 as the owner of the charge.

14. It is then pleaded that on the 8th October, 2021, Pepper appointed Mr. Anderson as receiver over the Property, and that: -

> *"23. The plaintiffs are strangers to the basis on which the second named defendant occupies the property set out in the schedule hereto and no rent or any such payment has been received by either of them from one or other of the defendants.*
>
> *24. Further, and despite demand, the defendants or either of them have failed to deliver up possession of the property set out in the schedule hereto."*

15. Pepper and Mr. Anderson therefore claim orders for delivery of possession of the Property either to Mr. Anderson or to Pepper.

16. As stated earlier, Mr. Fitzgerald has filed no affidavit in response to this claim. Ms. Fitzgerald has. In an affidavit of the 16th January, 2023 and delivered in reply to the special summons and the affidavit evidence grounding it, Ms. Fitzgerald says: -

> *"3. I say I am a tenant in [the Property] which is my family home. I say I commenced renting the house from my brother, the first named defendant herein and*

the owner of the said house, on the 1st December, 2015. It was agreed that the rent would be €600 per month. I entered into a lease dated 1 December 2015 for seven years initially. I say that I am the sole occupier of the house. I beg to refer to a true copy of the lease…"

17. At para. 8, Ms. Fitzgerald repeats that she is *"extremely concerned about [her] tenancy rights."* She says once again that she has *"a valid tenancy…"*.

18. At para. 9, Ms. Fitzgerald avers: -

"9. I say I sent an application for Dispute Resolution as regards my lease and the lack of a termination notice to the PRTB and the case reference is XXX [sic]. I do not believe either of the plaintiffs herein should have brought the application for possession when I have a valid lease and am paying rent to the beneficial owner of the house for whom Pepper is a nominee. I am surprised the proceedings were brought before the matter was referred to the PRTB and adjudicated upon. I am also surprised that the case is in the High Court that relates to a property which I am advised is in the jurisdiction of the Circuit Court. I beg to refer to a copy of my application to the PRTB …"

19. In fact, the reference to the RTB for *"Dispute Resolution"* made by Ms. Fitzgerald was later amended, at her instigation, from a request for mediation to a request for adjudication. Nothing turns on this.

20. It is important to note that Ms. Fitzgerald's contention that she was a tenant is laid out as a point of defence against the special summons proceedings. Indeed, in the last paragraph of this affidavit opposing the reliefs sought by the plaintiffs in the special summons, she prays the court *"to refuse the reliefs sought and to strike out the proceedings against me and*

to award my costs." As and from the delivery of her affidavit, therefore, Ms. Fitzgerald had put squarely as an issue in the proceedings the question of whether or not she was a tenant in the Property.

21. In their replying affidavits, both Mr. Anderson and Pepper disputed the contention that Ms. Fitzgerald enjoyed the rights of a tenant in respect of the Property. For example, in his affidavit of the 9th February, 2023 Mr. Anderson: -

(a) Noted, at para. 5, that the exhibited *"alleged tenancy agreement"* appeared to be in respect of a different property;

(b) Noted that *"if a lease agreement was entered into between the defendants as alleged"*, this was not registered with the RTB;

(c) Pointed out that, even if Ms. Fitzgerald was a tenant, Mr. Anderson was stepping into the shoes of the property owner, and was entitled to receive any rents payable under the tendency, and could seek to terminate the tenancy, or could otherwise try to come to an arrangement with any person who actually was a tenant in the property.

22. By the same token, Mr. Todd Bowen (on behalf of Pepper) swore an affidavit on the 13th February, 2023 which made similar points to those made by Mr. Anderson. He also said, plainly, that: -

> *"In so far as it is alleged that the second named defendant holds the property under a tenancy granted by the first named defendant, I say that Pepper does not acknowledge or recognise the same."*

23. Battle was therefore joined between the plaintiffs on the one side and Ms. Fitzgerald on the other in respect of the tenancy which she claimed to exist.

