

APPROVED



**AN ARD-CHÚIRT
THE HIGH COURT**

**[2024] IEHC 730
Record No. 2024/64MCA**

BETWEEN/

MAUREEN KELLY

APPELLANT

-AND-

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

-AND-

MIRACOVE HOLDINGS LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 28th day of November 2024

INTRODUCTION

Preliminary

1. This is an appeal against a determination order made by the Residential Tenancies Board (“the RTB” or “Tribunal”) on 10th January 2024 pursuant to the Residential Tenancies Act 2004, as amended (“the 2004 Act”) concerning a dwelling located at 52 Morehampton Road, Dublin 4 (“the property”) which Miracove Holdings Ltd (“the notice party/landlord”) had let to Ms. Maureen Kelly (“the appellant”) by way of a tenancy agreement dated 27th November 2019.
2. In brief, the determination order (Ref: TR0823-006576/DR1022-80258) stated that in accordance with section 121 of the 2004 Act, the RTB had determined that “(1) *The Notice of Termination served by the Respondent Landlord on the Appellant Tenant on 1st June 2021 with a termination date of 16th January 2022 in respect of the Dwelling at 52 Morehampton Road, Donnybrook, Dublin 4 is valid.*”
3. The RTB made further consequential orders directing the appellant to vacate the property within 42 days of the date of the issue of the determination order and directed the appellant to pay €60,000 (its jurisdictional limit) in rent arrears to the notice party.
4. The notice party is the landlord and the registered freeholder of this property (Folio DN20290F) and of the mews building to the rear, located at 14 Morehampton Lane, Donnybrook, Dublin 4 (Folio DN2077868F). The property is located within a rent pressure zone within the meaning of section 24A of the 2004 Act.

5. The lease dated 27th November 2019 is a Part 4 tenancy within the meaning of the 2004 Act and as such must not be terminated except in accordance with section 34 of the 2004 Act, which *inter alia* provides that a landlord can terminate a tenancy on a number of grounds, including that he intends to sell the property within the prescribed statutory period.

6. In summary, the appellant argues that the RTB erred in law in finding that there was sufficient evidence established by the notice party to meet the statutory criteria prescribing the grounds for termination in paragraph 3 of the Table set out in section 34 of the 2004 Act, *i.e.*, that the landlord intends, within 9 months after the termination of the tenancy, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of its interest in the property.

7. By this appeal, the appellant seeks to cancel or vary the determination order's validation of the notice of termination dated 1st June 2021 which was served by the notice party on the appellant and which had the effect of terminating the residential tenancy agreement between the notice party and the appellant in relation to the property.

THE 2004 ACT

8. Section 34 of the 2004 Act sets out the grounds for termination by a landlord and provides *inter alia* that “*subject to section 35A, a Part 4 tenancy may be terminated by the landlord (a) on one or more of the grounds specified in the Table to this*

section if (i) a notice of termination giving the required period of notice is served by the landlord in respect of the tenancy, (ii) the notice of termination cites as the reason for the termination the ground or grounds concerned and contains or is accompanied ... (II) in the case of paragraph 3 or 4 of that Table, by the statutory declaration referred to in that paragraph”.

9. Accordingly, paragraph 3 of the Table referred to in section 34 of the 2004 Act setting out the grounds for termination, states as follows:

“The landlord intends, within 9 months¹ after the termination of the tenancy under this section, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling and the notice of termination is accompanied by a statutory declaration referred to in section 35.”

10. Section 35(8) of the 2004 Act provides for the *statutory declaration* that is to accompany a *notice of termination* in respect of a termination referred to in paragraph 3 of the Table, and states that it shall include: (a) a declaration that the landlord intends to enter into an enforceable agreement to transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling; (aa) a declaration that the landlord, by virtue of the notice, is required to offer to the tenant a tenancy of the dwelling if the following conditions are satisfied: (ii) the landlord does not enter into an enforceable

¹ Substituted (4.06.2019) by the Residential Tenancies (Amendment) Act 2019 (14/2019), s. 12(2)(a)-(d), S.I.

No. 236 of 2019.

agreement of the type referred to in paragraph 3 of the Table within the period specified in that paragraph commencing (I) on the expiration of the period of notice required to be given under subparagraph (i) of paragraph (a) of section 34, or (II) in circumstances where a dispute in relation to the validity of the notice is referred to the Board under Part 6 for resolution, on the final determination of that dispute; and (iii) the tenancy to which the notice relates has not otherwise been validly terminated by virtue of the citation in the notice of the ground specified in paragraph 1, 1A, 2 or 6 of the Table, (b) where section 35A(3)(a) applies, a declaration that section 35A(2) does not apply to the said notice of termination as the price to be obtained by selling at market value the dwelling that is the subject of an existing tenancy to which Part 4 applies is more than 20 per cent below the market value that could be obtained for the dwelling with vacant possession, and that the application of that subsection would, having regard to all the circumstances of that case be unduly onerous on, or would cause undue hardship on, that landlord.

11. The 9 month period commences on the later of two dates – the expiry of the termination notice or the resolution of any dispute before the RTB.

NOTICE OF MOTION DATED 31st JANUARY 2024

12. By Notice of Motion dated 31st January 2024, the appellant sought to appeal (and effectively cancel) the determination order made by the RTB on 10th January 2024 pursuant to section 123(3) of the 2004 Act on the following grounds:

“a. The Tenancy Tribunal erred in law in determining that the Notice of Termination served on 1st June 2021 with a termination date of 16th January 2022 was valid;

b. The Tenancy Tribunal erred in law in determining that the requirements of section 34, paragraph 3 of the Table of the 2004 Act and section 35(8) of the 2004 Act were satisfied having regard inter alia to the following matters:-

