

**Private Residential Tenancies Board**

**RESIDENTIAL TENANCIES ACT 2004**

**Report of Tribunal Reference No: TR0514-000622 / Case Ref No: 1113-08719**

<b>Appellant Landlord:</b>	Peter O'Connor
<b>Respondent Tenant:</b>	Andreas Kyriacou, Francis Alzualde, Caribay Morales
<b>Address of Rented Dwelling:</b>	22 St Audeons Terrace, Merchants Quay , Dublin 8.
<b>Tribunal:</b>	Gareth Robinson (Chairperson) Gene Feighery, John FitzGerald
<b>Venue:</b>	Tribunal Room, PRTB, 2nd Floor, O'Connell Bridge House, D'Olier Street, Dublin 2
<b>Date &amp; time of Hearing:</b>	4 September 2014 at 10:30
<b>Attendees:</b>	Peter O'Connor, Appellant Landlord Elizabeth Byrne of Michael Finucane Solicitors, Representative, Landlord Sarah-Jane Hillery, Representative, Landlord Caribay Morales, Respondent Tenant Francis Alzualde, Respondent Tenant
<b>In Attendance:</b>	Gwen Malone Stenographers

**1. Background:**

On 05/11/2013 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 16/12/2013. The Adjudicator determined that;

The Respondent Landlord shall pay the total sum of €6950 to the Applicant Tenants, within 21 days of the date of issue of the Order, being the entire of the unjustifiably retained security deposit of €950, plus damages of €6000 for breach of landlord obligations under the Act (failure to properly terminate the lease, illegal eviction, reliance on an invalid lease, illegally retaining the deposit etc) in respect of the tenancy of the dwelling at 22 St Audeon's Terrace, Merchants Quay, Dublin 8.

Subsequently an appeal was received from the Landlord on 02/05/2014. The grounds of the appeal being 'Other'. The Appeal was approved by the Board at its meeting on 09/05/2014.

The PRTB constituted a Tenancy Tribunal and appointed Gareth Robinson, John FitzGerald, Gene Feighery as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Gareth Robinson to be the chairperson of the Tribunal ("the Chairperson").

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 25 June 2014 and on 04 September 2014 the Tribunal convened a hearing at Tribunal Room, PRTB, Floor 2, O'Connell Bridge House, Dublin 2.

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

PRTB File

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

There being no objection by the Respondent Tenants, an outline legal submission on behalf of the Appellant Landlord was submitted in evidence and accepted by the Tribunal.

## **4. Procedure:**

Procedure:

The Chairperson asked the parties 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".

The Chairperson explained the procedure which would be followed; that the Tribunal was a formal procedure but that it would be as informal as possible; that the person who appealed (in this case the Appellant Landlord) would be invited to present his case first, that there would be an opportunity for cross-examination by the Respondent Tenants; that the Respondent Tenants would then be invited to present their case and that there would be an opportunity for cross-examination by the Appellant Landlord. He also 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. He stressed that all evidence would be taken on oath or by way of affirmation 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 and/or up to 6 months imprisonment or both.

The Chairperson noted that should the parties indicate that they would be able to resolve the dispute through negotiation, the Tribunal would facilitate any such negotiation. The terms of any such agreement can be incorporated into a Determination Order of the Tribunal and would be enforceable through the Courts.

The Chairperson also reminded the parties that, as a result of the Hearing that they would submit their findings to the Board who would make a legally binding Determination Order which would be issued to the parties and could be appealed to the High Court on a point of law only.

The persons giving evidence were then sworn in and the hearing commenced.

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

### **Appellant Landlords case:**

Submission by Legal Representative

The Legal Representative on behalf of the Appellant Landlord stated that the first issue that had to be determined was whether or not a tenancy existed.

Opening the case, she stated that the Appellant Landlord owned the dwelling for 14 years and that rental payments go towards repaying his mortgage. She said that the tenancy commenced on 1 March 2012 when a one year fixed term tenancy was signed between Reuben Gonzales Moreno, Antonio Barrios and the Appellant Landlord. The rent was €950 per month, and there was a security deposit paid in the amount of €950.