24. Subsequent to the delivery of the affidavit of Mr. Anderson and the affidavit of Mr. Bowen, on the 24th February, 2023 Ms. Fitzgerald swore an affidavit grounding the motion which has given rise to the judgment of Simons J. and to this appeal. While the motion was described as a motion to adjourn, in truth it was an application to stay the proceedings for an indefinite period of time. The body of the motion seeks the following reliefs: -

> *"1. An order pursuant to the inherent jurisdiction of this Honourable Court and/or pursuant to the rules of court to adjourn the proceedings herein generally until the decision of the second named defendant's application by(sic) the Residential Tenancy Board and the final determination of any appeal arising therefrom. The details of the said RTB application has [sic] been averred to in the grounding [recte replying] affidavit of Helen Fitzgerald with exhibits sworn on the 16th January, 2023.*
>
> *2. Further or in the alternative and/or pursuant to the inherent jurisdiction of the Honourable Court and pursuant to the rules of court to stay the proceedings herein generally for the reasons set out in the grounding affidavit of Helen Fitzgerald and at paragraph 1 of the Notice of Motion herein."*

After the motion issued, there was a string of affidavits in which further evidence was given by Ms. Fitzgerald, by Mr. Anderson, by Mr. Bowen, and by Mr. Maxwell Mooney (Ms. Fitzgerald's solicitor). Indeed, on the 9th October, 2023 a motion was issued on behalf of Ms. Fitzgerald, grounded on an affidavit of Mr. Mooney, seeking liberty to admit new evidence on this appeal. That motion was heard by Costello J. on 20th October, 2023. Costello J. then refused the application as the refusal of Simons J to accept the evidence was one of the grounds of appeal and Ms. Fitzgerald could not ask the list judge, under

guise of a motion, in effect to determine an issue in the appeal: it was for the panel to determine this point. In any event, Costello J. was not satisfied that the appellant could meet the three criteria in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 which must be met if new evidence is to be admitted on appeal. She specifically held that while the documents might have a relevance to the issue whether – as Ms. Fitzgerald contended – there was a tenancy which was binding on the receiver, that was not an issue in the appeal.

25. As noted earlier, before the High Court Ms. Fitzgerald's motion focused on the *"issue of principle"* as described by the trial judge. It is clear from the judgment that the debate before him was in large measure one of jurisdiction; in deciding whether or not a tenancy existed, did the RTB have jurisdiction (or possibly exclusive jurisdiction); It is also clear from the judgment that the affidavits in the motion disclosed a certain level of dispute on the facts. For example, Ms. Fitzgerald stated that she paid rent to a company who received it on behalf of the plaintiffs. Pepper took the position that such payments were in fact made to it, and were treated as part payment of the debt of Mr. Fitzgerald, not as rent paid by Ms. Fitzgerald. There were also issues about the ability of Mr. Fitzgerald to create any tenancy, given the negative pledge clause contained in the security documentation. Quite properly, none of this was decided by the High Court judge but it is set out in his judgment as part of the issues which were agitated before him. The central issue which he decided, the issue of principle, related to the respective jurisdiction of the RTB and the High Court to decide on whether or not Ms. Fitzgerald had a tenancy in the first place.

26. Ultimately, the High Court decided against Ms. Fitzgerald. Simons J. found that the RTB does not have jurisdiction to determine conclusively the question *"of jurisdictional fact as to whether a valid tenancy ever existed."* The High Court did have such jurisdiction. In those circumstances, the appropriate course of action was to allow the special summons

proceedings to continue, as that would allow the High Court to decide the issue of Ms. Fitzgerald's claim to a tenancy.

27. Given his findings on the appropriate jurisdiction, which are not only now not challenged but expressly accepted as correct by counsel for Ms. Fitzgerald, it is impossible to see how the High Court could have come to any alternative decision on the motion. It would have been a nonsense to stay the special summons proceedings in order to allow Ms. Fitzgerald to seek determinations from the RTB when the first issue that would have arisen in any proceedings before the RTB was whether or not that body had jurisdiction given the dispute about Ms. Fitzgerald's status as tenant. Mr. Anderson and Pepper had already refused to accept that Ms. Fitzgerald was genuinely a tenant in the Property. This would have been raised, immediately and inevitably, before the RTB. The RTB could not have decided that issue, as it went beyond its jurisdiction. This result would have been quite peculiar. The High Court would have made an order staying the proceedings, thereby preventing the one body with jurisdiction to decide the issue from doing so. At the same time, Ms. Fitzgerald, Pepper, Mr. Anderson (and possibly Mr. Fitzgerald) would have been bundled off to conduct a meaningless debate before a body which could never actually decide the fundamental question at issue between them. Given the finding by the High Court on jurisdiction, it is impossible to see how an order staying the High Court proceedings could have been justified.