- (i) A bone fide intention as of June 2021 to enter into an enforceable [sic.] for the transfer or sale of the property within nine months of the January 2022 stipulated termination date was not properly demonstrated;*
- (ii) despite challenge to the statutory declaration, no direct evidence was called by the declarant or any director with personal knowledge of the company's intentions as of the date of service of the Notice of Termination;*
- (iii) The Tenancy Tribunal erred in law in finding that the Landlord had the intention to enter into an enforceable agreement to sell the dwelling within nine months of the January 2022 termination date, when it served the Notice of Termination in June 2021 in relying upon the Statutory Declaration of Mr. Brian*

Goulding dated 1st June 2021 in circumstances where the Statutory Declaration was unsupported by any oral evidence before the Tribunal from persons with means and knowledge as to the Landlord's intentions at that time;

- (iv) The Tenancy Tribunal erred in law, in finding that the Landlord had the intention to enter into an enforceable agreement at the relevant time by having regard to the evidence of Ms. Carol Morrissey as to the intention of the Landlord in the circumstances in which Ms. Carol Morrissey was not a Director of the Landlord at the time when the Notice of Termination was served and had conceded in her evidence that she did not have direct knowledge of and could not give evidence as to reasons why matters were done by the company prior to her appointment as director;*
- (v) It was implausible that there was an intention to effect a sale of the property for sale so long as there was a specific performance claim pending concerning a contract to purchase the property and a Lis Pendens registered in respect of same, and no evidence was given that the property was in fact to be offered to sale with that burden affecting it;*
- (vi) The Tribunal erred in law in concluding that it was impermissible for a Tenant to rely upon the fact of a*

Lis Pendens having been registered, the pertinent question was whether there was a bone fide intention to sell notwithstanding same;

- (vii) The Tribunal erred in law in relying on evidence from a director of the Landlord as to the Landlord's current intentions upon the security of vacant possession rather than evidence of intention as of the date of service of the Notice of Termination;*
- (viii) The Tenancy Tribunal erred in law in failing to place any, or any sufficient evidential weight, on the fact that a Lis Pendens was registered against the dwelling on 23rd December 2021, in advance of the service of the purported Notice of Intention;*
- (ix) The Tenancy Tribunal erred in law in determining that the Appellant Tenant and all persons residing in the dwelling shall vacate and give up possession of the dwelling within 42 days of the date of issue of the Determination Order.”*

13. The second relief sought by the appellant in the Notice of Motion dated 31st January 2024 sought, *if necessary*, a variation of the determination order made by the RTB on 10th January 2024 on broadly the same grounds as above.

14. The Notice of Motion of 31st January 2024 was grounded on the Affidavit sworn on 30th January 2024 from Maureen Kelly (the appellant) and occupier of the property.

15. The RTB delivered a Statement of Opposition on 5th April 2024 which was verified by the Affidavit of Janette O'Halloran, Assistant Director of the RTB, sworn on 4th April 2024 and by the Affidavit of Suzy Quirke, who was the Chairperson of the relevant hearing of the Tenancy Tribunal which took place on 4th October 2023 and 27th October 2023. Ms. Quirke points out that there were other terms of the determination order which were in favour of the appellant but which are not the subject of this appeal.

16. An Affidavit supporting the decision of the RTB was sworn on behalf of the notice party by Carol Morrisey, a company director of Miracove Holdings Limited, on 16th April 2024.

17. A replying Affidavit which addressed the Affidavits of Janette O'Halloran, Suzy Quirke and Carol Morrisey was sworn by Maureen Kelly on 7th May 2024 and this was further responded to, on behalf of the notice party, by Carol Morrisey in an affidavit sworn on 21st May 2024.

SCOPE OF THE STATUTORY APPEAL

18. This is a statutory appeal pursuant to section 123(3) of the 2004 Act which provides that 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.

19. As is often the case, whilst there is broad agreement between the parties in relation to the identification of general principles which determine the scope of a statutory appeal brought pursuant to section 123 of the 2004 Act (as set out below), they are not in agreement as to their application in the circumstances of *this* appeal.
20. On behalf of the appellant, for example, it is claimed that the central question at issue is a *legal question* concerning an error of law as to whether or not the RTB properly directed itself as to its approach to the question of the *sufficiency* of the evidence before it.
21. On behalf of the RTB, it is contended that in this appeal the Appellant takes issue with one question of fact, namely, whether the notice party as of 1st June 2021 (when it served the Notice of Termination) held an intention to sell the dwelling within nine months of the January 2022 termination date.
22. The RTB also maintains that the parties' differences in describing the issue which arises in this appeal – *i.e.*, whether the central question in the appeal relates to a finding of primary fact or inferences to be drawn from such facts – is largely irrelevant, as the appellant has failed to meet the requirements of either test.
23. The scope of this form of statutory appeal and the applicable principles have been discussed in a number of decisions of the Superior Courts, including, *Deely v The Information Commissioner* [2001] IEHC 91; [2001] 3 I.R. 439, *Sheedy v Information Commissioner* [2005] IESC 35; [2005] 2 I.R. 272, *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 3 I.R. 516, and specifically in the context of section

123 of the 2004 Act, in *Doyle v PRTB* [2015] IEHC 724, *Marwaha v RTB* [2016] IEHC 308, *Hennessy v PRTB* [2016] IEHC 174, *Gunn & Gunn v Residential Tenancies Board & Anor* [2020] IEHC 635, *Stulpinaite v The RTB* [2021] IEHC 178 and *Web Summit Services v RTB* [2023] IEHC 634.

24. The following principles apply to the exercise of my statutory appellate jurisdiction in this appeal when considering whether the RTB erred as a matter of law: (a) in its determination; and/or (b) in its process of determination:

- (i) I may not interfere with first instance findings of fact unless I find that there is no evidence to support them;
- (ii) as to mixed questions of fact and law, I: (a) may reverse the RTB on its interpretation of documents; (b) can set aside the RTB determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by it on the primary facts before it could not reasonably be drawn; (c) must set aside the RTB determination, if its conclusions show that it was wrong in some view of the law adopted by it;
- (iii) even if there is no mistake in law, or misinterpretation of documents on the part of the RTB, I can, nonetheless, set aside its determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn.