She said that the Landlord seeks to rely on, inter alia, Section 16(k) of the Act which expressly prohibits a Tenant from assigning or subletting a tenancy without the written consent of the landlord which is what the Appellant Landlord contends in this case.

### **Evidence of the Appellant Landlord:**

In his direct oral testimony to the Tribunal, the Appellant Landlord stated that no standing order for rental payments was set up between the parties but that rent was generally paid on time by lodgements directly into his account entitled 'rent'. He said he was satisfied with the tenants' employment credentials and was quite happy to rent the dwelling to them.

He further stated that it was necessary for him to attend at the dwelling on two occasions during the tenancy, once to repair a plumbing issue and another time to deal with repairs to the roof. At no stage during these visits did he witness anyone else living in the dwelling other than the original parties to the signed lease. He said that at one stage he did meet a visitor at the dwelling, but he had always made it clear to the tenants that he was not prepared to allow more than two tenants in the dwelling. He stated that he was emphatic about that and he refused their request for an additional bed in the event that they had visitors. He accepted that the tenants had girlfriends over to stay occasionally, however he said that no visitors had any arrangement or agreement with him and he said he was very forceful about that.

He said that when the fixed term tenancy terminated on 28 February 2013 he offered the tenants an opportunity to remain in the dwelling and he requested them to pay overdue rent. E-mail documentation supporting this offer was adduced in evidence. He said he received confirmation from the tenants that they would be remaining in the dwelling and as far as he was concerned, the tenancy continued on a periodic basis.

The Appellant Landlord stated that when an issue arose in the dwelling regarding blocked drains, Antonio Barrios asked if his friend Victor Torres could speak with him and act as interpreter as his level of understanding of English was not sufficient to understand the complexities of the problem. He said he spoke with Mr. Torres who asked him for his bank details. When asked by the Tribunal why an existing tenant who was lodging rent into his account regularly would request his bank details during a conversation about a plumbing issue, he said he did not understand that himself. Ultimately he said that he now understands that it was the same Mr. Torres from whom the Respondent Tenants now allege they rented the dwelling and to whom they allege they paid a deposit.

The Appellant Landlord stated that in October, 2013, he was contacted by Gabriella, (the Respondent Tenant) who was claiming to be a tenant regarding some difficulties she was experiencing with the heating system in the dwelling. He said that he had never heard of Gabriella previously and assumed that she was a girlfriend visitor of either Reuben Gonzales Moreno or Antonio Barrios.

When questioned by the Tribunal, about a number of e-mail correspondence between the parties, which included, inter alia, an e-mail sent by the Respondent Tenant to the Appellant Landlord on 2 June 2013 in which she stated "We are the new people living in the dwelling, we will pay you the rent tomorrow" he said that although the e-mail address was correct, he never received it. He said if he had received the e-mail, he would have refused the Respondent Tenant permission to stay in the dwelling because he was very strict and that he never accepted student tenants for insurance purposes. When questioned by the Tribunal about the source of rental payments to his account, he stated that the payments came in as usual by monthly lodgements entitled 'rent' so there was no obvious change and nothing to record a change in the source of the payment.

When asked to comment on further e-mail correspondence, in this instance from him to the Respondent Tenant on 13th October 2013 in relation to the central heating system wherein he asks "Do you remember you did this last year" and a further e-mail on 17 October 2013 wherein he wrote "in case Reuben did not mention it to you, it is the Tenant's responsibility to keep the drains clear - or you will have to pay for the repair in full as it is stated in the lease, walls must be left unmarked as the house was fully painted and cleaned at the beginning of your lease only 18 months ago" and a further e-mail dated 17 October 2013 where he stated "only now do I realise that the old tenants do not live there at all ....if you do not wish to clean the house, I can arrange for it to be cleaned and the payment will be taken from the deposit I received from Reuben Gonzales and Antonio Barrios. I have not received a deposit from you as of now ..... the house would have been cleaned and given to you in perfect condition" his reply was that any correspondence he had with the Respondent Tenant was on the assumption that the Respondent Tenant was a visiting girlfriend of one of the original tenants who were party to the signed lease agreement.

