

**Private Residential Tenancies Board**

**RESIDENTIAL TENANCIES ACT 2004**

**Report of Tribunal Reference No: TR0314-000590 / Case Ref No: 1013-08505**

<b>Appellant Tenant:</b>	Michael Doyle
<b>Respondent Landlord:</b>	Tom Kavanagh of Kavanagh Fennell
<b>Address of Rented Dwelling:</b>	Sienna, 3 Rockbrook Hall, Bray Road, Foxrock, Dublin 18
<b>Tribunal:</b>	John Tiernan (Chairperson) Orla Coyne, Finian Matthews
<b>Venue:</b>	Tribunal Room, PRTB, 2nd Floor, O'Connell Bridge House, D'Olier Street, Dublin 2
<b>Date &amp; time of Hearing:</b>	19 May 2014 at 2:30
<b>Attendees:</b>	Michael Doyle, Tribunal Appellant, Tenant; Niall Clancy, Legal Representative for Appellant Tenant; Niall Kearney for Tom Kavanagh (Receiver) Kavanagh Fennell, Tribunal Respondent, Landlord;
<b>In Attendance:</b>	Gwen Malone Stenographers

**1. Background:**

On 22/10/2013 the Tenant 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 11/12/2013. The Adjudicator determined that

1. The Notice of Termination served on the 11th October 2013 by the Respondent Landlord on the Applicant Tenant, in respect of the tenancy of the dwelling at Sienna, 3 Rockbrook Hall, Bray Road, Foxrock, Dublin 18 is valid.
2. The Applicant Tenant and all persons residing in the above dwelling, shall vacate and give up possession of the above dwelling within 21 days of the date of issue of the Order.
3. The Applicant Tenant shall pay €21,367.12 to the Respondent Landlord in 20 consecutive monthly payments of €1,000 on the 28th day of each month followed by one payment of €1,367.12 in the immediately succeeding month, commencing on the 28th day of the month immediately following the date of issue of the Determination Order by the Board, being rent arrears in respect of the tenancy of the above dwelling.
4. The enforcement of the Order for such payment of €21,367.12 will be deferred and the sum owing reduced by the cumulative sum paid in the monthly

installment(s) made by the Applicant Tenant to the Respondent Landlord, on each due date, until such time as the total sum of €21,367.12 has been paid in full.

5. For the avoidance of doubt any default in the payment of a monthly installment shall act to cancel any further deferral and the balance due at the date of default of any such monthly payment shall immediately become due and owing to the Respondent Landlord.

6. The Applicant Tenant shall also pay any further rent outstanding from the 11th December 2013 (date of hearing), at the rate of €98.63 per day, unless lawfully varied, and any other charges as set out in the terms of the tenancy agreement for each day or part thereof, until such time as he vacates and gives up possession the above dwelling.

Subsequently the following appeal was received:

Tenant : received on 06/03/2014. The grounds of the appeal: Invalid Notice of termination ; Approved by the Board on 07/03/2014

The PRTB constituted a Tenancy Tribunal and appointed John Tiernan, Finian Matthews, Orla Coyne as Tribunal members pursuant to Section 102 and 103 of the Act and appointed John Tiernan to be the chairperson of the Tribunal ("the Chairperson").

On 27/03/2014 the Parties were notified of the constitution of the Tribunal and provided with details of the date, time and venue set for the hearing.

On 19/05/2014 at 14.30 Hrs the Tribunal convened a hearing at Tribunal Room, PRTB, 2nd Floor, O'Connell Bridge House, D'Olier Street, Dublin 2.

## **2. Documents Submitted Prior to the Hearing Included:**

1. PRTB File

## **3. Documents Submitted at the Hearing Included:**

Letter dated 04 June 2013 handed in by Appellant Tenant.

## **4. Procedure:**

The Chairperson asked the Parties present (and their Representatives) to identify themselves and to identify in what capacity they were attending the Tribunal. He 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". He explained the procedure which would be followed; that the Tribunal was a formal procedure but that it would be conducted in a manner that would be as informal as was possible. He said that members of the Tribunal might ask questions of both Parties from time to time.