25. Accordingly, the parameters of the remit of my statutory appellate jurisdiction in this case are as follows:

- (i) I cannot set aside findings of primary fact unless there is no evidence to support such findings;
- (ii) I ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision-making body could draw;
- (iii) I can and should, however, reverse such inferences, if the same were based on the interpretation of documents which was incorrect; and
- (iv) if the conclusion reached by the RTB shows that it has taken an erroneous view of the law, then that is also a ground for setting aside the resulting decision.

26. After his review of many of the aforementioned authorities, Ferriter J. *inter alia* observed in *Web Summit Services v RTB* [2023] IEHC 634 at paragraph 27 that “*an appeal may not succeed unless, inter alia, there was no evidence to support a material finding of primary fact, or an inference or conclusion on the facts was one which no Tribunal could reasonably have reached*”.

RTB’S FINDINGS AND REASONS

27. Under cover of correspondence dated 11th January 2024 from Claire Diggin, Tribunal Section of the RTB, the Report of the Tribunal and the Determination Order dated 10th January 2024, made by the RTB in accordance with section 121 of the 2004 Act, was furnished to the appellant’s solicitors.

28. In addition to setting out its rationale, the following extract from the RTB’s report (Finding 7.1) concisely summarises the relevant factual context and the issues which arise in this appeal.

29. Therefore, insofar as this appeal is concerned, having considered the evidence provided, and based on the balance of probabilities, the Tribunal’s finding (which is challenged in this appeal) includes the following reasons at internal pages 15 to 17 of the Report:

“Finding 7.1

The Notice of Termination dated 1st June 2021; with a termination date of 16th January 2022 is a valid notice.²

REASONS

The Landlord submitted the tenancy began around 1st January 2010 with the Landlord corporate entity purchasing the property in December 2013. On 27th November 2019 a Tenancy Agreement was put in place between the parties on a fixed term basis which ended on 31st December 2021.

The first Notice of Termination served by the Landlord on the Tenant was served on 1st June 2021 and gave a termination date of 16th January 2022. The reason given was that the landlord intended to enter into an enforceable contract of sale for full consideration, within nine months of the termination date.

² Underlining added in this judgment.

The Notice of Termination was accompanied by a Statutory Declaration in accordance with section 35(8) of the Residential Tenancies Act 2004, completed by a Director of the Landlord. The Notice of Termination expired on 16th January 2022 and the notice period provided for therein, was 229 days.

Ms. Morrissey for the Landlord was quite clear and stated that the company would sell the property within a reasonable time of vacant possession being actually obtained. Her direct evidence is supplemented by the Statutory Declaration albeit signed by a director of the company at the material time, who did not give evidence at the appeal hearing, Mr. Brian Goulding and she accepted that she was not a director at the time the declaration was made and could not speak to his mind but she also did say she could follow the file.

In reply, the Tenant disputed the suggestion that the Landlord has any genuine intention or capacity to transfer its interest in the premises. At the time the Notice of Termination issued, it is alleged that the Landlord, acting through its Agent, had granted the Tenant an option to purchase the premises and was aware that the Tenant had sought to exercise that option. It was submitted that the Landlord could not have intended to bind itself to a Contract of Sale within a 9-month period as alleged in the Notice of Termination in circumstances where it had

already granted an option to sell the premises to the Tenant and that the Tenant had exercised, or sought to exercise, that option.

Ms. Morrissey was cross-examined and it was put to her, that there was no reasonable prospect that the Landlord will be in a position to enter into a binding contract for the sale of the premises, pending the resolution of the High Court proceedings, in light of the fact that the Tenant has registered a Lis Pendens over the premises and the fact that the Tenant was in occupation meant that there could be no realistic option of selling the property. She did not accept it was impossible to sell but it made it difficult. [The] [t]enant's Counsel suggested that the relevant time for the intention of the Landlord is the time the Notice is served, and he pointed out that the Landlord's Counsel had not pointed out any authority for that proposition and he was not aware of any such provision in the Act in that regard.

The Landlord submitted that a Lis Pendens was not a bar to sale but rather a factor that had to be disclosed to any potential buyer. The Landlord's position was that they could not sell the property in circumstances where they could not get vacant possession. Furthermore, it is stated that all of the statutory requirements had been met and in those circumstances the Notice was valid and lawful.

A Notice of Termination served by a Landlord must comply with section 62 of the Residential Tenancies Act 2004 as amended. The Notice must be in writing, signed by the Landlord or their authorised Agent, state the termination date and the date of service. A Notice of Termination must give a sufficient notice period and no issue was raised by the Tenant on this point. The Notice of Termination served on 1st June 2021 by the Landlord on the Tenant, based on the evidence, has the correct requirements listed above and was properly served based on the oral testimony of the Landlord and the evidence. At the time of service of this Notice, it was not a statutory pre-requisite as to validity that a copy be served on the RTB.

*The statutory test is set out expressly in section 34 and has been interpreted on a number of occasions, particularly in the cases of *Hennessy v PRTB* [2016] IEHC 174 and *Gunn [sic.] v Residential Tenancies Board* [2020] IEHC 635. The Tribunal is cognisant of the fact that there was no evidence given here, as to the hallmarks of what one would normally find when an intention to sell is contested by a Tenant, such as the engagement of selling agents, draft contracts for sale, but these matters were considered as part of the much shorter three month period when a landlord had to intend to enter into an enforceable contract from the termination date and their significance may have faded with the more generous nine month*

period from the date of termination to enter into an enforceable agreement for sale. The Tribunal pauses to note that in Hennessy the ratio decidendi was that the statutory formula reciting the intention to enter into an enforceable contract of sale was not recited and therefore failed, whilst here the statutory wording was properly followed by the Landlord.

