RESIDENTIAL TENANCIES ACT 2004

Private Residential Tenancies Board Tribunal

Report of Tribunal Ref. No: TR34/DR1072/2010. Case Ref. No. DR1072/2008

Appellant Landlord:	X
Respondent Tenant:	Eva Power
Address of Rented Dwelling:	Z (The Dwelling)
Tribunal:	Orla Coyne (Chairperson) John Elliott Patrick Riney
Venue:	Tribunal Room, PRTB, Floor 2, O'Connell Bridge House, D'Olier Street, Dublin 2
Date of Hearing:	4 March 2010 at 2.30pm
For the Appellant:	Vincent Kelly (Kelly Bradshaw Dalton Auctioneers known as ERA) John Dalton (Kelly Bradshaw Dalton Auctioneers known as ERA) Pat Doyle (Kelly Bradshaw Dalton Auctioneers known as ERA)
For the Respondent:	Eva Power (Tenant)
In Attendance:	Carla Reynolds (PRTB Representative) Gwen Malone Stenographers

Background:

1. On the 3rd September 2008 the Tenant made an application to the Private Residential Tenancies Board (the PRTB) pursuant to Section 78 of the Act alleging the reason she was seeking dispute resolution was for breach of Landlord obligations and standard of maintenance of the Dwelling. The matter was referred to an adjudication which took place on 11th June 2009. The Adjudicator determined that the Landlord was not responsible for items alleged to have been stolen from the Dwelling. He further determined that the Landlord was liable for breach of her obligations in not attending to notified defects in the Dwelling leading to loss of peaceful occupation of the Dwelling by the Applicant. The Adjudicator further found that the Landlord was to make payment to the Tenant in the sum of €2,600 in respect of the breach of her obligations under the Act.

2. Subsequently a valid appeal was received from the Landlord by the PRTB on the 8th December 2009. On the 27th January 2010 the PRTB constituted a Tenancy Tribunal and appointed Orla Coyne, John Elliott and Patrick Riney as Tribunal members pursuant to Sections 102 and 103 of the Act and appointed Orla Coyne to be the chairperson of the Tribunal (the "Chairperson").

3. On the 8th February 2010 the parties were notified of the constitution of the Tribunal and provided with details of the date, time and venue set for the hearing.

4. On the 4th March 2010 the Tribunal convened a hearing at 2.30 pm at the offices of the PRTB, Floor 2, O'Connell Bridge House, D'Olier Street, Dublin 2.

Documents Submitted prior to the Hearing Included:

- PRTB file.

Documents Submitted at the Hearing Included:

- No additional documents submitted.

Procedure:

The Chairperson asked the parties present to identify themselves and to identify in what capacity they were attending the Tribunal. She confirmed with the parties that they had received the relevant papers from the PRTB in relation to the case and that they had received the PRTB document entitled "Tribunal Procedures".

She explained the procedure which would be followed; that the Tribunal was a formal procedure and that it would be as informal as was possible; that the person who appealed (the Appellant Landlord) in this case would be invited to present their case first including her witnesses; that there would be an opportunity for cross examination by the Respondent Tenant; that the Respondent Tenant would then be invited to present her case and that there would be an opportunity for cross- examination by the Appellant Landlord. She said that the members of the Tribunal might ask questions of both Parties from time to time. The Chairperson explained that following this both Parties would be given an opportunity to make a final submission if necessary.

She stressed that all evidence would be taken on Oath and would be recorded by the official stenographer present and she reminded the parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of €3,000 or up to six months imprisonment or both.

She also reminded the Parties that as a result of the Hearing that day the Board would make a Determination Order which would be issued to the Parties and could be appealed to the High Court on a point of law only pursuant to Section 123 (3) of the 2004 Act.

She asked the Parties if they had any queries about the procedure. There were none. The Chairperson requested all those persons giving evidence be sworn and Vincent Kelly, John Dalton, Pat Doyle and Eva Power were duly sworn.

