

Private Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0714-000751 / Case Ref No: 0214-10687

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| Appellant Tenant: | Gregori Dresser, Louise Dresser |
| Respondent Landlord: | Shane McCarthy |
| Address of Rented Dwelling: | 7 The Boulevard, Burkeen Friars Hill , Wicklow |
| Tribunal: | Patricia Sheehy Skeffington (Chairperson) Aidan Brennan, Finian Matthews |
| Venue: | Tribunal Room, PRTB, Floor 2, O'Connell Bridge House, D'Olier Street, Dublin 2 |
| Date & time of Hearing: | 17 September 2014 at 10:30 |
| Attendees: | Gregori Dresser - First Named Appellant Tenant Louise Dresser - Second Named Appellant Tenant Ian Boyle-Harper BL - Appellant Tenants' Representative Evan O'Leary - Respondent Landlord's representative |
| In Attendance: | Gwen Malone Stenographers |

1. Background:

On 28 February 2014 the Tenants made an application to the Private Residential Tenancies Board ("the PRTB") pursuant to Section 78 of the Residential Tenancies Act ("the Act"). The matter was referred to an Adjudication which took place on 9 June 2014. The Adjudicator determined that the Notice of Termination served on 28 January 2014 on the Applicant Tenants, in respect of the tenancy of the dwelling at 7 The Boulevard, Burkeen, Friars Hill, Wicklow was valid. He also made consequential orders for the vacant possession of the dwelling.

The Appellant Tenants applied to appeal, which application was received on 23 July 2014. It cited as grounds that the Notice of termination was invalid. The application for the appeal was approved by the Board on 8 August 2014.

The PRTB constituted a Tenancy Tribunal and appointed Patricia Sheehy Skeffington, Aidan Brennan and Finian Matthews as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Patricia Sheehy Skeffington 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 17 September 2014 the Tribunal convened a hearing at Tribunal Room, PRTB, Floor 2, O'Connell Bridge House, D'Olier Street, Dublin 2.

2. Documents Submitted Prior to the Hearing Included:

PRTB File

3. Documents Submitted at the Hearing Included:

Four letters, admitted with consent of all parties.

4. Procedure:

The Chairperson asked the Parties to identify themselves and to identify in what capacity they were attending the Tribunal. Mr O'Leary confirmed that he appeared on behalf and with the authority of the Respondent Landlord, who he confirmed was correctly named as appeared on the Notice of Termination on file, being the Receiver of Certain Assets of Fachtna Whittle, Robert Dunne and the Burkeen Co-Ownership (in receivership).

The Chairperson asked the Parties to confirm 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 held in as informal a manner as was possible; that the person who appealed (the Appellant Tenants in this case) would be invited to present their case first; that there would be an opportunity for cross-examination by the Respondent Landlord; that the Respondent Landlord would then be invited to present its case, and that there would be an opportunity for cross-examination by the Appellant Tenants. The Chairperson explained that following this, both parties would be given an opportunity to make a final submission. She clarified that albeit the Tribunal could have regard to the Adjudicator's report, it was not bound by it and that the Tribunal was a fresh re-hearing of the matter.

The Chairperson stressed that all evidence would be taken on oath and 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 €4,000 or up to 6 months imprisonment or both.

The Chairperson 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 Residential Tenancies Act, 2004, hereafter referred to as the Act).

The Chairperson also informed the parties that if it seemed that they might be able to resolve their dispute by agreement, the Tribunal would facilitate any such negotiations.

The Parties were then sworn in.

5. Submissions of the Parties:

The parties agreed that the main issues in dispute were:

- (a) Whether a Notice of Termination served on the Tenants on 28 January 2014 validly terminated the tenancy, with particular reference to its stated intention to sell and the identity of the Landlord;
- (b) Whether the Respondent Landlord was in breach of its obligations in respect of the standard and maintenance of the dwelling;
- (c) Whether a deposit was paid, and if so in what sum.

WHETHER THE NOTICE OF TERMINATION OF 28 JANUARY 2014 WAS VALID

The Appellant Tenants' counsel critiqued the Notice of Termination on three grounds: that the reason given as the intention to sell was dubious; that the identity of the landlord and therefore the Respondent's ability to serve the Notice of Termination was unclear; and inaccuracies in the dwelling's address and Respondent Landlord's name on the face of the Notice.