In Gunn [sic.], Judge Simons held, that under the version of the Residential Tenancies Act 2004 applicable as of the date of the service of the Notice of Termination, a Part 4 Tenancy can only be terminated early by reference to an intended sale where a Landlord intended to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling within three months after the termination of the tenancy. He held that the Tenancy Tribunal erred in law in its interpretation of sections 34 and 35 of the 2004 Act. He held that the Tribunal also erred in its application of the principles set out in the judgment of Hennessy v Private Residential Tenancies Board. He held that there was simply no evidence before the Tenancy Tribunal which would have allowed it to reach a lawful finding that, as of 18th December 2018, the owner had intended to commit to a contract for sale within three months of the termination of the tenancy. There was evidence from an estate agent that marketing of the property would be deferred until vacant possession had been achieved,

thereby leaving only three months to identify a potential purchaser and an enforceable agreement entered into. He noted Judge Baker's comments that the legislation does not provide that a termination notice can only ever be served in the context of an identified sale and he could not see how this could happen with the conveyancing and contract of sale requirements leading to a long lead time between a sale being agreed and the closing of the sale.

*The Tribunal has had to consider the salient facts here and where there is express intention in the Notice of Termination to enter into an enforceable agreement for sale and where a director of the company gives direct evidence of the intention to sell within a reasonable time of vacant possession, then this is persuasive evidence, even in the absence of an identified sale. The Tenant's actions in lodging a Lis Pendens and their highlighting of the difficulties in selling a property with a tenant in occupation is noted, but it cannot be the case that they could benefit from such matters to defeat the avowed intention to sell of the Landlord or as stated by Counsel, Mr. Keane S.C. 'held to ransom.' The supplementing of the evidence by the requisite Statutory Declaration is of assistance to the Landlord but the Tribunal notes the cautious comments by Judge Barr in *Stulpinaite* [2021] IEHC 178 [and the] decision of Judge*

Simons in Gunn [sic.], of the evidential weight of such declarations.

On the balance of probabilities, the Tribunal is satisfied that the Landlord had the intention to enter into an enforceable agreement to sell the dwelling within nine months of the January 2022 termination date, when it served the Notice of Termination in June 2021 and is not persuaded by the submission of Mr. McGrath B.L., that as that time has passed and the property is not sold, the intention to sell has not been made out. Nor is it persuaded by the registering of the Lis Pendens or the Tenant in occupation arguments.”

Summary of the appellant’s case

30. The Appellant argues that the RTB’s decision in this case comes within the type of case identified by the High Court (Baker J.) in *Doyle v Private Residential Tenancies Board* [2015] IEHC 724 when, for example, contrasting the jurisdiction of the statutory appeal process under the 2004 Act with conventional judicial review, Baker J. observed, at paragraph 19, that 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.*”

31. The Appellant relies on two of the three sub-categories of the third principle identified by Barrett J. in *Marwaha v Residential Tenancies Board* [2016] IEHC

308 at paragraph 13(3) of his judgment, namely that in relation to mixed questions of fact and law:

(i) I can set aside the Tenancy Tribunal determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by the RTB on the primary facts before it could not reasonably be drawn; and

(ii) I must set aside the Tenancy Tribunal determination, if its conclusions show that it was wrong in some view of the law adopted by it.

32. Accordingly, it is submitted on behalf of the appellant that the fundamental question raised by this appeal, as reflected in the originating Notice of Motion dated 31st January 2024, is whether the statutory requirements of Ground 3 of the Table contained in section 34 of the 2004 Act have been met by the notice party, and whether the RTB had sufficient evidence to support its finding that the notice party, as the time of the service of the first notice, had an intention to sell the property within the required time as prescribed therein.

33. It is further submitted that, as this appeal centres on the question of ‘intention’, establishing *intention* as a matter of evidence is necessarily a matter of *inference* which can be reviewed by the High Court on a statutory appeal on a point of law. It is contended that the way in which the RTB assessed the admissible evidence constituted an error of law, *i.e.*, the RTB erred, for example, in finding that the Statutory Declaration of Brian Goulding dated 1st June 2021 was effectively sufficient evidence of the truth of its contents.

34. It is submitted, referring to the judgment of the Supreme Court (O'Donnell J., as he then was) in *Whelan & Ors v AIB & Ors* [2014] 2 I.R. 199 at pp. 238-239, that I must consider whether the RTB drew inferences which no reasonable decision-making body could draw.
35. The appellant argues, by reference to section 7 of the Statutory Declarations Act, 1835 and the judgment in *Proberts v Glackin* [1993] 3 I.R.134, that the statutory declaration process is not a substitute and does not relieve the landlord of the obligation to establish by evidence, at the hearing, that their intention was present.
36. The appellant seeks to distinguish the decision of the High Court (Barr J.) in *Stulpinaite v The RTB* [2021] IEHC 178, by stating that, unlike the position here, there was extensive corroborating evidence of a *bona fide* intention to pursue a sale in *Stulpinaite v The RTB*.
37. In that case, the landlord (a notice party in the High Court appeal) did not give evidence before either the adjudicator or the Tribunal. Evidence of his intention to sell the property at the date of service of the notice of termination was given by the landlord's letting agent and a substantial volume of supporting documentation was also put before the Tribunal to establish that the landlord had the requisite intention at the date of service of the notice of termination.

Summary of the RTB's response

38. It is submitted on behalf of the RTB that, based on the evidence adduced, it found as a fact that the notice party had proved, on the balance of probabilities, that it had an intention to sell the property. It was not a case, therefore, of there being no evidence to support such findings. It determined, *inter alia*, that the notice of termination served by the notice party/landlord, Miracove Holdings Limited, on the appellant on 1st June 2021, was valid in respect of the tenancy of a dwelling at 52 Morehampton Road, Donnybrook, Dublin 4.
39. In summary, adopting the principles identified by the High Court (Barrett J.) in *Marwaha v The Residential Tenancies Board* [2016] IEHC 308 at paragraph 13(2), the case made on behalf of the RTB was that the appellant's appeal was in the category of an appeal where "*the court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them.*"
40. In this case, it was argued that the following evidence was before the RTB: (a) a statutory declaration of Brian Goulding (at a time when he was a director of the notice party) which declared an intention on the part of the notice party to sell the property; (b) direct evidence of Carol Morrissey, a director of the notice party since July 2022, who confirmed that while she was not a director at the time the statutory declaration was made, as a current director, she had the authority to act on behalf of the notice party and that she could "*follow the files*" of the company; (c) that it remained the intention of the notice party to sell the dwelling (referring to day 2 of the hearing, page 39: line 19).

