

RESIDENTIAL TENANCIES ACT 2004

Private Residential Tenancies Board Tribunal

Report of Tribunal Reference No: TR38/DR1499/2010. Case Ref No: DR1499/2009

Appellant Tenant: Donal McAuliffe

Respondent Landlord: Jim Barry

Address of rented Dwelling: Apartment 32, the Towers, Fairgreen,
Mallow, Co. Cork
("the dwelling")

Tribunal: Geraldine Feeney (Chairperson)
Paul Good
John Elliott

Venue: Dobbin Suite, Isaacs Hotel, 48 MacCurtain Street, Cork

Date of Hearing: 12th May 2010 at 10am.

Attendees:

For the Appellant: Donal McAuliffe (The Tenant)
Owen Hurley (Accountant and Representative of the
Tenant)

For Respondent: Jim Barry (The Landlord)
Harry McCullagh (Solicitor for the Landlord)

In Attendance: Gwen Malone Stenographers

1. Background:

1. The dispute concerns alleged rent arrears and over-holding by the Tenant in respect of “the dwelling” which was the subject of a 2 year fixed term tenancy agreement between the parties and dated 1st March 2007. The rent was agreed at €700.00 per month and no deposit was paid. The tenancy commenced on 1st March 2007 and the date of termination is in dispute and is part of the subject of this hearing.
2. On 5th December 2008, the Landlord made an application to the Private Residential Tenancies Board (“the PRTB”) pursuant to Section 78 of the Act. The matter was referred to an adjudication which took place on 7th May 2009. The Adjudicator determined that the Tenant pay the sum of €9100 to the Landlord within 7 days of the issue of the Determination Order by the PRTB, being in respect of rent arrears.
3. Subsequently a valid appeal was received from the Tenant by the PRTB on 11th December 2009.
4. On 5th February 2010 The PRTB constituted a Tenancy Tribunal and appointed Geraldine Feeney, Paul Good and John Elliott Tribunal members pursuant to Section 102 and 103 of the Act and appointed Geraldine Feeney to be the chairperson of the Tribunal (“Chairperson”).
5. On 24th March 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.
6. On 12th May 2010, the Tribunal convened a hearing at 10.00 am. at Dobbin Suite, Isaacs Hotel, 48 MacCurtain Street, Cork.

2. Documents Submitted Prior to the Hearing Included:

- PRTB file

3. Documents Submitted at the Hearing Included:

- Copy of PRTB file
- Copies of 7 letters sent by Harry Mc Cullagh & Co Solicitors for the Landlord to David J. O’Meara & Sons Solicitors for the Tenant dated- 8th March 2007, 11th May 2007, 20th February 2008, 14th October 2008, 21st October 2008, 24th March 2009, 2nd April 2009.

- Copy letter from David J.O Meara & Sons to Harry Mc Cullagh & Sons dated 3rd April 2009.

4. Procedure:

The Chairperson asked the Parties present (and their witnesses) 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 but that it would be as informal as was possible; that the person who appealed (the Appellant) would be invited to present his case first including his witnesses; that there would be an opportunity for cross-examination by the Respondent; that the Respondent would then be invited to present his case, including the evidence of his witness, and that there would be an opportunity for cross-examination by the Appellant.. She said that 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.

She stressed that all evidence would be taken on oath and would be recorded by the official stenographer. 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 6 months imprisonment or both.

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

She noted, for the record, that the issue of jurisdiction had been raised in the papers, submitted by the Tenant’s solicitors in April 2009, although how it allegedly arose was not made clear.

She further noted that Jurisdiction was not a factor in the adjudication hearing and had not therefore been the subject of any ruling. It was also the case that jurisdiction had not been raised as a ground of appeal and would not be part of the appeal.

She noted that the Tenant stated in his appeal that he had a Part 4 tenancy.

She concluded that this ground was not therefore before the Tribunal.

She stressed to the parties that the Tribunal had no jurisdiction to deal with any matters or issues other than those within the remit of the 2004 Act.

She referred in particular that any issues in relation to a contract for sale of “the dwelling” or other associated issues that the parties might seek to raise during the hearing, would be outside the Tribunal’s jurisdiction.

She asked the Parties if they had any queries about the stated procedures. There were none.