Submissions of the Parties:

Appellant Landlord's Case

Mr. Vincent Kelly gave evidence on behalf of the Landlord. Mr. Kelly pointed out to the Tribunal that the Landlord was not responsible in respect of items that were alleged to have been stolen from the Dwelling and that the two matters that the Landlord was appealing were in respect of the Landlord being liable to the Tenant for breach of the Landlord's obligation for not attending to notified defects to the Dwelling leading to the loss of peaceful occupation of the Dwelling and the payment for the said breaches in the sum of €2,600.
Mr. Kelly said that his firm were hired by the Landlord as agents to find a Tenant, which they did. He then went on to explain that the Landlord can decide to use their firm as either a caretaker service or a management service. He stated that they carried out a

caretaker service for the Landlord which, he stated, means that if there was a problem, the Tenant could contact the Landlord about the difficulties with the Dwelling and in turn the Landlord would contact them to carry out any maintenance. If the Landlord chose this service an extra fee was paid by the Landlord.

It was put to Mr. Kelly by the Tribunal whether this was made clear to the Tenant and he confirmed that they had e-mailed directly to the Landlord and the correspondence that had been entered into between the Landlord and the Tenant he believed both the Landlord and the Tenant were aware of what "services" his company provided.

He stated that a Lease was entered into between the parties on the 8th July 2008. The rent was €1300 and there was a deposit of one and a half month's rent in the sum of €1,950. The Lease was due to expire on 30th July 2009. The Tenant left the premises on or about September 22nd 2008 and had e-mailed the Landlord twenty-eight days prior to that date advising that she was leaving. This notice that the Tenant had issued was accepted by Mr. Kelly on behalf of the Landlord. He confirmed that there was no issue in respect of this method of terminating the Tenancy.

Mr. Kelly accepted that the Tenant when she moved into the Dwelling pointed out a number of matters she wanted to be rectified to Mr. Patrick Doyle, a representative of the company, at the time. The items that needed to be rectified were a Sliderobe wardrobe which was not sliding properly. Mr. John Dalton, his maintenance man, called to look at it, and he said it couldn't be fixed because there were no parts to replace them with, as they were no longer available. The alternative was to take it out and replace it with a brand new mechanism, which he said the Landlord was not in a position to do financially.

The next item was a kitchen drawer. There were three kitchen drawers, one of which was damaged. Once again, this could not be fixed as a part was no longer available for this drawer.

Another problem was the extractor fan in the kitchen area, but this was fixed.

The third problem was the "kickboard" in the kitchen. There was a drawing on it and it was made out of cardboard. This was fixed. When asked how long it took for it to be fixed, he said that it took a period of time because it was not a priority. He said that when he let a dwelling the main priorities of problems which arose were if there was a leak, a fire or a break-in to the dwelling. However he claimed that all problems that were raised were dealt with as quickly as possible.

The main issue as he saw it was in relation to the defective shower. This arose subsequently as it was not noticed when the Tenant initially gained access to the dwelling and it took approximately three weeks to fix it.

Finally the alarm, he accepted, was not operating because they did not have a code for it. He stated they were not in a position to give the code to the Tenant as it appears that the company that put in the alarm was no longer in existence.

However he accepted that by the e-mail of 17th August 2008 the only matter that appeared to have been repaired was the shower and all other items as stated for the reasons above were outstanding which included the alarm code which the Landlord he claimed had still not given to him. Mr. Kelly said that they had done everything he believed within reason to fix the items concerned.

Mr. Kelly stated during the course of his evidence that there had been a number of break-ins to properties in the development and that the dwelling itself had also been broken into before. However he stated that he did not believe that the front door to the Dwelling which was broken into to gain access to the Dwelling was weaker than any other door in the development. He subsequently found out that the Tenant had some very valuable photographic equipment in the Dwelling and thought that somebody may have seen it through the window of the Dwelling and, as they were portable enough to be stolen easily, the Dwelling was burgled.

When the Dwelling was broken into on the 20th August 2008 he treated it as a Category 1 problem and therefore as a priority.

Mr. Kelly stated that he did advertise the Dwelling on Daft.ie and in the advertisement it did say that the Dwelling had an alarm. He agreed that the Tenant could not use the alarm, as she had not got the code. He had tried to source the code from the Landlord. He further said that it was unacceptable that it took so long to obtain the code and unfortunately while the code was being sought, the Dwelling was broken into. He stated that after the break-in, the Tenant herself had made a decision that she wanted to leave the Dwelling. He said that he made no issue about returning her deposit, even though she was leaving before the expiration of her fixed term Tenancy Agreement. He also went on to state he was not initially aware that the Tenant was a photographer and had brought her valuable equipment into the Dwelling during her Tenancy.