The Chairperson explained to the parties that in the event that agreement is reached between them the terms of any such agreement can be incorporated in to a determination of the Tribunal and thus become enforceable through the Courts.

He stressed that all evidence would be taken on oath and be recorded by the official stenographer present and he reminded the Parties that knowingly providing false or

misleading statements or information to the Tribunal was an offence punishable by a fine of €4,000 or up to 6 months imprisonment or both.

He 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 enforced by either of the Parties or in some cases by the Board of the PRTB at its discretion. He also advised the parties that the Tribunal process was the final step in the dispute resolution process unless appealed to the High Court on a point of law only [reference section 123(3) of the 2004 Act].

He asked the Parties if they had any queries about the procedure. There were none.

The parties were sworn in.

## **5. Submissions of the Parties:**

The Appellant Tenant's Case:

The Appellant Tenant said that the tenancy commenced on 18th December 2008 the terms of which were set out in a written tenancy agreement and which stipulated that the rent was €5,000 per month. He also cited that the agreement required that a security deposit of €5,000 was required and that this was paid over to the former Landlord. He gave evidence that the monthly rate of rent was reduced by agreement with the former Landlord to €4,000 per month in 2009 and that during 2010 it was further reduced by agreement with the former Landlord to €3,000 per month. He said that he could not remember whether these revised terms were committed to writing. Furthermore the Appellant Tenant contended that there was an agreement between himself and the former Landlord to permit the Appellant Tenant to deduct without prior consultation un-vouched amounts from the monthly rent due to compensate him in respect of items of expenditure on maintenance of the Dwelling. When queried by the Tribunal in regard to the logic behind such a concession on the former Landlord's part the Appellant Tenant said that he did not know why it was done but that it could have been a gesture of goodwill on the former Landlord's part particularly since the former Landlord did not have funds to carry out such repairs himself.

The Appellant Tenant gave evidence that when he had been informed that the Respondent Landlord/Receiver was assigned responsibility as receiver for the Dwelling on 22nd March 2013 he had already paid the rent due for March to the former Landlord. He said that he had paid €2,000 in rent to the Respondent Landlord/Receiver on 8th May 2013 but that this amount was in respect of the €3,000 rent due on 18th March 2013 to 18th April 2013 and that the €1,000 deduction was in respect of maintenance. He said that he had no records or account of such maintenance and he later stated that he had just picked that sum as a round figure because he wanted to put pressure on the Respondent Landlord/Receiver in regard to the significant repairs required in the Dwelling some of which impacted on his and his family's health and safety. He stated that he withheld the full €3,000 rent due on 18th April 2013 for the same reason. He presented a list of repairs to be addressed that had been forwarded previously to the former Landlord and more recently to the Respondent Landlord/Receiver and stated that nothing had been done except for some work on a faulty fireplace/chimney by the former Landlord which work had not been successful. When it was put to the Appellant Tenant by the Tribunal that at least some of the items on the list such as street lighting and the fact that the site next door was vacant were not matters over which the Respondent

Landlord/Receiver could exercise control he agreed that this was the case but emphasised the health and safety aspects for example of mould in a small room in the basement as a result of bad workmanship and said that he did not think that the Tribunal would be going in to these details.

The Legal Representative on behalf of the Appellant Tenant presented the case that the Notice of Termination was invalid due to the fact that the 14 day Warning Letter which was issued on 20th September 2013 and which comprised part of the purported Termination process did not state the monetary value of the amount of rent arrears that was due. He said that this was in contravention of Section 67(3) of the Act. He said that the Warning Letter was unclear and that the Appellant Tenant was entitled to know the exact amount of rent arrears due. He further argued that the Respondent Landlord/Receiver should have enquired more thoroughly into the case to establish for himself the appropriate monthly rent to apply.