DISCUSSION & DECISION

41. I consider that, taken together, the factors outlined below provide the evidence to support the material findings of primary fact made by the RTB and that the inferences and conclusions drawn from those facts were ones which the RTB could reasonably have reached – a summary of which, for example, can be ascertained in the following extract of the RTB’s report:

“The Tribunal has had to consider the salient facts here and where there is express intention in the Notice of Termination to enter into an enforceable agreement for sale and where a director of the company gives direct evidence of the intention to sell within a reasonable time of vacant possession, then this is persuasive evidence, even in the absence of an identified sale. The Tenant’s actions in lodging a Lis Pendens and their highlighting of the difficulties in selling a property with a tenant in occupation is noted, but it cannot be the case that they could benefit from such matters to defeat the avowed intention to sell of the Landlord or as stated by Counsel, Mr. Keane S.C. ‘held to ransom.’ The supplementing of the evidence by the requisite Statutory Declaration is of assistance to the Landlord but the Tribunal notes the cautious comments by Judge Barr ... in Stulpinaite [2021] IEHC 178 [and the] decision of Judge Simons in Gunn [sic.], of the evidential weight of such declarations.

On the balance of probabilities, the Tribunal is satisfied that the Landlord had the intention to enter into an enforceable agreement to sell the dwelling within nine months of the January 2022 termination date, when it served the Notice of Termination in June 2021 and is not persuaded by the submission of Mr. McGrath B.L., that as that time has passed and the property is not sold, the intention to sell has not been made out. Nor is it persuaded by the registering of the Lis Pendens or the Tenant in occupation arguments”.

42. The following factors, in my view, confirm that the RTB was entitled in this case to come to the conclusion that there was sufficient evidence in this case that Miracove Holdings Ltd (the notice party), when it served the Notice of Termination in June 2021, intended within 9 months after the termination of the tenancy (on 16th January 2022) under section 34 of the 2004 Act, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of its interest in the property located at 52 Morehampton Road, Dublin 4:

- (1) the 2019 Act;
- (2) the notice of termination;
- (3) the statutory declaration;
- (4) the option agreement (particularly the specific performance and lis pendens
- (5) the fact that there was no sale after 9 months;
- (6) the evidence of Carol Morrissey.

43. I will now address each of these factors.

The 2019 Act

44. The background to the legislative reforms recognised that selling a residential tenancy with a tenant *in situ* had the effect of depressing the sale price and the Oireachtas, through the Residential Tenancies (Amendment) Act 2019 (“the 2019 Act”), sought to address this, in a balanced way, and from the perspectives of *both* the landlord *and* the tenant.

45. Accordingly, whilst the rights of tenants have been expanded, a landlord’s capacity to sell at the best price was also sought to be reserved, *i.e.*, realising the best value for a property. The right to sell was considered by the Legislature to be a right to be preserved and one which should be given practical effect without unrealistic deadlines.

46. The balancing of this right was also reflected by the provision of serious consequences (which were meant to have a deterrent effect) for a landlord if the sale did not proceed.

47. A further example of how the Oireachtas sought to recognise the *real-time* practical consequences of this legislative regime is reflected in the change from three months to nine months (which took effect from 4th June 2019 by section 12 of the 2019 Act) because the three month period was unrealistic and too circumscribed when seeking to secure an enforceable pre-sale contract and, of course, a contract was only required to be signed rather than having a sale completed: see the observations of

the High Court (Simons J.) in *Gunn & Gunn v Residential Tenancies Board & Anor* [2020] IEHC 635 at paragraphs 48 and 49 in comparison to the previous three months and which was referred to by the High Court (Baker J.) in *Hennessy v PRTB* [2016] IEHC 174 at paragraphs 37 and 38.

48. There is, therefore, an onerous responsibility on a person who makes a statutory declaration. As mentioned, the 2019 Act, for example, sets out a number of serious consequences for a defaulting landlord who fails to implement a sworn intention contained in a statutory declaration to sell a property, including: (a) the offer of a new tenancy to the tenant as per section 35(8) of the 2004 Act; (b) being liable to a potential claim for damages under section 56 of the 2004 Act in any of three circumstances (which is a deterrent or anti-avoidance provision, *e.g.*, if the tenant moves out, it may create a great expense that could found an action in damages and a right to a new tenancy); (c) a possible criminal sanction in section 74 of the 2004 Act; and (d) Part 7A by the 2019 Act provides for direct action by the RTB and Schedule 2 sets out the range of improper conduct.

Notice of Termination

49. The notice of termination served on the appellant on 1st June 2021 *inter alia* stated that “*The Tenancy of the dwelling at 52 Morehampton Road, Donnybrook, Dublin 4, will terminate on the 16th January 2022.*” It represents *the communication* of a statement of intent and paragraph (3) of the “grounds for termination” prescribed in the Table at section 34 of the 2004 Act mandates that “*the notice of termination is accompanied by a statutory declaration referred to in section 35*” of the 2004 Act, which occurred in this case.

50. The notice of termination provided that the appellant must vacate and give up possession of the dwelling on or before the termination date and that *“The reason for the termination of the Tenancy is due to the fact that the Landlord intends, within nine-months of the termination date, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling.”*

Statutory Declaration

51. By way of a statutory declaration dated 1st June 2021, the Declarant, Brian Goulding, declared as follows:

“I Brian Goulding, Director of Miracove Holdings Limited, do solemnly and sincerely declare that I intend, within a period of nine-months after the termination date, to enter into an enforceable agreement to transfer to another, for full consideration, the whole of the company’s interest in the dwelling or the property containing the dwelling.