The Tribunal put to Mr. Kelly why a copy of the Lease was not returned to the Tenant and he stated that it had not been processed properly in his office.

The Tribunal brought to Mr. Kelly's attention about the overpayment of rent by the Tenant when she vacated the Dwelling as the rent was paid up until the end of October and she moved out on the 20th October there was an overpayment of 11 days of rent. He accepted this overpayment in the sum of €470.14 was due to the Tenant.

Mr. Pat Doyle's Evidence

Mr. Doyle stated that he made first contact with the Tenant on 9th July 2008. He was the person who dealt with her on an ongoing basis. He went through the Dwelling with her and took note of the problems before she moved in. He said he knew there was not a code for the alarm. He was unaware that there was something wrong with the shower because it had not been tested when she gained entry to the Dwelling. He said the difficulty with the kickboard was that there was a piece of cardboard in place of the kickboard. The reason this occurred was for ease of access to pipes as there was a difficulty with some blocking of the pipes under the kitchen sink periodically causing a smell.

Mr. Doyle went on to state that he said to the Tenant that he would pass the items that were not correct on to their maintenance team and hopefully have them addressed sooner rather than later. He did not give a commitment to have them fixed within a specific time.

Mr. John Dalton's Evidence

Mr. Dalton said he was the maintenance man for E.R.A. He said that before the Tenant moved into the Dwelling, he went through the Dwelling with the Landlord and agreed to fix a number of items. He said regarding the problem with the Sliderobe, unfortunately he couldn't obtain a part for it, but that it wasn't a danger as it was bolted to the top and would not fall out. He gave the telephone number that was on the alarm to the Landlord for her to go and try to contact the company to have the alarm activated. When eventually the Landlord reverted to him she advised that the alarm company was no longer trading. They obtained the services of another company to come in and recode and service it, which was approximately two weeks after the Dwelling had been broken into.

Cross-examination by the Tenant

The Tenant put to Mr. Doyle that they were not just caretakers but they were managing agents. She went on to state that she was told by Mr. Doyle that ERA Kelly Bradshaw Dalton would be dealing with all matters. Mr. Kelly did not accept this was the situation. To support his repudiation he referred to a letter he wrote to the landlady on the 28th August 2008 which stated that they were not appointed managing agents of the Dwelling.

Respondent Tenant's Case:

The Tenant stated that she was advised at all stages that ERA were the managing company. She was never given the Landlord's details and only received them when a copy of the letter of the 28.08.2008 was sent to her by ERA that she was able to obtain the Landlord's phone number through directory enquiries. This was the first time she had ever dealt with the Landlady. The Tenant said that it was on the 4th August 2008 that the shower was eventually replaced and fixed, although she had been in the Dwelling since the 9th July, she had to shower in a friend's apartment before the 4th August.

The Tenant went on to state that she chose the Dwelling because it had car parking, an alarm code and it was a good size. She said the first day that she was shown around the Dwelling she was advised by another employee of ERA (none of the attendees present at the Tribunal) that each new Tenant gets a new alarm code.

She said that Mr. Doyle, when he walked through the Dwelling at a later date when she was about to take up occupancy, stated that their company would repair the items as they had their own handyman, which she believed Mr. Dalton did on behalf of the company. She also stated that she advised Mr. Doyle what she did for a living at the time and that she wanted the alarm code so that she could put the alarm on as she had important equipment in the Dwelling. She said that she had made well over 20 phone calls and had sent numerous e-mails seeking the alarm code. The Tenant had produced into evidence her mobile phone records showing a number of calls being made to ERA.

The Tribunal asked the Tenant whether she was aware that in the Lease it stated that the Tenant is responsible for her own insurance. The Tenant responded that she was aware of it and understood this completely. However, she also said that although most of her equipment was covered by insurance but that unfortunately she had only just bought a number of new items and had not put them onto her insurance at that stage. She went on to state that it is her opinion that an alarm is a deterrent, and that if the alarm had been working at the time of the break-in, it would have gone off and there was a possibility that the thieves might have left the Dwelling quickly without taking all the items that they had. It would have been a decided deterrent. However, she stated that it would not necessarily have prevented a break-in.