In response to a query from the Tribunal the Appellant Tenant stated that subsequent to receipt of the 14 day Warning Letter and earlier notifications he did not make any enquiries directly with the Respondent Landlord/Receiver's office to clarify the position of the amount that had been demanded in the earlier notifications of rent arrears in April, May 2013 and June 2013. He said that his correspondence with the Respondent Landlord/Receiver had set out his contention on the monthly rent due. He said that in particular if he had acknowledged the process of notifications and the 14 day Warning Letter by making the payment that was demanded he was fearful that the erroneous €5,000 monthly rent amount being demanded at the time in those communications might become established. He confirmed to the Tribunal that no rent has been paid since the €2,000 paid in May 2013 which was in respect of the rent due on 18th March 2013.

#### The Respondent Landlord's/Receiver's Case:

The representative of the Respondent Landlord/Receiver gave evidence that Mr Tom Kavanagh of the Company (Kavanagh Fennell) was appointed receiver over the Dwelling on 22nd March 2013. He said that on assuming the responsibility of receiver the only reliable written record of the tenancy agreement that the Respondent Landlord/Receiver had from the files presented to them stated that the rent was €5,000 per month. He said that at the outset there was no evidence to the contrary except the averment of the Appellant Tenant himself but that this was uncorroborated. He further stated that the former Landlord did not engage in the process when an attempt was made to contact him to verify the monthly rent but the representative did not provide evidence of the details of such attempted contact. He provided written evidence of having sought evidence from the Appellant Tenant and he said that the Appellant Tenant did not provide any evidence to support the contention of the lower monthly rent than that stated in the original tenancy agreement. In the written correspondence submitted to the Tribunal any responses from the Appellant Tenant on this matter merely re-stated the averment and did not clarify or add to the matter. The representative of the Respondent Landlord/Receiver gave evidence that ultimately in November 2013 when attending a separate dispute process between the Appellant Tenant and the former Landlord he was sufficiently persuaded on the basis of evidence adduced thereat to proceed on the basis that the monthly rent accruing in respect of the tenancy should be €3,000. He said that he was further persuaded in that regard when he saw the letter on behalf of the former Liquidator from Fitzpatrick & Associates dated 25th February 2013 that referred to the €3,000 monthly rent.

The representative of the Respondent Landlord/Receiver gave evidence of the arrears of rent outstanding. He stated that the outstanding arrears amounted to €40,000 up until the 18th May 2014 which was the day prior to the Tribunal Hearing. He said that this was based upon the €3,000 per month rate of rent for 13 months from April 2013 to May 2014 plus €1,000 arrears in respect of March 2013. He further stated that he was not in a position to contest the matter of the security deposit and as such accepted the position that it had been paid to the former Landlord. He also did not contest that the rent that was due in February 2013 was paid to the former Landlord and he was not seeking reimbursement of that rent amount.

The representative of the Respondent Landlord/Receiver adduced evidence in the form of a copy of a communication from a now former employee of Savill's Blackrock relating to numerous unsuccessful efforts made to contact the Appellant Tenant in order to gain access in the accompaniment of an Architect to the Dwelling on behalf of the Respondent Landlord/Receiver in order to assess the maintenance and repair issues that were listed by the Appellant Tenant in a communication of 8th May 2013 for attention and which communication stated that the list had previously been presented to the former Landlord. The communication from the former Savill's employee stated that despite repeated efforts to make contact and gain access these attempts were unsuccessful.

Correspondence Trail between the Parties relevant to the Notice of Termination:

The representative of the Respondent Landlord/Receiver presented evidence of written correspondence with the Appellant Tenant providing written notification that he was in breach of his obligations that he was in rent arrears.