The Appellant Tenants' counsel submitted that no steps had been taken to market the dwelling and as such, the stated reason underlying the Notice (the intention to enter into an enforceable agreement for the transfer or sale of the whole of its interest in the property within three months) was not reflective of the reality. The Appellant Tenants' counsel submitted that an intention to obtain vacant possession of the dwelling did not equate to an intention to sell within the requisite time frame. The Appellant Tenants gave evidence that other dwellings in the small estate now controlled by the Receiver had not been put up for sale, despite one of them being vacant. They further gave evidence that they had offered to buy the dwelling but that this offer to purchase had not been taken up. They refuted the Respondent Landlord's representative's understanding that this offer was no longer on the table: they said that the Respondent Landlord's receiver had refused to deal with them until vacant possession had been gained. They submitted a letter from the receiver reflecting this position.

The Appellant Tenants' counsel submitted that the Respondent Landlord had not furnished the Mortgage Deeds to illustrate satisfactorily that the receiver and/or the entities who called themselves the landlords were entitled to act as the landlords. He highlighted that a guarantee (rather than a mortgage deed) had been supplied on behalf of Fachtna Whittle and Robert Dunne, which guarantee contained no clause allowing for the appointment of the receiver. Upon questioning from the Tribunal as to whether the title of the dwelling was being drawn into question, and thus whether the matter fell outside the jurisdiction of the PRTB, he said that he did not question title as such, but stated that the Tribunal had to satisfy itself that the entity that served the Notice of Termination had the right to so do as the landlord or on its behalf. Upon further questioning from the Tribunal, the Appellant Tenants confirmed that they had paid rent to the receiver pursuant to his letter of 19 May 2014 in his capacity of receiver over certain assets of Fachtna Whittle and Robert Dunne and the Burkeen Investor Co-Ownership. They said that they had done this in order that rent arrears did not accrue for which they would then become liable. The Tribunal then queried whether formal deeds of appointment of receivership were required for the purposes of the Residential Tenancies Act, which allowed an agent to be appointed by a landlord to act on his or her behalf. A discussion ensued as to whether an agent (in the form of a receiver) was able to serve

documents informing a tenant that they were the appointed agent: it was submitted by counsel that this was not permissible under the Act.

The Appellant Tenants' counsel stated that the errors in the Notice of Termination rendered it technically invalid pursuant to section 62 of the Act. He highlighted that the address of the dwelling was stated to be 7 The Boulevard, Burkeen, Friar's Hill, Co Wicklow (omitting the town it was in) and its header named one of the persons over whom the receiver had been appointed as Robert Dune rather than Dunne. Counsel stated that the address and the identity of the landlord had to be correct, otherwise the Notice was technically flawed.

The Respondent Landlord's representative stated that the intention set out on the face of the Notice of Termination reflected the receiver's position: that the dwelling was to be sold within three months of obtaining vacant possession. He was questioned by Counsel for the Appellant Tenants as to why, if this was the case, the receiver had failed to engage with the Appellant Tenants' offer to buy the dwelling. The Respondent Landlord's representative stated that the strategy was first to obtain vacant possession and then to market the property. He was questioned as to the reality of this intent where other properties in the estate controlled by the receiver and which were vacant were not for sale, however he remained consistent in his statements in respect of the receiver's intention to sell the dwelling and what his instructions were in relation to this property.

Strictly in the alternative, the Appellant Tenants' counsel argued that given the improvements and close links the family had with the dwelling (see below), the longest period possible for compliance with any order giving vacant possession should be afforded to them.

The Respondent Landlord's agent stated that the receiver was appointed over the assets which included the dwelling. He referred to the Deeds of Appointment on the Tribunal file. He characterised any mistakes in the Notice of Termination as typographical errors and submitted that these should not invalidate the Notice of Termination.

WHETHER THE RESPONDENT LANDLORD WAS IN BREACH OF ITS OBLIGATIONS IN RESPECT OF THE STANDARD AND MAINTENANCE OF THE DWELLING

The Second Named Appellant Tenant stated that the tenants had effected many improvements to the dwelling and that the Respondent Landlord had been content for them to do so. She referred to a list of improvements which included putting down a patio in the back garden, painting, plumbing jobs including a replacement pump and boiler maintenance. She said that the Respondent Landlord had told her that the boiler maintenance was a tenant's responsibility, however she said that they had (with agreement) taken the cost of the replacement pump from the rent as it was over €200. She said that the Respondent Landlord was well aware of the improvements, and through Brian Egan (upon whom the Burkeen Co-Ownership had given management control of the dwelling under the lease of 5 March 2010) they had been given the impression that they may get the opportunity to purchase the dwelling at the end of 2013. Given that, the Second Named Appellant Tenant said that they had made improvements to the dwelling and made it their home. She said that she had children in school which, as it was a Gaelscoil nearby, had been specifically chosen by them and they needed to live nearby. She said that in the circumstances the Appellant Tenants had not treated the dwelling as a normal rental, but much more akin to their owning it.

Under questioning from the Tribunal as to the quantities spent on the dwelling, the Appellant Tenants were not able to provide any specifics.