5. Submissions of the Parties:

A preliminary point was raised by the solicitor for the Landlord, whereby it was claimed that the Tenant was late in filing his appeal, against the adjudicator’s determination, with the PRTB, in that 21 days had elapsed before the appeal was lodged with the PRTB and that he was in breach of s.100(2) of the Act.

The Tribunal adjourned for 20 minutes in order to receive information from the Tribunal office in Dublin, as to the exact date of posting of the adjudication report by the PRTB to both parties.

The Tribunal was faxed a copy of the original certificate of posting, which clarified that the letters to both parties were posted two days after they were written and dated. The Tribunal office also provided confirmation by telephone, that there was a note on the copy of each letter on the file sent to both solicitors, stating that there had been a delay in the internal posting system within the PRTB and that the note stated the letters were posted two days after they had been dated and written.

The Tribunal held that the Appeal lodged by the Appellant Tenant was valid, as it had been lodged within 21 days of the date of the adjudication report having been served on him and that he had complied with s.100(2) of the Act.

The hearing commenced with the Appellant’s case.

Appellant Tenant's Case:

The main points in the Tenant's evidence and in the case submitted by him and his solicitor were as follows:

He accepts that there are arrears of rent due to the Landlord but that he does not accept the adjudicator's finding that the sum of €9100 is due and owing.

He admits that he owes the sum of €5,250.

He maintains that this sum of €5,250 is rent owed by him for the period up to and including the 14th October 2008.

He acknowledges that a valid notice of termination was served on him by the Landlord's solicitor on 2nd September 2008 with an expiry date of the 14th October 2008.

He claims that the fixed term tenancy terminated on the 14th October 2008. He claimed that as the tenancy terminated there was no rent due after that date.

He stated that any rent due after termination would have to be based on foot of over-holding, but that there was no basis for a claim of over-holding as he never occupied "the dwelling".

He referred to s.37 of the Act whereby he as the Tenant was entitled to rely on a deemed termination and claimed that:

- a) The tenancy was a part 4 tenancy.
- b) The part 4 tenancy was not sub-let or assigned.
- c) The rent was in arrears for a period of 28 days.
- d) "The dwelling" was vacated by virtue of the fact that occupancy had never been taken up at any stage during the period 1st March 2007 to 28th March 2008.
- e) In summary he claimed on the above basis, that the part 4 tenancy shall be deemed to have terminated on the 28th March 2008, on the grounds that arrears of rent were not discharged and were due for a period of 28 days, and as "the dwelling" was not sub-let or assigned and was vacant and no notice of termination had been served by him on the Landlord.

Respondent Landlord's Case:

The main points of the Landlord's evidence and in the case submitted by him and his representative were as follows:

The tenancy was a fixed term tenancy of 2 years. The tenancy commenced on the 1st March 2007. The tenancy was a part 4 tenancy and but the fixed term tenancy took precedence over the part 4 tenancy. He referred to s.26 of the Act and claimed that the Tenant had greater

security and additional beneficial rights by virtue of a fixed term tenancy and was as result not entitled to rely on a deemed termination under s.37 of the Act.

He submitted that the Tenant is only entitled to terminate a fixed term tenancy, when the Landlord is in breach of his obligations under the Act and that he, the Landlord was not in breach of any such obligations.

He claimed that in relation to the Tenant's argument, whereby the Tenant had relied on a deemed termination in accordance with s.37 of the Act, he accepted that the Tenant had served no notice of termination. As regards the Tenant having vacated "the dwelling", he referred to the adjudicator's report, whereby the adjudicator found that "the respondent Tenant failed to vacate "the dwelling" in accordance with the notice of termination and remained on in possession of "the dwelling" until 3rd April 2009, when the keys to "the dwelling" were returned to the Landlord". He asserted that the adjudicator's finding was correct and confirmed that the keys were given to him on 3rd April 2009, which was in response to his solicitor's letter of 2nd April 2009, threatening that the locks would be changed by a locksmith.

He disputed the fact the Tenant had vacated "the dwelling" and maintained the Tenant had occupancy and access during the whole of the two year fixed term period. He claimed that the sum of €9100 was due in respect of arrears of rent and that the adjudicator's finding correctly calculated the arrears for the period up to 3rd April 2009, representing thirteen month's rent for the period 1st March 2008 to 31st March 2009 at a monthly rent of €700.