This evidence comprised inter alia:

- 1) Following some earlier correspondence seeking to make contact with the Appellant Tenant to which the Respondent Landlord/Receiver did not receive a reply the first of the written notification letters was dated 25th April 2013. This was stated to be a hand delivered letter which was further stated to be accompanied by a formal notice of breach of obligation. However the purported attached document was not submitted in evidence.
- 2) On 15th May 2013 the Respondent Landlord/Receiver wrote to the Appellant Tenant acknowledging receipt of €2,000 and advising that rent was then €8,000 in arrears.
- 3) On 29th May the Respondent Landlord/Receiver dispatched a letter by registered post restating that the arrears were €8,000 and that if not remedied he would be forced to pursue the alternative options including termination for no-payment of rent.
- 4) On 12th June 2013 the Respondent Landlord/Receiver dispatched a further letter by registered post to the Appellant Tenant advising that based upon the tenancy agreement of 18th December 2008 the monthly rent was €5,000 and that the Appellant Tenant had not furnished him with any documentary evidence to support the purported reduction in rent to €3,000 per month. The letter again sought submission of such evidence. The letter continued to state that in any event the Appellant Tenant was still in arrears of rent for the month of May and seeking immediate remittance.
- 5) A 14 day Warning Notice dated 20th September 2013 was sent by registered post to the Appellant Tenant that incorporated the words 'you have failed to pay rent in accordance with the terms of the tenancy agreement' and giving 14 days to remedy the breach of obligation. No monetary amount was stated and there was no reference to the previous notifications therein.

6) A 28 day Notice of Termination stating date of service of 11th October 2013 was sent by registered post by the Respondent Landlord/Receiver to the Appellant Tenant.

The Appellant Tenant responded to the correspondence stream above from the Respondent Landlord/Receiver in letters dated:

7) 8th May 2013 enclosing a cheque for €2,000 and in which he outlined some of the history of the tenancy and seeking some clarifications in respect of to whom rent should be paid going forward. He also sought that long standing repairs be carried out.

8) 22nd May 2013 in which he stated that the rent had been reduced to €3,000 per month. He did not provide any documentation or third party corroboration of that averment. He further advised that it was also agreed with the former Landlord that he could deduct amounts from the monthly rent in lieu of maintenance.

9) In further correspondence dated 4th June 2013 submitted at the Tribunal Hearing the Appellant Tenant responded to the correspondence of 29th May 2013 referring back to his correspondence of 8th May 2013.

10) 21st June 2013 in which the Appellant Tenant again re-stated that there was a revised monthly rental agreement reducing the rent to €3,000 and advising that after agreeing the new rent the former Landlord had agreed to address the numerous and various issues relating to his obligations and this commitment had never been fulfilled. He further asked that the Respondent Landlord/Receiver should adjust his calculations of rent arrears in accordance with the revised lower monthly rental agreement of €3,000.

11) On 2nd October 2013 in which the Appellant Tenant again referred to the issues of repairs and maintenance citing that the Respondent Landlord/Receiver was in breach of his obligations. The correspondence also restated the position in relation to the monthly rent being €3,000 and that he intended to seek damages for injury to health arising as a result of the Respondent Landlord's/Receiver's failures.

## **6. Matters Agreed Between the Parties**

- 1) The Tenancy commenced on 18th December 2008.
- 2) A security deposit of €5,000 was paid to the former Landlord at the commencement of the tenancy.
- 3) The current rent applicable to the tenancy is €3,000 per month.

## **7. Findings and Reasons:**

Findings of the Tribunal and Reasons Therefor:

Based upon the evidence as presented and upon the balance of probabilities the Tribunal has made the following findings:

Finding No. 1

The Appellant Tenant is in rent arrears in total sum of €40,098.63 as of the date of the Tribunal Hearing. The Tribunal determines that this sum is due to the Respondent Landlord/Receiver and shall be paid within 28 days of the date of issuance of the Determination Order by the Board.

Reason 1:

Both parties agreed at the Tribunal that the monthly rent of €3,000 has not been paid to the Respondent Landlord/Receiver since May 2013. Arrears of €1,000 in respect of the payment due for 18th March 2013 to 18th April 2013 must also be taken in to account.