I understand that I am required to offer to the Tenant the option of a Tenancy if the Company does not enter into an enforceable agreement to transfer to another, for full consideration, the whole of its interest in the dwelling or the property containing the dwelling, within a period of nine months from the expiry of the notice period in the Notice of Termination or if a dispute in relation to the validity of the notice is referred to the Residential Tenancies Board, the final

determination of the dispute and the Tenancy to which the Notice relates had not otherwise been validly terminated by the grounds specified in the table to section 34 of the Residential Tenancies Act 2004 to 2019.

The opportunity to occupy requires the Tenant to provide contact details to the Landlord within twenty eight days from the service of the Notice of Termination or the final determination of a dispute referred to the Board as regards the validity of the Notice, and the Tenant notifies the Landlord as soon as possible should the Tenant's contact details change.

I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1938

Signed: Brian Goulding".

52. In the context of the *statutory declaration*, the appellant's primary argument centred around the judgment of the High Court (Simons J.) in *Gunn & Gunn v Residential Tenancies Board & Anor* [2020] IEHC 635.

53. The facts in *Gunn & Gunn*, however, are important in understanding the court's observations in relation to statutory declarations.

54. The landlord had decided, in fact, not to market the dwelling *until after* the property was secured and this, therefore, undermined the probative value of the statutory declaration in that case from an evidential perspective. Thus, the *Gunn & Gunn* judgment did not involve a statutory declaration, as such, and the judgment recognises (at paragraph 52) that the views expressed as to the evidential status of a statutory declaration were, of necessity, *obiter*. The Tenancy Tribunal in that case, therefore, did not attach any significance to the statutory declaration in reaching its conclusions and therefore this court (Simons J.) held (at paragraph 54) that it would be unjust to allow the RTB to rely on the existence of the statutory declaration in circumstances where it had never been suggested to the tenants during the course of the hearing before the Tenancy Tribunal that it would be relied upon as proof of intention and consequently the tenants were not afforded an opportunity to consider whether, for example, the declarator should be summonsed or indeed cross-examined. There is no suggestion, however, that a statutory declaration is impermissible *per se* in a hearing.

55. Further, the applicable period was 3 months in that case and not 9 months.

56. In *Stulpinaite v The RTB* [2021] IEHC 178 the High Court (Barr J.) referred to the submission made by senior counsel for the appellant, in that case, to the effect that “*once there was a prima facie case that the landlord did not have the requisite intention, the Tribunal could not act on hearsay and documentary evidence in the manner in which it had done*” and it was submitted, on the facts of that case, there was no admissible evidence before the Tribunal which would enable it to make a

finding of fact that the landlord had the requisite intention at the date of service of the notice of termination.

57. In *Stulpinaite v The RTB*, this court (Barr J.) referred (at paragraph 62) to the capacity of bodies such as the RTB and the statutory scheme established pursuant to the 2004 Act to act informally,³ simply and less expensively,⁴ but at all times acting fairly to enable it to take the necessary steps itself to ensure that it had adequate evidence to decide a dispute. The court was satisfied that the RTB had the power to act in an informal and non-adversarial way and that under the 2004 Act it had been given wider powers than a court, including the power to *subpoena* witnesses on its own behalf, demand production of documents and receive unsworn evidence, *i.e.*, to ensure that relevant witnesses and documentation were placed before it in order to resolve the dispute. The court observed, as follows, at paragraph 63:

“(63) The court is satisfied that the Tribunal has the power to act on documentary evidence and on hearsay evidence and can adopt such informal procedures as appear to it to be appropriate as being best suited to achieving a fair resolution in the case. However, the Tribunal must always act within the bounds of fairness. If a party challenges the truth or accuracy of a document, the Tribunal must decide whether it is necessary to have that document formally proved

³ *Stulpinaite v The RTB* [2021] IEHC 178, per Barr J. at paragraph 59, referring to *Kiely v Minister for Social Welfare (No. 2)* [1977] I.R. 267 at page 281 and at paragraph 61 referring to *Foley v Johnson* [2017] IEHC 424.

⁴ *Stulpinaite v The RTB* [2021] IEHC 178 per Barr J. at paragraph 60 referring to *Doyle v The Private Residential Tenancies Board* [2015] IEHC 724 per Baker J. at paragraphs 40 and 41 and at paragraph 61 referring to *Canty v Attorney General & Ors* [2011] IESC 27.

in evidence. Furthermore, the parties to the dispute are given the express right under the Act, to cross-examine any witnesses that may be called to give evidence before the Tribunal. They are also given the right to have the Tribunal issue a subpoena to have witnesses called on their behalf. The court is satisfied that the procedures of the Tribunal, which are set out in the Act and in a document that is circulated to the parties in advance of the hearing, are designed to ensure that, while the hearing before the Tribunal is of an informal nature, it nonetheless adheres to the requirements of natural justice.”

58. In *Stulpinaite v The RTB* [2021] IEHC 178, the landlord wanted to terminate the lease in order to renovate the property and this was raised against him. Barr J. referred to the debate, in the course of the argument by counsel for the respective parties, as to the correct evidential status to be attached to the statutory declaration in that case, and which is sworn by a landlord when serving a notice of termination. Barr J. addressed the issue at paragraphs 67 and 68 of his judgment as follows:

“(67) Notwithstanding that the dicta of Simons J in the Gunn [& Gunn] case were obiter dicta, the court is satisfied that they represent an accurate statement of the law in relation to the evidential value of statutory declarations. The statutory declaration made by a landlord is not presumptive evidence, much less is it conclusive evidence of the matters stated therein. Indeed, it could be argued that a statutory declaration is not admissible as evidence of the matters stated therein at all, as it would constitute a statement by a person confirming their

own state of mind and as such its admission could be seen as offending the rule against self-corroboration.

(68) However, the court is of the view that for the Tribunal to exclude a statutory declaration as evidence, would be to take too restrictive a view of the issue of admission of evidence before it. Given the informal nature of proceedings before the Tribunal, the better view is that a statutory declaration constitutes evidence of intention, due to the fact that there are penal consequences if the statement made therein is not true; however, given that the statutory declaration is essentially just a statement by the interested party confirming his own stated intention, it is not strong evidence of intention, but is nonetheless some evidence that can be taken into account by the Tribunal.”