He said that the Respondent Tenant's e-mail to him dated 17 October 2013 wherein she stated that "Reuben Gonzales and Antonio Barrios aren't living in the house, I never met them" was the first inkling he had that the original parties to the lease were not living in the dwelling. He said he was concerned that strangers, for whom he had no details were occupying his dwelling and that the locks to the dwelling were changed by the occupants. He said he sought to regularise the situation so, having consulted Threshold he issued the occupants of the dwelling with a Notice of Termination dated 22 October 2013 giving them a vacation date 20 November 2013. He said on 23 October, 2013 the Tenant's changed the locks to the dwelling, effectively denying him access to his own dwelling. He said that he removed the locks that the occupants installed and he re-instated his own locks.

### **Respondent Tenants' case:**

#### **Evidence of the First Named Respondent Tenant**

In her direct sworn testimony to the Tribunal the Respondents Tenants gave evidence that they entered the tenancy in good faith, having responded to an advertisement on

Daft.ie. The advertisement was registered by Victor Torres. Documentary evidence of the advertisement was adduced in evidence to the Tribunal in support of her case. She stated that she, and her co-tenant commenced their tenancy in June and that they paid a deposit in the sum of €350 each directly to Victor Torres who was moving out, and they took over paying the rent which they did each month and on time.

She stated that, she informed the Appellant Landlord as per her e-mail dated 3 June 2013, and adduced in evidence to the Tribunal, that she was one of three girls living in the dwelling and they requested new mattresses and 4 bulbs and told him that the rent would be paid the following day, however she said they never received a reply from him.

She said that when they took up occupancy of the dwelling it was very dirty. She understood that a deposit is to cover damage however they were willing to clean the dwelling themselves. She said that they did not pursue the issue of a mattress further with the Appellant Landlord as a friend of their who was moving to Venezuela gave them one. She said that she dealt with issues as they arose in the dwelling and they did not bother the Appellant Landlord so they cleaned the dwelling and replaced a number of bulbs.

She said that the Appellant Landlord was aware that there were three tenants in the dwelling and he dealt with them in relation to a number of issues such as the heating, the blocked drains, fixing the roof. She said that in October the central heating did not function and in e-mail correspondence commencing on 13 October 2013, and adduced in evidence to the Tribunal, she said she and the Appellant Landlord exchanged e-mails relating to the technique required to get the heating system working. She further stated that in these e-mails he gave them instructions on how to keep the house mould free. She said that she confirmed with the Appellant Landlord that they were keeping the house in good condition and that the Appellant Landlord entered the dwelling to fix the central heating, but they were not in the dwelling at the time.

She said that following a series of e-mail exchanges between herself and the Appellant Landlord which began in a respectful manner, and where the Appellant Landlord said he would return their deposit, relations between the parties became strained and ultimately resulted in the Appellant Landlord telling them to vacate the dwelling and informing them the security deposit held by him would be returned to the former tenants, and parties to the original signed lease.

She told the Tribunal that at this point the Landlord became extremely aggressive towards them and they were afraid of him. She said that he gave them a notice to quit and that then they received e-mails from him telling them they had to be out by 6pm or he would throw their belongings in the landfill. She said that because they were locked out of the dwelling that they had no access to their passports, clothes, uniform for work and other belongings. She said that they were allowed a very limited time to return to the dwelling to collect all of their belongings.

The Tribunal adjourned to consider the first point of appeal, i.e. the existence of the tenancy from which all other matters flowed. When the Tribunal reconvened the parties were told that the Tribunal had found that a tenancy existed between the parties, and on that basis the Tribunal would reconvene at a later date to hear the matter of the alleged illegal eviction and deposit retention.

