

THE HIGH COURT

[2024] IEHC 482

Record No. 2023/440 MCA

BETWEEN

JOHN O'GARA

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

PATRICK FITZGERALD

NOTICE PARTY

JUDGMENT of Mr Justice Barr delivered electronically on the 31st day of July 2024.

Introduction.

1. This is an appeal on a point of law pursuant to s. 123 of the Residential Tenancies Act 2004, as amended (hereinafter "the 2004 Act"). In particular, the appellant appeals against a report of the tenancy Tribunal dated 13 September 2023 and against the Determination of the respondent which flowed therefrom, dated 6 December 2023; which found that the Notice of Termination dated 8 September 2022 served by the notice party on the appellant was valid, and in further determining that the appellant had to deliver up possession of the leased property within 21 days, being Fonthill House, 19 Fonthill Abbey, Ballyboden Road, Dublin 14, to the notice party, who was deemed to be the landlord of the property.

2. In essence, the appellant's appeal is grounded upon an assertion that the finding that the Notice of Termination was valid should be set aside, as there was no evidence before the Tribunal which would have enabled it to make the finding that the appellant had ever been a tenant to the notice party of the property.

3. The appellant did not participate in the hearing before the Tribunal because he maintained that no tenancy between him and the notice party had ever existed. He submitted that as he had been in continuous occupation of the property for more than 15 years prior to the date of the Tribunal hearing, without paying rent and not under any tenancy between him and the immediate predecessor in title of the notice party, he had acquired title to the property by adverse possession.

4. The appellant submitted that because there was no tenancy in existence between him and the notice party, the respondent did not have jurisdiction to deal with the matter under the 2004

Act.

The Evidence Given by the Notice Party.

5. The court was not provided with any transcript of the hearing before the Tribunal. There is reference in the report of the Tribunal to the evidence given by the notice party before it. In addition, the court has been provided with the RTB file, which included the written submission of the notice party dated 13 April 2023. The court is satisfied that this submission represents an accurate account of the evidence given by the notice party to the Tribunal. The relevant parts of that submission are as follows:

"We [the notice party and his wife] were the successful bidders to purchase Fonthill House at a BidX1 online public option on 19 May 2022. The property was being sold by the receiver Tom O'Brien on behalf of Niall Clarke and Patrick McGee. It had been promoted as a six bedroom detached house on half an acre in Rathfarnham, subject to a tenancy under terms unknown. There were no viewings prior to the auction.

The property was bought with the tenant John O'Gara in situ. The vendors did not provide any information regarding his tenancy. The property was bought sight unseen and subject to a tenancy under terms unknown.

Before the sale closed, I visited Fonthill House as I needed to view the property, put insurance cover in place and get information on the tenancy.

I visited the property with my son Graham Fitzgerald, on 25th May 2022, and rang the front doorbell. John O'Gara opened the door and I introduced myself and my son. I told him why we were there and handed him a letter seeking details of his tenancy. I commenced by asking him for details of the occupants in the house and he replied "it's occupied". I tried to press him on the details and he again replied "it's occupied" before slamming the door shut, leaving us outside. That was the end of the conversation.

Niall Clarke and Patrick McGee were the previous owners of Fonthill House. I managed to meet with Niall Clarke on 1 June 2022 and he confirmed that he and Patrick McGee purchased the property in late 2006 with a loan from AIB bank. He said that he let the property to John O'Gara in 2007. He was not very clear on detail and said that he believed the rent was €2000 a month. There was a lease but he did not have a copy. Rent was paid monthly for about 12 to 18 months, before AIB took over the rent collection. After that, he had no involvement with the letting.

I have no verified information regarding O'Gara's tenancy, such as RTB registration, lease, number of tenants, rent payable, rent increases or if, indeed, O'Gara was actually paying any rent to anyone. I emailed registrations@rtb.ie seeking any information, if any, that they might have regarding his tenancy.

Two weeks after becoming the owners, with no concrete information to go on, I sent John O'Gara a demand for rent of €4500 per month. This was based on the present-day rental market for similar properties. I registered his tenancy with the RTB. Two days later I received an email from registrations@rtb.ie verifying that John O'Gara had indeed been registered with the RTB in 2007 and again in 2011.