Reason 2:

The total amount of rent arrears is calculated as follows:

A) Arrears for period 18th March 2013 to 18th April 2013:	€ 1,000.00
B) Arrears for the 13 month period from 18th April 2013 to 18th May 2014:	€39,000.00
C) Arrears of 1 Day to date of Tribunal Hearing on 19th May 2014:	€ 98.63
Total	€40,098.63

The Daily rate as included in item C) above is calculated as follows:

Monthly Rent = € 3,000

Annual Rent = Monthly Rent multiplied by 12 = €3,000 X 12 = €36,000

The Daily rate has been calculated as the Annual Rent divided by 365 = €98.63

Reason 3:

In the context of the entire circumstances of the case as presented the Tribunal considers that it is reasonable to determine that the Appellant Tenant shall discharge the arrears of rent due within 28 days of the date of issuance of the Determination Order by the Board.

Reason 4:

Notwithstanding that at the commencement of the engagement between the Appellant Tenant and the Respondent Landlord/Receiver there was a dispute about the monthly rent due in respect of the tenancy, under Section 16(a) of the Act of 2004 it is the obligation of the tenant to pay the rent provided for to the Landlord on the date it falls due. Furthermore Section 86(a) and (b) of the Act of 2004 stipulate that pending the determination of a dispute the rent payable shall continue to be payable. The Tribunal notes also that even since the Adjudication date when the monthly rental amount of €3,000 was agreed between the parties no payments have been received by the Respondent Landlord/Receiver.

Furthermore the Tribunal considers that it was not reasonable for the Appellant Tenant who continued to aver his position that the monthly rent had been reduced from €5,000 to €3,000 to continually withhold the entirety of the monthly rent due.

Finding No. 2

The Notice of Termination as issued by the Respondent Landlord/Receiver to the Appellant Tenant dated 20th September 2013 is invalid.

Reason 1:

The Tribunal finds that the process leading up to the issuance of the Notice of Termination was flawed. In particular the 14 day Warning Letter which even in its most favourable interpretation may have purported to rely upon past account statements as had been forwarded to the Appellant Tenant some 3 months previously represented an inherently unfair procedure.

Reason 2:

Section 34 of the Act requires that in a termination process relating to a Part IV tenancy the tenant must be notified of the failure in his/her obligation and that if the failure is not remedied within a reasonable time-frame, which time-frame must be specified in the notification, the landlord is entitled to proceed to the next stage of the termination process. The notification under Section 34 need not necessarily be in writing.

Section 67(3) of the Act makes it a pre-condition on a landlord purporting to terminate a Part IV tenancy on the grounds of rent arrears that in addition to the provisions of Section 34 as set out above he/she must notify the tenant in writing that an amount of rent due has not been paid and that 14 days elapse from the receipt of the notice without the amount having been paid to the landlord.

The Tribunal considers that in the interest of fair procedure such a 14 day Warning Letter process as required under Section 67(3) of the Act must present a clear statement of the amount of rent that is in arrears and due in order to facilitate compliance on the part of the recipient. Furthermore the Tribunal considers that the amount referred to within that 14 day Warning Letter element of the termination process need not necessarily be the full or precise amount due at the date of service however the amount that is being conveyed to the tenant to be paid within 14 days in order to stay the termination process must be clear.

In the instant case whereas a statement of arrears including reference to the amount of arrears being €8,000 was issued in writing on 15th May 2013, on 29th May 2013 and restated again on 12th June 2013 purporting to fulfil the requirements of a Section 34 notification the subsequent Warning Letter was issued in excess of 3 months later and failed to refer to an amount of arrears due but rather relied upon the words 'you have failed to pay the rent in accordance with the terms of the tenancy agreement'. Even if it was the inherent intention in the Warning Letter to rely upon any of the previous notifications, the Letter did not refer to any of those notifications as sent to the Appellant Tenant in May and June of 2013. Moreover those notifications were also based on a monthly rent of €5,000 which amount was known to the Respondent Landlord/Receiver at the time to be disputed by the Appellant Tenant. The Appellant Tenant had queried the amount due subsequent to receipt of the notifications received in May 2013 and significantly had re-stated the position relating to the agreed reduced monthly rental amount of €3,000 in the immediately preceding correspondence between the parties in his letter dated 21st June 2013.