59. Accordingly, in terms of admissibility and probative value, having regard to: (i) the informal nature of the statutory scheme in the 2004 Act; (ii) the penal consequences prescribed in the scheme under the 2004 Act if the statement made by Mr. Goulding at the time was untrue; and (iii) the fact that the statutory declaration simply constituted a confirmatory statement by Mr. Goulding of his stated intention, I consider that the statutory declaration of Brian Goulding dated 1st June 2021 (set out earlier in this judgment), which accompanied the notice of termination served on the appellant on 1st June 2021, constitutes some (albeit not strong) evidence that Miracove Holdings Ltd (the landlord in this case) intended within 9 months after the termination of the tenancy under section 34 of the 2004 Act, to enter into an

enforceable agreement for the transfer to another, for full consideration, of the whole of its interest in the property located at 52 Morehampton Road, Dublin 4.

60. There is a difference between questions which go to the admissibility of evidence and the quality of the evidence. A sworn statement and an e-mail, for example, should not be treated as equal. What matters is the intention at the date of the Notice of Termination and what evidence was before the RTB. In contrast, section 7 of the Statutory Declarations Act 1835 and the judgment in *Probets v Glackin* [1993] 3 I.R. 134 are about proof of their contents in court whereas, in this case, it is a statutory tribunal. In *Probets v Glackin* [1993] 3 I.R. 134, the Supreme Court, for example, regarded it as unsatisfactory that the application was grounded on an affidavit of a solicitor and not that of the applicant himself and in circumstances where the applicant sought to rely on it so as to confer an evidential status on the statutory declaration exhibited and Gunn.

61. In *Whelan & Ors v AIB & Ors* [2014] 2 I.R. 199 the Supreme Court, in the judgment of O'Donnell J. (as he then was) referred at pp. 238-239 to the judgment of the Supreme Court in *Northern Bank Finance v Charlton* [1979] I.R. 149,⁵ where Henchy J. (at pp. 191-192 of his judgment) observed that “[t]he court of appeal will only set aside a finding of fact based on one version of the evidence when, on taking a conspectus of the evidence as a whole, oral and otherwise, it appears to the court that, notwithstanding the advantages which the tribunal of fact had in seeing and

⁵ In *Northern Bank Finance v Charlton* [1979] I.R. 149, the Supreme Court *inter alia* held that the right to rescind a contract for misrepresentation was lost if the party seeking rescission affirms the contract after becoming aware of the misrepresentation.

gearing the witnesses, the version of the evidence which was acted on could not reasonably be correct’.

62. In further referring to *Northern Bank Finance v Charlton* [1979] I.R. 149, O’Donnell J. *inter alia* observed⁶ that “[w]hile the state of a man’s mind is a matter of fact to be proved like any other, proof of a state of mind is always inferential. It is deduced from something else, such as the statement of the person and his or her actions. This is not a question of a conflict of oral evidence of perception as to whether certain matters occurred. In this case it is more a matter of evaluation and deduction from the evidence as to the state of Mr Lynch’s mind and in particular whether he had made a decision not enter the transaction unless the loan was non recourse. While the trial judge made reference to observing Mr Lynch while giving evidence, that cannot overcome the contrary objective evidence.”⁷

63. In addition, the appellant accepts that the formal requirements of the Notice of Termination, in this case, were complied with and the formal requirements of the Statutory Declaration were complied with and that both were served, *i.e.*, the Notice of Termination and the Statutory Declaration were formally valid.

Specific Performance and Lis Pendens

64. The existence of an Option Agreement is contested between the parties.

⁶ *Whelan & Ors v AIB & Ors* [2014] 2 I.R. 199 at p. 239.

⁷ O’Donnell J. also referred to the judgment of Lord Atkins in *Société d’Avances Commerciales v Merchants’ Marine Insurance Co.* (1924) 20 Lloyd’s Rep. 140 at p. 152.

65. Ms. Maureen Kelly avers in her Affidavit, sworn on 30th January 2024, that whilst accepting her tenancy of the dwelling, she states in or around December 2016 her son, Simon Kelly, acting as her agent, entered an agreement on her behalf (referred to as the Option Agreement) with Mr. John Morrissey on behalf of the Landlord. She says that Mr. Morrissey was then a Director of the Landlord and was duly authorised to enter into the Agreement on its behalf. She states that under the terms of the Option Agreement, which terms she avers were recorded in a series of emails exchanged between Simon Kelly and John Morrissey between 4th December 2021 and 7th December 2021, she acquired for good and valuable consideration an option entitling her to acquire the Landlord's freehold interest in the dwelling on 31st January 2021.

66. The fact of the claim for Specific Performance and the Lis Pendens, which arose from this claimed Option Agreement, were relied upon by the appellant in seeking to take issue with the question of '*intention*'.

67. The report and decision of the RTB noted that on the balance of probabilities, the Tribunal was satisfied that the Landlord had the intention to enter into an enforceable agreement to sell the dwelling within nine months of the January 2022 termination date, when it served the Notice of Termination in June 2021.

68. In its report, the RTB was not persuaded that the following arguments illustrated that the intention to sell had not been made out: (i) the registering of the Lis Pendens (in the circumstances just described) (ii) the arguments in relation to the

‘rights of a tenant in occupation’ and (iii) that after the 9 months had passed, the property was not sold.

69. As mentioned earlier, the statutory scheme in the 2004 Act aimed to balance the rights of the tenant and the landlord. In terms of timing or sequencing, the unilateral action of the appellant (tenant) in issuing specific performance proceedings, which in all likelihood would not be finally disposed of within nine months, and in the registration of a Lis Pendens, which post-dated the Notice of Termination and was not in existence when the requisite intention had to be formed, do not negate *paragraph (3)* of the “grounds for termination” prescribed in the Table at section 34 of the 2004 Act which provides that “*the landlord intends, within 9 months after the termination of the tenancy under this section, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling and which is the notice of termination is accompanied by a statutory declaration referred in section 35*”.