Final submission of Tenant:

The tenancy was a fixed term tenancy. A valid notice of termination was served by the Landlord and as result of that, the fixed term tenancy was terminated.

He claimed that the Landlord's case was inconsistent- there was either a fixed term tenancy or there was not,(if as the Landlord claimed he served a valid notice of termination?). He claimed the Landlord could have and should have forcibly entered "the dwelling" on the expiry of the notice of termination, in accordance with the Forcible Entry Act 1971, but failed to do so. He further claimed the Landlord could have taken possession with a duplicate set of keys, which he maintained the Landlord had in his possession.

Final submission of Landlord:

He bought “the dwelling” in 2006 from the Tenant, who was the developer of “the dwelling”. He never received the keys to the outer building, so could not access “the dwelling”. His auctioneer was also unable to get the keys.

His solicitor wrote on four occasions asking for the keys. Despite these letters, the keys to

a) The outer building, b) a gate and c) a car park were never sent to him until 3rd April 2009, on a date after the fixed term tenancy had expired and when he had threatened that he would bring a locksmith to change the locks. He maintained that it would have been impracticable and imprudent to break and enter, when these keys were communal keys to the apartment complex.

On 14th October 2008, the date of the expiry of the notice of termination, his solicitor wrote to Tenant’s solicitor asking for possession. Vacant possession was never handed over until the 3rd April 2009.

6. Findings of the Tribunal and Reasons Therefor:

- a) There was a fixed term tenancy between the parties, which commenced on 1st March 2007 and the term was for two years. The rent was €700 per month. No deposit was paid.
- b) The tenancy was a part 4 tenancy under the Act.
- c) The Tenant was in arrears with the rent payments and the Tribunal finds that the Tenant was in breach of his obligations under s.16 (a) (1) of the Act by failing to pay the rent as it fell due.
- d) On 2nd September 2008 the arrears of rent totalled €4200. On that date the Landlord served the Tenant with a notice of termination. The Tribunal finds that this notice was a valid notice, as it was in compliance with s.62 and s.67 of the Act.
- e) The notice demanded that the Tenant vacate “the dwelling” on the 14th October 2008. We find that the Tenant failed to hand over possession to the Landlord in compliance with the notice of termination on the 14th October 2008.
- f) We are satisfied that the Tenant, even if as he claimed never took up occupation of “the dwelling”, was still in possession of “the dwelling” up to 3rd April 2009, when the Landlord finally received the keys. We find that the Tenant had effective possession of

“the dwelling” and could control entry and exit to and from “the dwelling”. The Tenant retained the keys maintaining control of “the dwelling” and declined to return the keys. We find that the Tenant was unfounded in his claim that he never took up possession of “the dwelling”. He paid the sum of €8400 in respect of twelve month’s rent arrears (1st March 2007 – 1st March 2008) on the 14th July 2008. We further find that as a consequence, the Tenant could not have deemed the tenancy of “the dwelling” terminated in accordance with s. 37(2) of the Act as he was still in possession.

- g) We find that during the period from 14th October 2008 to 3rd April 2009 the tenant was over-holding “the dwelling” and continued to be liable for the sum of €700 per month.
- h) We are satisfied that the Tenant was erroneous in claiming that the Landlord could have forcibly entered “the dwelling”. We find that as the tenancy was a part 4 tenancy, the Landlord would have been in breach of s. 58 of the Act, if he attempted to enter.
- i) We find that the Tenant owes the Landlord the total sum of €9100 for thirteen months rent from the 1st March 2008 to 31st March 2009.

7. Determination:

Ref: TR38/DR1499/2010

In the matter of Donal McAuliffe (Appellant Tenant) and Jim Barry (Respondent Landlord) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

- The Appellant Tenant shall pay the sum of €9,100 to the Respondent Landlord within 14 days of the date of issue of the Order made by the Board, being arrears of rent in respect of the tenancy of the dwelling at Apartment 32, the Towers, Fairgreen, Mallow, Co Cork.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on this 19th day of May 2010.

Signed:

Geraldine Feeney, Chairperson
For and on behalf of the Tribunal