Furthermore the May and June 2013 notifications did not specify a reasonable time-frame in which the Appellant Tenant was required to remedy the failure in his obligations. Moreover the Tribunal considers that the time lapse from 12th June 2013 to 20th September 2013 bearing in mind the fact that rent continued to accrue could be construed as contributing to further doubt in the mind of the Appellant Tenant as to what sum of arrears was required in order to comply with the requirements of the evolving termination process.

The Tribunal considers that notwithstanding any part played by the Appellant Tenant in the Respondent Landlord's/Receiver's uncertainty relating to a purported revised lower monthly rental agreement having been effected between the Appellant Tenant and the former Landlord, the Appellant Tenant was entitled to a clearer statement from the Respondent Landlord of the amount of rent arrears required to be paid by him in order to facilitate him in staying the process of termination than that provided in the 14 day Warning Letter which ultimately was issued. The time lapse from June to September and



the lack of evidence of diligence in the pursuance of the issue to clarify any such revised monthly rental agreement on the part of the Respondent Landlord/Receiver with the former Landlord and with the Appellant Tenant in the interim period were significant.

The Tribunal considers that in the circumstances that prevailed there was an onus on the Respondent Landlord/Receiver to ensure that an updated statement of an amount due in the 14 day Warning Letter of 20th September 2013 was conveyed to the Appellant Tenant. Thus the Tribunal finds that the process of termination including the 14 day Warning Letter and earlier notifications of rent arrears was lacking in compliance and in fair procedures.

#### Finding No. 3

The Tribunal finds that there is no evidence to support the contention of the Appellant Tenant that a new agreement between the Appellant Tenant and the former Landlord to permit the Appellant Tenant without prior consultation with the then Landlord to deduct un-vouched amounts from the monthly rent due to compensate him in respect of items of expenditure on maintenance of the Dwelling.

#### Reason 1:

The Appellant Tenant has not presented any evidence to uphold the contention that was put forward at the Tribunal Hearing that contrary to the provisions of the original written tenancy agreement there existed more favourable terms to him as tenant in an undocumented agreement with the former Landlord to the effect that he could deduct un-vouched amounts from the monthly rent without prior consultation with the former Landlord and thus that these terms should carry through to the Respondent Landlord/Receiver. The Appellant Tenant was vague in his responses and recollections relating to details of such revised terms in the agreement which terms would have had significant implications for the continued conditions of his tenure. The Tribunal could not accept such a proposition without any convincing evidence from the former Landlord or other documentation such as a signed contemporaneously written record being produced.

### **8. Determination:**

#### **Tribunal Reference TR0314-000590**

**In the matter of Michael Doyle (Tenant) and Tom Kavanagh of Kavanagh Fennell (Receiver/Landlord) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:**

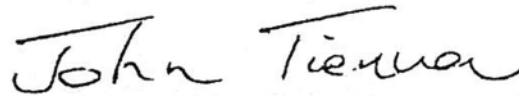
The Notice of Termination served on 11th October 2013 by the Respondent Landlord on the Appellant Tenant in respect of the tenancy of the Dwelling at Sienna, 3 Rockbrook Hall, Bray Road, Foxrock, Dublin 18, is invalid.

The Appellant Tenant shall pay the sum of €40,098.63 to the Respondent Landlord within 28 days of the date of issue of the Determination Order by the Board being rent arrears in respect of the tenancy of the Dwelling at Sienna, 3 Rockbrook Hall, Bray Road, Foxrock, Dublin 18

Unless lawfully varied in accordance with the provisions of the Act of 2004 the Appellant Tenant shall continue to pay rent to the Respondent Landlord at a rate of €3,000 per month on the 18th day of each month and at a daily rate of €98.63 where a whole calendar month does not apply, without deduction.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on 05/06/2014.

**Signed:**

A handwritten signature in black ink that reads "John Tiernan". The signature is written in a cursive style with a horizontal line underneath it.

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**John Tiernan Chairperson**

For and on behalf of the Tribunal.