From the beginning John O'Gara did not pay any rent and this has continued up to the present day. He also refused to let me have access to the property to carry out a routine inspection, at one stage, he told me that the only way I could inspect the property was if I came with a gun.

In phone conversations with John O'Gara, he informed me that he was the only occupant except for some casual guests that would stay from time [sic]. He also informed me that he had received a confirmation from the RTB regarding the registration of his tenancy and that he had written back to say that he was not accepting that he was a tenant.

On 8/10/2023, two days before the termination of his tenancy, I received a letter by email from Paul Kelly, solicitor, instructed by John O'Gara requesting a copy of the tenancy agreement that I was purporting to terminate and stating that his client was in occupation of the property in excess of 15 years and his occupancy was not based on the existence of the tenancy but on adverse possession. I replied that O'Gara's tenancy was originally registered with the RTB on 30 April 2007."

Report of the Tribunal.

6. The Tenancy Tribunal issued its report on 13 September 2023, following a virtual hearing held on 8 September 2023. In the report, the Tribunal referred to the evidence that had been given before it by the notice party, who claimed to be the landlord of the property. It outlined the various interactions that he had had with the appellant. It also set out a summary of the steps that he had taken, such as service of the Warning Notice, which was served by the notice party on the appellant on 6 August 2022. The Tribunal also referred to the subsequent Notice of Termination dated 8 September 2022, which was served on the appellant on that date.

7. The Tribunal noted that the notice party had received a letter dated 7 October 2022, from

the solicitor acting on behalf of the appellant, wherein it was claimed that the appellant was the owner of the property by adverse possession. The Tribunal ruled that pursuant to the terms of the Act, any claim in respect of title was not within the remit of the Tribunal.

8. The essential findings of the Tribunal were as follows:

"The Tribunal is therefore satisfied that the warning of rent arrears validly identified the arrears as at least €4500 as of the date of the warning letter, being 30 July 2022. Accordingly, the Tribunal is satisfied that the Notice of Termination is premised upon a valid warning in accordance with s.67(3) of the Act.

The Tribunal notes that there is no evidence of a written lease in respect of the tenancy, but does find that the landlord purchased the property subject to a party in occupation. While the prevailing rent at that time and certain other terms of that tenancy are not entirely certain, the Tribunal accepts that the rent payable at the commencement of the tenancy in 2007 was €1700, in accordance with the information supplied to the landlord by the RTB.

Accordingly, it follows that the notification of rental arrears for the purposes of s.67(3) of the Act was valid, premised as it was on the rent having not been paid for a considerable period."

9. The Tribunal went on in the report to find that the notice of termination was validly served on the appellant on 8 September 2022, due to non-payment of rent, and it had cited a termination date for the tenancy of 10 October 2022. The Tribunal was satisfied that the Notice of Termination complied with the requirements of the Act. The Tribunal found that any errors that existed on the face of the warning letter, or in the Notice of Termination, regarding the dates of service thereof, were slips, which could be corrected under the slip rule in accordance with s.64A of the Act.

10. The Tribunal went on to make the following findings in relation to the level of rent arrears:

"For the avoidance of doubt the Tribunal is not making any determination or finding in relation to the level of rent arrears currently outstanding as it does not have sufficient evidence before it to make an accurate calculation of rent arrears at this time. The Tribunal finds only that there is at least €4500 owed by the respondent tenant in rent arrears and so the appellant landlord was justified in seeking payment of at least this sum in July 2022. Nothing herein should prejudice any future proceedings for rent arrears once the level of rent arrears owed by the respondent tenant has been accurately calculated."

11. The Tribunal went on to make a formal determination that the Notice of Termination dated

8 September 2022 was valid. It further determined that the appellant should vacate the property and deliver up possession of it within 21 days of the date of issue of the Determination Order, being 13 September 2023.

The Law.

12. Section 123(3) provides that any of the parties concerned in dispute resolution under the Act of 2004 may appeal to the High Court from a determination of the Tribunal (as embodied in a Determination Order) on a point of law. Subsection (5) provides that the High Court may, as a consequence of the determination it makes on such appeal, direct the Board to cancel the Determination Order concerned, or to vary it in such manner as the court specifies.