Reconvened Tribunal on 4 September 2014

### **The Appellant Landlord's case:**

The legal representative of the Appellant Landlord stated that at all times the facts, including the lease document and evidence pointed to the fact that a tenancy existed solely between the Appellant Landlord, and tenants Mr. Gonzales and Mr. Barrios. She rejected that a tenancy existed between the Respondent Tenants and the Appellant Landlord and therefore no eviction that was unlawful under the Act took place.

She further averred that had the original tenancy been assigned to the Respondent Tenants, it would constitute a breach of the original Tenant's obligations under the terms of their lease and under Section 16 (k) the Act as they failed to get the written consent from the Landlord for any such assignment.

She stated that there was no obligation on the Appellant Landlord under Section 12 (1)(d) of the Act to return a deposit to the Respondent Tenants in circumstances where he did not receive any deposit from them. Furthermore she argued that a tenancy can only be terminated in compliance with the Act.

She stated that on the basis that the Respondent Tenants considered that they were only in the dwelling for approximately four months, the issue of a part four tenancy does not arise, and that the quantum of damages, if any should reflect this fact.

She stated that the Adjudicator failed to take into account the breach of tenant's obligations under Section 16 (f) by changing the locks in the dwelling. She said that the Respondent Tenants were told not to change the locks by a member of the Garda Siochana, Threshold and the Appellant Landlord however they willfully ignored this advice.

She stated that her instruction from the Appellant Landlord is to seek legal costs.

Dealing specifically with the issue of the alleged illegal eviction, the Appellant Landlord's legal representative led him through his evidence. He stated that in October, 2013 he learned through an e-mail that the original tenants were no longer in the dwelling. He said that the Respondent Tenants had ample opportunity to inform him of this fact but they had failed to do so. The Tribunal's attention was drawn to the Appellant Landlord's e-mail dated 17 October 2013 to the Respondent Tenant's in which he says he was not aware that the original tenants were no longer in the dwelling and in which he confirms that he received a deposit from the original tenants, but not from the Respondent Tenants.

He said that when he finally established from the Respondent Tenant's that the original tenants had vacated the dwelling, he sought to formalise the landlord/tenant relationship in the form of a signed lease. He said they refused to formalise any arrangement until such time as he recognised that he was obliged to return the security deposit to them at the end of the tenancy. The Appellant in turn refused to acknowledge receipt of a deposit from the Respondent Tenant's in circumstances where he had not received one and he did not recognise the existence of their tenancy. He said that he would return the deposit, less any amounts lawfully withheld to Mr. Gonzales and Mr. Barrios should they ever ask him for it.

The Appellant Landlord said that it was at this point that relations became strained. He said he received a number of threatening phone calls from an Agent in Threshold telling him that he will find himself in front of the PRTB if he did not recognise the deposit. He said he attempted to resolve the matter and he personally called to Threshold and he was

advised by the Agent that the easiest way to resolve the matter was to issue the Respondent Tenants with a notice of termination. He stated that on 22 October 2013 he 'lost the head' when he went to the dwelling and encountered a stranger changing the locks on the door to his dwelling. He said that he called Threshold and the Gardai and that the Agent from Threshold dictated a notice of termination to him which he scribbled on a piece of cardboard, in the presence of a member of the Garda Síochána. The notice was given to the Respondent Tenants. The Notice of Termination was adduced in evidence to the Tribunal.

He stated that the attending member of the Garda Síochána instructed the stranger to reinstate the Appellant Landlord's lock on the door and informed him that if he refused to do this he would be prosecuted for criminal damage. He said that the Agent from Threshold also spoke with the stranger by telephone however he would not accept or recognise the Agent from Threshold and he refused her advice which was to accept the notice of termination and not to change the locks.

The Appellant Landlord stated that he did not understand the context in which he wrote the notice of termination and he was merely acting on the advice of Threshold and hoping to avoid a potential dispute with the PRTB. He said he wrote to the Respondent Tenants that evening and told them he had only written the letter under threat of the PRTB. He said that that was the end of the matter as far as he was concerned until he received a phone call from a neighbour to the dwelling saying that his locks had been changed again by the Respondent Tenants. He said that this action by the Respondent Tenants was the catalyst that escalated matters. He said that once the locks were interfered with, everything changed.