The Tenant stated that upon her reading the letter of 28.08.2008 from ERA to the Landlord that up until that time she believed that the Landlord had never been asked for the code. In a subsequent conversation she had with the Landlord when she put it to her as to whether she had been requested to furnish the alarm code the Landlord had responded that she had not been asked for the alarm code by Mr. Kelly.

The Tenant gave further evidence that there were a number of visits to the Dwelling in relation to assessing the problems in the Dwelling and the fixing of the shower. She stated that there were four visits altogether including the visits to look at the drawers, the Sliderobe and the kickboard but that nothing could be done in any event to fix them. She also said that there was a smell every so often in the Dwelling and that the replacing of the kickboard with a piece of cardboard was unsightly and was there to gain access to the pipes with which the Landlord had difficulties.

She also went on to state that when the person came out to fix the alarm he stated that it was not just the code that was wrong, that even if they had the code it wouldn’t have worked because there was a panel missing. The alarm itself was broken.

The Tenant also stated in her evidence that she returned the Leases to ERA and while she was always assured that she would get back a copy, it never arrived until much later into the Tenancy, despite her repeated requests for it.

The Tenant produced a list of items that were not covered by her insurance. She confirmed that she did not have contents insurance on the Dwelling and her business insurance did not cover her computer which was also damaged in the burglary. She said that the total of the goods stolen or damaged came to the sum of €9,638: €7,208 for the photographic equipment and €2,428 in relation to the damage to the computer.

The Tenant also stated that the door was not as secure as Mr. Kelly was saying in that the thieves popped the panel out and got in through it. The panel could be put back again and was easily popped out. She also stated that the door was not similar to all the other doors in the development, but no evidence was produced by her in relation to this statement.

The Tenant argued that the Landlord was negligent as they knew that the property had been broken into a number of times prior to her Tenancy. She had been requesting the alarm code to be furnished to her for weeks. She believed the Dwelling was less secure as a result. ERA also advised her after the break-in that as far as they knew when she put the question to them, that the property had never been broken into before. The Landlord herself said she wasn't aware that it had been broken into, that an attempt had been made but that the attempt had only damaged the door. The door was fixed, but the Tenant stated that she subsequently found out that not only was there an attempt to break into the apartment but there also was an actual break-in. She had spoken with the previous Tenant and had a letter written by the previous Tenant admitted into evidence confirming this fact.

Mr. Kelly's Cross-examination

Mr. Kelly put a number of questions to the Tenant in relation to how many visits there were made by the plumber to rectify the shower and the extractor fan.
There was some confusion as to the exact number of times as there were also appointments made whereby the plumber was unable to attend. Mr. Kelly also asked the Tenant whether or not she advised Mr. Doyle about being a photographer. She said that she did.

He also asked the Tenant whether or not she advised him that she had valuable photographic equipment in the Dwelling and she said she did not. He also asked her whether or not she was using the Dwelling as her office/ business premises and she replied that she was not. He asked the Tenant whether or not she agreed that there was never any intention by the Landlord to retain any of her money and she said there was never an issue in relation to that. He also asked her whether or not the Tenant was responsible for their own insurance and she accepted this as well.

Mr. Kelly asked her was the door in the Dwelling different from the doors in the other apartments in the development. She said that it was that the door had been changed because she had been advised that previous tenants had broken it. Mr. Kelly asked her did she think that the replacement was a stronger and better door. The Tenant replied that she could not say, as she had never seen the other door and could not compare it. She didn't believe that it was a stronger door as the panel on it could be and was pushed through.

Mr. Kelly put to the Tenant that if a thief was of a mind, not only could they break in a door but also a window. The Tenant stated that to do so by a thief would involve a lot more noise by breaking a window. Mr. Kelly also asked that because of the contents she had in the Dwelling was there was a greater risk of her being broken into. She did not accept this due to the fact that the Dwelling had already been broken into prior to her taking up the Tenancy. It was also put to the Tenant by Mr. Kelly as to whether or not she agreed that his company was very co-operative with her as shown by four attempts to carry out the repair to the shower. She didn't accept this, she said that it was only when they received her email on the 27th July 2008 did they take action as up to then she was only being told that it would be dealt with over the phone. In any event as he had already stated the shower was not a Category 1 priority.