13. The principles applicable to an appeal on a point of law were set out by the Supreme Court in *Fitzgibbon v The Law Society* [2015] 1 IR 516, where Clarke J (as he then was) stated at paras. 127 and 128:-

"[127] The applicable principles were helpfully summarised by McKechnie J. in Deely v. Information Commissioner [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, as follows:-

'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 ...'

This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in Sheedy v. Information Commissioner [2005] IESC 35, [2005] 2 I.R. 272.

[128] In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in

which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decisionmaker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

14. In *Petecel v Minister for Social Protection* [2020] IESC 25, O'Malley J stated as follows in relation to the narrow scope of an appeal on a point of law at para. 106:-

*"Questions as to the scope of the jurisdiction of the High Court in a statutory appeal must always be answered by reference to the terms of the statute creating that jurisdiction. The fact that one Act uses similar terminology to another may be helpful but is not necessarily determinative. However, it may be borne in mind that an appeal on a point of law is the narrowest of the four categories of statutory appeals identified by Clarke J. in *Fitzgibbon v. Law Society* [2014] IESC 48."*

15. The jurisdiction of this Court when hearing an appeal on a point of law in relation to appeals from the RTB was considered by Barrett J in *Marwaha v Residential Tenancies Board* [2016] IEHC 308, where, having reviewed the relevant case law in relation to appeals on a point of law, the learned judge set out the following principles at para. 13:-

"What principles can be drawn from the foregoing as to the court's role in the within appeal? Four key principles can perhaps be drawn from the above-considered case-law:

(1) the court is being asked to consider whether the Tenancy Tribunal erred as a matter of law (a) in its determination, and/or (b) its process of determination;

(2) the court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them;

(3) as to mixed questions of fact and law, the court (a) may reverse the Tenancy Tribunal on its interpretation of documents; (b) can set aside the Tenancy Tribunal determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by the Tenancy Tribunal on the primary facts before it could not reasonably be drawn; (c) must set aside the Tenancy Tribunal determination, if its conclusions show that it was wrong in some view of the law adopted by it.

(4) even if there is no mistake in law or misinterpretation of documents on the part of the Tenancy Tribunal, the court can nonetheless set aside the Tribunal's determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn."

16. The court is satisfied that the principles enunciated in the cases cited above, and in particular those set out in the *Fitzgibbon* and *Marwaha* cases, correctly set out the jurisdiction of this Court when considering the appeal in this case.

Conclusions.

17. At the outset, a somewhat unusual submission was made on behalf of the respondent. It was submitted that, while the appellant had not attended the virtual hearing held by the Tribunal on 8 September 2023 because he did not recognise the jurisdiction of the Tribunal to deal with the matter, as he claimed that there was never a tenancy between him and the notice party; by submitting an appeal pursuant to s.123 of the 2004 Act, as amended, challenging the report of the Tribunal and the determination of the respondent, he had effectively acknowledged the jurisdiction of the respondent to deal with the matter.

18. The court does not regard that submission as well founded. The appellant has maintained all along that the Tribunal and the respondent lacked jurisdiction to deal with the matter, as there was never any tenancy agreement, oral or written, between him and the notice party. The court does not regard the lodging of an appeal by the appellant as in some way acknowledging or accepting the jurisdiction of the respondent to have dealt with the matter.

19. This is all the more so, because the appellant's main ground of appeal is that there was no evidence before the Tribunal which would have enabled it to find that a tenancy existed between the appellant and the notice party, and therefore, they lacked jurisdiction to deal with the matter. The court is satisfied that by bringing his appeal against the report of the Tribunal and the Determination of the respondent, the appellant has not somehow conferred jurisdiction on the respondent, or estopped himself from pursuing this ground of appeal.

20. The case law on appeals on a point of law, makes it clear that this court can intervene if there is no evidence to support a finding of fact made by the inferior court, or Tribunal, or statutory decision-maker.

21. The court is satisfied that when one looks at the totality of the evidence, both oral and documentary, that was before the Tribunal at the hearing held on 8 September 2023, there was no evidence of any tenancy between the appellant and the notice party. The evidence before the

Tribunal was as follows: The notice party purchased the property at an online auction on 19 May 2022. He bought the property sight unseen. The auction pack apparently stated that the property was being sold subject to a tenancy, but the terms thereof were unknown.