He said that because he did not recognise the tenancy he considered that he had strangers in his dwelling. He said he returned the next day, the 23rd October 2013 with a Locksmith and he changed the locks back again to give himself access to his own dwelling.

In summary, he said that he tried to be nice, he was happy for the Respondent Tenants to stay however they refused to sign a lease and they sought a deposit from him that they had no claim on. He said that he is not interested in money, he just wanted the lease signed or the tenants out so he could re-let the dwelling to tenants who would sign a lease. He said the tenants were in his dwelling without his permission and without a lease being signed. He said the Respondent Tenants have no proof that they made payments to his account and for all he knows, Mr. Gonzales and Mr. Barrios are continuing to pay the rent, therefore they cannot call themselves tenants.

Finally, he stated that when he told the Respondent Tenants that he was returning the deposit at the end of the tenancy, that was just 'plamás' to get them out and that he had no intention of returning the deposit because it was given to Victor Terres and not him. He said that the Respondent Tenants moved into his dwelling and that they knew the original Tenants, because he speculated that there is no way anyone would give a deposit to a stranger in a pub. He said that probably with hindsight he shouldn't have changed the locks and he should have let the termination ride its course, however he flew off the handle and if he had not, he would not be attending the Tribunal.

## **Respondent Tenants' Case**

### **Evidence of the Second Named Respondent Tenant**

In her sworn testimony to the Tribunal she stated that a tenancy existed and that they dealt with the Appellant Landlord on all matters relating to the dwelling, including heating, drains, roof leak and she said that he asked them to sign a new lease and that they agreed to this. She said that they paid their rent regularly and on time and that they sent him an e-mail telling them that they were living in the dwelling.

She stated that she met with Victor Torres whom the Appellant Landlord was aware lived in the dwelling and that he had conceded that point at the previous hearing. She said they paid Mr. Torres their deposit because he told them that this was the routine. They never suspected that anything was irregular with this arrangement given that he had advertised the property on Daft.ie.

She said that on 17 October they wrote to the Appellant Landlord telling him that they wanted to remain in the dwelling and requesting that he prepare a new contract and arrange a meeting. The e-mail correspondence was adduced in evidence to the Tribunal.

She said that initially he agreed to return the deposit to them, even after he knew that Mr. Barrios and Mr. Gonzales had vacated the dwelling. She said that in an e-mail on 17 October 2013 the Appellant Landlord said that he had deducted €100 from the previous tenants because they had left the rent €100 short and that the balance would be returned to them if they left the house in good condition.

She stated that after relations soured every time they spoke with the Appellant Landlord he shouted at them and that because they were living alone in the dwelling they were afraid of him. She said that the Appellant Landlord threatened to throw their belongings into the dump and they were afraid he would come in the night.

She said the locks were changed on 22nd October, the day the Appellant Landlord came to the dwelling. She said they did not know who he was initially, because they had never met him and they called the Gardai because they were afraid of him. She said he wrote a notice of termination and he said that they had 28 days to vacate the dwelling. She said that although she was upset, she accepted that they would have to move within 28 days and they resigned themselves to look for alternative accommodation.

She said that on the evening of 22nd October they received e-mails from the Appellant Landlord that made them frightened so they took the decision to change the locks despite advice. The following day they went to work and college and when they returned to the dwelling the locks had been changed again by the Appellant Landlord. She said that they were locked out of the dwelling, with no place to live, without all of their belongings, including passports and work uniforms. She said she is alone in Ireland. She found the Appellant Landlord's behaviour intimidating.

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

1. The address of the premises is: 22, St.Audeon's Terrace, Merchants Quay, Dublin 8
2. The rent was €950 p.m.
3. The Deposit was €950
4. In the course of the Tenancy the locks were changed by both parties



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

Findings and Reasons:

### **Finding 1:**

The Tribunal finds that a tenancy existed despite the absence of a written lease agreement and that a Landlord Tenant relationship existed between the parties.