Findings of the Tribunal and Reasons Therefor:

1. The Tenant entered into a Tenancy Agreement with the Landlord for a one year fixed term from the 8th July 2008. The rent was €1300 per month and a deposit of €1950 was paid. The deposit was returned in full to the Tenant when she vacated the Dwelling.

2. The Landlord through her agents accepts that the sum of €470.14 in excess rent is to be returned to the Tenant by the Landlord.

3. The Tribunal also finds that the purported Notice of Termination which was sent by e-mail by the Tenant to the Landlord was not valid and was not in compliance with Section 62 of the Residential Tenancies Act 2004. However, Mr. Kelly, during the course of his evidence, stated that this was not an issue.

4. Mr. Kelly on behalf of the Landlord accepted that there were a number of items that needed to be repaired, however some of them could not be repaired at all because of the parts that were necessary and needed total replacing were unavailable and probably obsolete. The difficulty with the shower involved the shower being replaced by a new shower; this was eventually done and completed three weeks after the Tenant had moved in. However, e-mails as late as 1st September from the Tenant show that the alarm code had still not been obtained and the alarm activated.

5. There was a burglary at the apartment on the 20th of August 2008. The Tenant however admitted that under the Lease which she signed with the Landlord she was responsible for her own insurance. The Tenant admitted that she was not covered for all items under her own insurance as some of the items stolen were relatively new and she had not put them on her own insurance. The Tenant also accepted that as to other contents not covered by her insurance in relation to her photographic equipment, namely her computer and other personal items, it was a matter for her to obtain her own contents insurance of the Dwelling, which she did not.

6. Mr. Kelly accepted the length it took for the alarm code to be furnished was unacceptable. The Tribunal does not accept that the Mr. Kelly and his company ERA were acting only as caretakers throughout the Tenancy and from the evidence given by Mr. Kelly, Mr. Dalton and Mr. Doyle, they were on behalf of the Landlord, responsible for the maintenance and dealing with the difficulties that arose in relation to the Dwelling. There was never anything in writing from them to advise the Tenant of the situation between them and the Landlord. If there was an arrangement between the Landlord and ERA that is a matter for them and not a matter for the Tenant unless it is specifically brought to the Tenant's attention. The Tenant gave her own evidence that she was unaware of this arrangement and indeed this is further supported by her own evidence that it was only when she received the letter of 28th August 2008 from the agents that she became aware that there was a difference between the ERA acting in a caretaker role or a managing agents type situation. The Tenant only dealt with Mr. Dalton and Mr. Doyle and Mr. Kelly at a later stage and this was confirmed by their evidence also.

Accordingly, the Tenant was entitled to rely on the representations made by them as in any event the Tenant had no point of contact with the Landlord until she was given a copy of the letter to the Landlord of the 28th August 2008 and she had to carry out her own research to obtain the Landlord's details.

7. The Tribunal finds that if an alarm had been working it may have acted as a deterrent but this did not occur in this instance. The Landlord and her agents were aware that there had been at least one prior break-in and possibly an attempted break-in in relation to previous Tenancies. They should therefore have been more mindful of the importance of having the alarm in working order.

8. The Tribunal accepts that there were a number of defects in the Dwelling and the number of attempts to rectify same, together with the disruption caused by the break-in, resulted in the loss of peaceful occupation of the Dwelling by the Applicant, which resulted in a breach by the Landlord of her obligations under Section 12 of the Act.

Determination:

Ref: TR34/DR1072/2010

In the matter of X (Appellant Landlord) and Eva Power (Respondent Tenant) the Tribunal in accordance with Section 108(1) of the Residential Tenancy Act 2004 determines that:

1. The Appellant Landlord shall return to the Respondent Tenant, within 14 days from the date of the making of an Order by the Board, the excess rent of €470.14 which she paid from the 20th October 2008 until the 31st October 2008 in respect of the tenancy of the dwelling at Z.

2. The Landlord shall also pay to the Respondent Tenant the sum of €3,000 in respect of the breach of the Landlord's obligations under Section 12 of the Act, the said sum to be paid within 14 days from the issue of the Determination Order by the Board.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on this 21st day of April 2010.

Signed : _____

Orla Coyne (Chairperson)
For and on behalf of the Tribunal