28. It is in that context that I turn to the grounds of appeal.

Grounds of Appeal

29. There are, in total, 11 grounds of appeal. The last two of these relate to costs, and will be dealt with separately. According to Ms. Fitzgerald's written legal submissions, grounds 1 to 6 deal with issues of jurisdiction, and grounds 7 to 9 deal with *"matters of law and fact"*.

30. Given that there is no issue about the jurisdictional entitlements respectively of the High Court and the RTB, it is surprising that 6 grounds are stated to relate to that question. Nonetheless, I will deal with each of these individually.

31. Ground 1 reads:-

> *"(1) The learned judge erred in law and in fact in refusing to grant the adjournment sought in circumstances where there was no application before the High Court to determine the validity or otherwise of a tenancy between the defendant/appellant and the plaintiffs/respondents."*

This ground of appeal fails when one considers the basic fact that Ms. Fitzgerald herself had raised the question of her alleged tenancy as her essential point of defence to the relief sought by the plaintiffs in the special summons proceedings.

32. Ground 2 reads: -

> *"(2) The learned judge erred in law and exceeded his jurisdiction in adjudicating upon the merits of the defendant's/appellant's case before the Residential Tenancies Board."*

The learned High Court judge did no such thing. In as much as this ground is made out at all in the submissions made to this court, it seems to involve an assertion (in the written submissions) that: -

> *"34. The actions of the Respondents and Appellant clearly reflect that a valid Part 4 tenancy was in place. Consequently, any dispute in relation to the said tenancy was in the first instance a matter for the RTB and it was properly before the RTB prior to the hearing of the Motion to adjourn."*

33. There is a particular piquancy about this submission, in as much as it is understood. In order for it to even appear to hold together, it means that the High Court should have decided conclusively, on the basis of a motion to adjourn, that Ms. Fitzgerald had established valid and binding tenant rights in respect of the property such as would vest jurisdiction on the RTB. However, the High Court could not make any determination adverse to Ms. Fitzgerald as that would in some way offend the exclusive jurisdiction of the RTB to decide *"any dispute in relation to the said tenancy …"*.

34. This submission makes no sense. On the application to adjourn, the High Court could not have been properly be asked by either party to determine once and for all whether or not a tenancy existed. The High Court judge properly and clearly forbore from doing so. He also did not purport to decide anything that was within the purview of the RTB.

35. Ground of Appeal 3 reads: -

> *"(3) The learned judge erred in law in failing to defer to the statutory entitlement of the Residential Tenancies Board pursuant to the Residential Tenancies Act, 2004, and in particular section 84 thereof, to consider fully if the Board would or would not deal with the defendants'/appellant's Residential Tenancies Board application for adjudication."*

At the hearing of the appeal, the position with regard to s. 84 of the 2004 Act was especially unsatisfactory. Counsel for Ms. Fitzgerald informed us that the version of s. 84 of the 2004 Act which appeared in the Book of Authorities had been significantly amended. The version of s. 84 in the appeal books provided that the RTB could determine that it would not deal with certain references and so notify the referring party. The version of s. 84(5) contained in the Book of Authorities reads: -

> *"(5) The party who referred the dispute concerned to the Board or, as the case may be, any other party to the dispute may appeal to the Circuit Court against a decision of the Board (made in consequence of the procedures under this section having been employed) not to deal with or, as appropriate, to deal with the dispute."*

36. Counsel informed the court at the hearing of the appeal that the legislation was changed in 2015, that there had previously been an appeal to the Circuit Court and that *"now it's the High Court."* When asked if there was any appeal from the High Court determination under s. 84, we were told *"no"*.

37. The oddity about this is that the written submissions of Ms. Fitzgerald set out exactly the same version of s. 84 as is found in the Book of Authorities lodged with the court for the purpose of the appeal, with the exception of one word – *"frivolous"* – which was added to s. 84(1)(d) by s. 40 of the Residential Tenancies (Amendment) Act, 2015. The written submissions quote, word for word, the subsection referring to a right of appeal to the Circuit Court and not to the High Court. Needless to say, these submissions were drafted and delivered well after any amendment in 2015.