22. On 25 May 2022, the notice party visited the property and spoke with the appellant. The content of that conversation has been outlined in the submission that was made by the notice party to the Tribunal. It is fair to say that the appellant did not acknowledge that he was a tenant of the property on that occasion.

23. On 1 June 2022, the notice party spoke to a previous owner, Mr Clarke, who told him that he had entered into a tenancy agreement with the appellant and two others to rent the property in 2007. Mr Clarke stated that that tenancy agreement had been in writing, but he no longer had a copy of the lease. He stated that his best recollection was that the agreed rent was €1700 per month. He stated that the tenants only paid the rent for approximately one year or 18 months; meaning that they stopped paying rent in or about 2009. He stated that in or about that time, AIB bank took over management of the property. Mr Clarke was not able to give any further information concerning the appellant's occupation of the property after 2009.

24. In making inquiry of the RTB, the notice party was informed that a tenancy had been registered in 2007, wherein the appellant and two others, had been named as tenants of the property. He was informed that a further tenancy had been registered with the RTB in 2011, wherein the appellant was also named as a tenant. However, it is accepted that registration of a tenancy does not create a tenancy. That is explicitly stated in the correspondence sent out by the RTB following registration of a tenancy.

25. The notice party's purchase of the property closed on 28 June 2022. On 14 July 2022, the notice party registered a tenancy in the property, naming the appellant as tenant. Thereafter, the notice party proceeded to serve the warning letter and the Notice of Termination, in the manner described in the Tribunal's report. There was never any acknowledgement by the appellant that he was a tenant of the property to the notice party. Indeed, his verbal assertions had been contrary to that proposition. More importantly, the letter from his solicitor dated 7 October 2022, made it crystal clear that he was denying the existence of any tenancy and was instead asserting ownership of the property by adverse possession.

26. At its height, there was evidence before the Tribunal in the form of hearsay evidence from the notice party as to what Mr Clarke had told him concerning the existence of the tenancy in 2007. There was hearsay evidence that the rent payable was €1700 per month. The evidence was

that payment of that rent only continued until 2009 at the latest. There was some support for the hearsay evidence, by virtue of the fact that the tenancy was registered with the RTB in 2007. Presumably that was a tenancy under Part IV of the Act, which would have lasted for four years.

27. There was no evidence of any actual tenancy after 2011; there being only evidence of the further registration of a tenancy at that time, which registration can be unilaterally undertaken by a purported landlord. Thus, the evidence before the Tribunal, which was hearsay evidence, only pointed to the existence of some tenancy in 2007. The evidence that someone registered a further four year tenancy in 2011, is not sufficient to establish that a tenancy existed at that time.

28. It is clear from the evidence of the notice party, that there was no agreement for any tenancy between him and the appellant. The evidence of the notice party was that his interaction with the appellant, was limited to a brief conversation at the door of the property after he had purchased the property at auction and some unspecified telephone contact thereafter. The notice party does not allege that there was any tenancy agreement between him and the appellant.

29. In such circumstances, there was no evidence of the existence of any tenancy agreement between the appellant and the notice party, as landlord, after 2011. The fact of registration of a tenancy in that year, did not create a tenancy. In particular, there was no evidence of any tenancy between the notice party and the appellant. In these circumstances, there was no basis on which the Tribunal could have found that the Notice of Termination was valid, because one can only terminate an existing tenancy.

30. If the notice party had established that a tenancy agreement existed up to the date when he served the Notice of Termination on 8 September 2022, either because he had concluded a tenancy agreement with the appellant, or because he had succeeded to the landlord's interest in a tenancy that existed at that time, the respondent would have had jurisdiction to deal with the matter.

31. However, in the absence of any evidence of the existence of any tenancy agreement since 2007, and in particular, in the absence of evidence of a tenancy existing at the time of service of the Notice of Termination by the notice party, the Tribunal lacked jurisdiction to deal with the matter and were in error in finding that the Notice of Termination was valid. On this basis, the appeal against the report of the Tribunal and the Determination by the respondent, must be allowed.

32. The court will set aside the report of the Tribunal dated 13 September 2023 and the Determination of the respondent dated 6 December 2023; and will remit the matter back to the

respondent for a fresh hearing.

33. As this judgment is being delivered electronically, the parties shall have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

34. The matter will be listed for mention at 10.30 hours on 10th October 2024 for the purpose of making final orders.