Section 5 -

1. Definition of Landlord - entitled to receive rent etc.
2. Tenancy - no need for written lease to demonstrate that a tenancy exists. "whether oral or in writing or implied and where the context so admits, includes a sub-tenancy and a tenancy or sub-tenancy that has been terminated"
3. Tenant - person entitled to the occupation of a dwelling under a tenancy

### **Reasons:**

It is very clear to the Tribunal from the oral testimony of the parties and the supporting documentation adduced in evidence to the Tribunal that a tenancy existed between the parties and that the Appellant Landlord acquiesced in the second set of tenants taking on the rights and obligations of first set of tenants, including the payment of rent, standard and maintenance of the dwelling under the tenancy and he cannot now argue that a tenancy does not exist. The Tribunal is satisfied that the Landlord was aware that the Respondent Tenants took up occupancy in June, 2013 when he was first contacted by them in relation to a new mattress and light bulbs.

### **Finding 2:**

The Respondent Tenants' are in breach of their obligations by changing the locks on the dwelling, in the knowledge that the Landlord was the owner of the dwelling.

### **Reason:**

The Respondent Tenants have an obligation under Section 16(I) not to alter or improve the dwelling without the written consent of the Landlord, and specifically not to change the locks. It is determined that this obligation was breached by Respondent Tenants in this regard.

### **Finding 3:**

The Appellant Landlord is in breach of his obligations under Section 12(d) of the Act to reimburse the deposit less any amounts lawfully withheld. Furthermore the Appellant Landlord is in breach of Section 14 of the Act by reason of his penalising the tenants following their complaint to a specified authority, namely Threshold.

### **Reason:**

Having acquiesced in the second set of tenants assuming all of the first set of tenants rights and obligations, the Appellant Landlord cannot now argue that they have no right to the return of the deposit. The Respondent Tenants are entitled to the benefit of the security deposit of €950 previously paid, and furthermore this deposit should have been refunded at the conclusion of the Tenancy.

It is clear from the evidence that the Landlord's actions became particularly punitive towards the Respondent Tenants following their consultation and advice from Threshold and the lodgment of their dispute application to the PRTB.

**Finding 4:**

The Appellant Landlord cannot rely on Section 16(k) of the Act by reason of a failure of the head tenants not to assign or sub let the tenancy without his written consent in circumstances where he is in breach of Section 15 of the Act where it is stated that he owes a duty to enforce the obligations of his tenants to each person who could be potentially affected.

**Reason:**

It was reasonably foreseeable that the sub-tenants could be potentially affected directly and adversely by his failure to enforce the obligations of the head tenants in relation to the assignment of the lease to the sub-tenants without his written consent. Furthermore, no dispute was lodged by the Landlord seeking to enforce this obligation.

Section 70 of the Act states that when terminating a head tenancy where a sub tenancy already exists, the Landlord must issue a notice of termination to both the head and sub tenants. The Appellant Landlord failed in this requirement even though he was aware that the sub tenants were occupants in the dwelling.

**Finding 5**

The Appellant Landlord is not entitled to his legal costs.

**Reason:**

Section 5 (1)(3) of the Act states that costs in relation to a matter being dealt with by the Tribunal or a determination or direction made or given by it does not include legal costs or expenses or costs.

**8. Determination:**

**Tribunal Reference TR0514-000622**

**In the matter of Peter O'Connor (Landlord) and Andreas Kyriacou, Francis Alzualde, Caribay Morales (Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:**

The Appellant Landlord shall pay the sum of €5,950 to the Respondent Tenants within 28 days of the date of issue of the Order being damages in the sum of €6,000 for the unlawful termination of the tenancy together with the entire of the unjustifiably retained security deposit in the sum of €950 less €1,000 in damages for breach of tenant obligations for damage in respect of changing the locks in respect of the tenancy of the dwelling at 22 St. Audeon's Terrace, Merchant's Quay, Dublin 8.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on 19/11/2014.

A handwritten signature in blue ink, appearing to read 'Gareth Robinson', written over a horizontal line.

**Signed:**

**Gareth Robinson Chairperson**

For and on behalf of the Tribunal.