38. In addition, the researches after the hearing indicate that any amendment to s. 84 was of an immaterial nature. Notwithstanding this level of confusion about the precise text of s. 84, and the procedure which it establishes, the third ground of appeal falls at the first hurdle which is that, on the basis of the position taken before this court, ultimately whatever attitude the RTB took towards the potential use of s. 84 (and regardless of what form s. 84 actually takes) the proper ultimate result would have been that the RTB could not have decided the issue of whether or not Ms. Fitzgerald has or had a tenancy in the property. Even if this were a question that could have been determined on appeal (variously by the Circuit Court or by the High Court, depending on the accuracy of counsel's submissions to us) the learned trial

judge was entirely within his rights to decide that the issue of whether or not Ms. Fitzgerald really was a tenant was best decided in the current proceedings which were well underway as opposed to at the end of an involved process that could ultimately have led to a determination after much delay. The current proceedings are well capable of being determined in 2024, not least as Simons J.'s order indicates that he is retaining seisin of the matter. The alternative process under s. 84, as described by counsel, would be unlikely to yield a result with the authority of the High Court before late 2025.

39. The fourth Ground of Appeal is: -

> *"(4) The learned judge erred in law and exceeded his jurisdiction by depriving the defendants/appellant of the opportunity to invoke the Residential Tenancies Board dispute resolution process pursuant to s. 76(1) or s. 109 of the 2004 Act without the intervention of the court and/or bringing the judgment of 19th June, 2023 to the attention of the Residential Tenancies Board."*

40. As noted earlier, the procedure under s. 76 is only available to a party who is or was a tenant. That question is in dispute. That dispute can only be resolved by the High Court. While s. 109 was not opened to us, there is no reason to believe that the position with regard to that section is different. The reference to the notification to the RTB of the judgment of the High Court makes no sense, as a ground of appeal, and was not developed before us.

41. The fifth Ground of Appeal is: -

> *"(5) The learned judge erred in law in the application of section 78 of the Residential Tenancies Act, 2004."*

Once again, this ground of appeal is unstateable given the decision of the High Court judge that the *in limine* jurisdictional issue as to the existence of a tenancy had to be decided before the RTB was in a position to exercise this power under the 2004 Act.

42. The sixth Ground of Appeal is: -

> *"(6) The learned judge misinterpreted and fell into error in dealing with the reasons cited for the defendant/appellant's adjudication application before the Residential Tenancies Board by the defendant/appellant and, at paragraph 22 of the Judgment, fell into error by considering an issue of principle for the adjournment as 'whether the jurisdiction to determine the validity of the supposed tenancy lies with the High Court or Residential Tenancies Board', which said supposed tenancy consideration was not the basis of the defendant/appellant's application to the High Court to stay the proceedings."*

43. As with ground (1), Ms. Fitzgerald's lawyers seek to ignore the fact that both she and they had made an important issue in the special summons proceedings the question of whether or not she enjoys a tenancy in respect of the Property. In those circumstances, and on the basis of the issues described to him, the learned High Court judge was quite correct to fix this jurisdictional issue as an important one which he had to decide for the purpose of the motion to adjourn.

44. The seventh Ground of Appeal is: -

> *"(7) Without prejudice to the foregoing paragraphs 1 - 6, the learned judge erred in law and exceeded his jurisdiction in his findings in respect of the tenancy claimed by the defendant/appellant by failing to take adequate cognisance of the authorities open[ed] to the court …"*

In this regard, particular reference is made to *Fennell v N17 Electrics Limited* [2012] 4 I.R. 634 and *In re O'Rourke's Estate* (1889) 23 L.R. Ir. 497. In fact, the trial judge noted the argument made on foot of these authorities, but quite properly declined to decide definitively (on an essentially procedural application) whether or not Ms. Fitzgerald had established she was a tenant in respect of the property.

45. The following two grounds of appeal (8 and 9) relate to a similar issue, namely whether the learned trial judge was wrong in not deciding conclusively that the facts set out in the affidavits before him established Ms. Fitzgerald's claimed tenancy. As I said, the application was an application to adjourn the proceedings or, more precisely, to stay them. The motion did not seek any declaration to the effect that Ms. Fitzgerald was a tenant. Had it done so, there could well have been an important debate as to whether or not that could be done at this time in the proceedings, without discovery, and in the absence of cross-examination. It is quite wrong to complain that the trial judge did not decide an issue which, quite simply, was not placed before him by Ms. Fitzgerald. The issue of a tenancy was an issue in the proceedings, but not to be decided on the motion.