70. Further, it is, of course, the case that the RTB has no jurisdiction to adjudicate on the specific performance proceedings. It was argued on behalf of the RTB, for example, that the appropriate remedy for a tenant who claims an entitlement to remain in a property, relying on an alleged contract to purchase, was to issue injunctive proceedings. Certainly, there is force in the suggestion that the basis for asserting the right in such a scenario was a purported contract rather than the tenancy *per se* or the machinery of the scheme in the 2004 Act. In circumstances

where a contract is alleged, the RTB cannot test the cogency or the quality of such assertions as part of its legislative mandate under the 2004 Act.

No sale after 9 months

71. The fact of the failure to sell the property after 9 months was also relied upon by the appellant in seeking to undermine the previous stated ‘intention’. This was initially raised in submissions from counsel for the appellant at the oral hearing, where at pages 139 -140 of the transcript of the hearing held on 27th October 2023 it had been submitted *inter alia* that a statutory declaration was not the same as the company (the notice party landlord) providing evidence to the Tribunal “*that gives force and gives an explanation of how the landlord had a specific intent to bind itself*” and “*that a sale of this nature under section 34(4) must be sale of full value*” and that “*it was certainly was not sold within the nine-month period that was specified in the termination notice.*” It was acknowledged by counsel for the appellant, however, that senior counsel for the landlord (notice party) had, in his closing submission, “*suggested that the relevant time for the intention of the landlord is the time the notice was served and that’s well and good insofar as it goes*”.

72. Perhaps, not surprisingly, it was accepted at the hearing before me that the fact that the property had not been sold during those 9 months was not a basis for negating the requisite intention. In any event, such a proposition runs counter to the provisions of section 35(8) of the 2004 Act where the time period is postponed.

The evidence of Carol Morrissey

73. The report and decision of the RTB recorded that “*Ms. Morrissey for the Landlord was quite clear and stated that the company would sell the property within a reasonable time of vacant possession being actually obtained. Her direct evidence is supplemented by the Statutory Declaration albeit signed by a Director of the Company at the material time, who did not give evidence at the Appeal hearing, Mr. Brian Goulding and she accepted that she was not a Director at the time the Declaration was made and could not speak to his mind but she also did say she could follow the file.” (Underlining added).*

74. The Affidavit sworn on 5th April 2024 of Suzy Quirke, Chairperson of the relevant hearing of the Tenancy Tribunal which took place on 4th October 2023 and 27th October 2023, reflects the findings made in the RTB report (which was signed by Suzy Quirke for and on behalf of the RTB) and the direct evidence of Carol Morrissey as stated in the transcripts of the hearing.

75. Ms. Quirke avers that the Tribunal took into account the evidence of Carol Morrissey, a director of the notice party since July 2022 and avers *inter alia* that: “*Ms. Morrissey also gave evidence that it remained the Notice Party’s intention to sell the Dwelling on gaining vacant possession ... While Ms. Morrissey was not a Director of the Notice party at the time the Statutory Declaration was signed, she had authority to act on behalf of the company and had access to all of the papers and documents of [sic.] company, at the time the Statutory Declaration was signed, and since. The Tribunal was satisfied that the evidence of Ms. Morrissey who confirmed that it was still the intention of the company to sell the Dwelling was*

supplemented by the Statutory Declaration declared by Brian Goulding on 1st June 2021 ... In cross-examination of Ms. Morrissey, she was questioned whether it would be possible to sell the Dwelling whilst there was a lis pendens registered against the Dwelling, in reply to which she stated that indicated that it would be more difficult but not impossible and that it was still the intention of the Notice Party to sell the Dwelling on gaining vacant possession of the Dwelling”.

76. The evidence of Carol Morrissey and her reference that she could “*follow the files*” is not dispositive of the issue in this case either way, and is at best, neutral. In the Affidavit of Suzy Quirke, Chairperson of the relevant hearing of the Tenancy Tribunal, sworn on 5th April 2024, it is averred *inter alia* at paragraph 21 that “*No direct evidence was adduced to the effect that the Notice party did not in fact hold the requisite intention on 1st June 2021*” and that rather, the appellant’s position “*was that, in view of the surrounding circumstances, there was no reality to the intention as stated in the Statutory Declaration. The surrounding circumstances were addressed in the direct evidence, cross-examination and arguments at the hearing*”.

CONCLUSION

77. In carrying out a balancing exercise of the evidence which was before the RTB, I am mindful of the approach articulated by Barr J. at paragraphs 67 and 68 of his judgment in *Stulpinaite*, referred to earlier in this judgment (and also his endorsement of the observations of Simons J. in *Gunn & Gunn*), and in doing so I consider that there was sufficient evidence in this case to establish that Miracove

Holdings Ltd intended within 9 months after the termination of the tenancy under section 34 of the 2004 Act, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of its interest in the property located at 52 Morehampton Road, Dublin 4.

78. The RTB was, in my view, correct in the Determination Order made by it on 10th January 2024 (Ref: TR0823-006576/DR1022-80528) that *“In the matter of Maureen Kelly [Appellant Tenant] and Miracove Holdings Limited [Respondent Landlord] the Residential Tenancies Board, in accordance with section 121 of the Residential Tenancies Act 2004, determines that (1) The Notice of Termination served by the Respondent landlord on the Appellant tenant on 1 June 2021 with a termination date of 16th January 2022 in respect of the Dwelling at 52 Morehampton Road, Donnybrook, Dublin 4 is valid.”*

79. Accordingly, I refuse the orders sought in the appellant’s originating notice of motion dated 31st January 2024.

PROPOSED ORDER

80. I shall, therefore, make an Order dismissing the appellant’s appeal. I shall put the matter in for mention before me at 10:30 on Tuesday 21st January 2025 to address any ancillary or consequential matters arising, including the question of costs.

CONLETH BRADLEY

28th November 2024