46. There is also an utter lack of logic in the approach taken by Ms. Fitzgerald and her lawyers on the issue as to what the High Court judge was and was not to decide. Ground of Appeal one states that there was no application before the High Court to decide the validity of the tenancy. Grounds of Appeal seven, eight and nine protest that the High Court Judge did not (on the motion) decide that very issue.

47. This lack of analytical congruence in the appeal was echoed in the confusion about s. 84 of the 2004 Act, and also in the appeal on costs issues.

48. As noted earlier, grounds 10 and 11 dealt with costs. The appeal on costs was simple. Ms. Fitzgerald argued, through her counsel, that these proceedings could and should have

been commenced in the Circuit Court, and that because of this the High Court judge erred in awarding the costs of the motion against Ms. Fitzgerald on the High Court scale. In as much as the High Court judge came to the view that proceedings gave rise to complicated legal issues, it is argued that he was incorrect.

49. The problem with the appeal on costs is that there was no record of the reasoning of the High Court judge as to why costs should be awarded against Ms. Fitzgerald at the High Court level. There appears to have been no application for access to the DAR in order to have a record of the debate before the High Court judge on this issue, and (more importantly) his rationale in coming to the decision that he did. There appears to have been no effort to agree a note between either counsel or solicitors (or both) which would set out the arguments advanced on the hearing before the High Court judge on the costs issue, and his decision. No note was prepared by the appellant, and submitted to the High Court judge for his approval, which would have been the correct course of action in the event that a note could not be agreed between the lawyers. On top of all this, at the hearing before this court there was a genuine but unhelpful dispute between counsel as to exactly how Simons J. had rationalised his decision on costs. It also appears to be the case that the provisions of s. 17 of the Courts Act, 1981 featured in the debate before Simons J. and (possibly) his decision. However, the wrong version of s. 17 was, we are told, put before the High Court judge by counsel for Ms. Fitzgerald. This error does not appear to have been corrected during the course of the dispute about costs.

50. At the risk of stating the obvious, this is an appellate court. The starting point for the exercise of the jurisdiction of this court is a consideration of the decision made by the court below, and the reasons for that decision. In this case, despite the fact that there were various ways in which it could have been done, we have not been provided with the reasoning giving

rise to the decision of the High Court on the costs issue. In those circumstances, we simply cannot decide that the approach of the learned High Court judge was either right or wrong.

51. The responsibility for having the relevant materials, including the rationale of the judge, before this court lies squarely with the appellant. As we cannot decide that the trial judge's reasoning was in any way flawed on the costs issue, I would dismiss the appeal against the costs order.

A phantom appeal

52. This was an appeal without any merit whatsoever. Once the essential issues of the respective jurisdictions of the High Court and the RTB were isolated and decided, the motion to adjourn made no sense. It would of course, have been open to Ms. Fitzgerald and her team to challenge the important finding by the High Court on the jurisdictional issue. They did not do so, though it was not until he was questioned by this court that counsel for Ms. Fitzgerald frankly accepted the findings as to jurisdiction made by Simons J. Instead, a bundle of unstateable propositions were advanced, some of which were mutually inconsistent and none of which could survive the basic fact that it was indisputably open to the High Court in the current proceedings to decide whether or not Ms. Fitzgerald enjoyed the tenancy which she claims. Not surprisingly, counsel for Ms. Fitzgerald was unable to identify any palpable disadvantage for his client that would arise in the event that the adjournment motion was refused, given the undoubted authority of the High Court to determine the essential dispute between the parties.

53. I have no hesitation in dismissing the appeal on all grounds. My provisional view is that Ms. Fitzgerald, having been completely unsuccessful in the appeal, should be liable for the costs of Mr. Anderson and of Pepper. However, if any alternative costs order is sought notice to that effect (together with the reasons for such proposed order) must be given to the

Court of Appeal office (and to the opposing side) within 14 days of the date of this judgment. Responding submissions must be delivered within a further 14 days.

54. Costello and Allen JJ agree with this judgment.