The Respondent Landlord's representative made no submissions in respect of any improvements or repairs.

THE DEPOSIT

The Second Named Appellant Tenant stated that at the commencement of the tenancy, a deposit of €1,400 was paid to the Respondent Landlord, which was equivalent of one month's rent.

The Respondent Landlord's representative said that he was not aware of whether any deposit had been paid or not.

6. Matters Agreed Between the Parties

1. The tenancy commenced on 1 April 2008;
2. A Notice of Termination was served on 28 January 2014 by Shane McCarthy, receiver over the assets of Fachtna Whittle and Robert Dunne and the Burkeen Investor Co-Ownership;
3. The tenants remain in occupation of the dwelling.

7. Findings and Reasons:

Finding One:

The Appellants paid a deposit of €1,400 at the commencement of the tenancy.

Reasons:

1. The Second Named Appellant Tenant gave clear sworn testimony that a deposit in the sum of €1,400 was paid.
2. The Respondent Landlord did not contradict nor in any way put in issue the claim that the deposit was paid. The Tribunal accepts the evidence of the positive sworn testimony of the Appellant Tenants in this regard.

Finding Two:

The Landlord of this tenancy is Fachtna Whittle, Robert Dunne and the Burkeen Investor Co-Ownership, whose asset of the dwelling subject of this tenancy is under receivership, the receiver being Shane McCarthy.

Reasons:

1. A landlord is defined in section 5(1) of the Act as "the person for the time being entitled to receive (otherwise than as an agent for another person) the rent paid in respect of a dwelling by the tenant thereof...". The Appellant Tenants agreed that they had, following a letter from Shane McCarthy as Receiver over Certain Assets of Fachtna Whittle, Robert Dunne and Burkeen Investor Co-ownership paid rent to him as agent of the landlord.
2. No evidence of any third party seeking rent arrears or impugning the appointment of the receiver over the asset including the dwelling subject of these proceedings in any

forum was adduced to the Tribunal. The agent for the receiver gave evidence that he acted for the receiver over this dwelling and other properties in the Estate. The Tribunal accepts that he acted in this capacity over the dwelling in question.

3. The Tribunal is therefore satisfied that, on the balance of probabilities, the correctly identified landlord is the person to whom the Appellant Tenants were paying rent.

4. The Tribunal notes that the Appellant Tenants counsel submitted that while under section 110 of the Act the title of lands or property may not be drawn into question in PRTB hearings, he was not questioning title as such but that nonetheless the Tribunal must be satisfied of the identity of the landlord. The Tribunal considers that it is not the forum to analyse mortgage deeds and deeds of appointment as suggested by the Appellant Tenant, as this would be to draw the title of the property into question in the proceedings, which the Act expressly excludes it from doing. However it determines that the circumstances of this case, as outlined above, suffice to satisfy the Tribunal on the balance of probabilities of the identity of the agent/receiver acting on behalf of the Landlord.

Finding Three:

The Notice of Termination served by the Respondent Landlord on the Appellant Tenants on 28 January 2014 is valid.

Reasons:

1. The Tribunal accepts the Respondent Landlord's agent's testimony that its strategy is to sell within three months of obtaining vacant possession. As such, the rationale falls within the statutory circumstances in which a Landlord is permitted to terminate a Part 4 tenancy, in particular section 3 of the Table to section 34.

2. While the Tribunal accepts the Appellant Tenants' testimony and submissions that few steps have been taken to market the dwelling, it notes that the appointment of a receiver and the stated strategy to sell with vacant possession potentially allow for the Respondent Landlord to enter into an enforceable contract for the transfer of its interest for full consideration within three months. However it notes that in circumstances whereby this agreement to transfer is not achieved within three months, the Appellant Tenants may apply under section 56(3) of the Act for damages for deprivation of possession and/or a direction seeking to resume possession of the dwelling.

3. The Tribunal finds that the Notice of Termination complied with section 62 of the Act. It complies with section 62(1)(a) in that it is 'in writing'. Section 62(1)(b), that it be signed by the landlord or authorised agent, has been dealt with above in that the authorised agent, the Receiver, signed it by a 'pp' of one of his agents. Section 62(1)(c) requires the date of service: this features on the Notice. Section 62(1)(e) requires a reason for termination: this has been dealt with above. Section 62(1)(f) in respect of the termination date and 62(1)(g) in respect of the tenants' right to refer the matter within 28 days to the PRTB were fulfilled. The Tribunal notes that the address of the dwelling is not specifically mentioned, and while clearly an address to which the Notice pertains must be included, it suffices to identify the dwelling. The same applies for the landlord and the spelling of their name. The Tribunal notes that no issue as to service of the Notice was raised: as such it finds that the Notice was properly received and understood by the information set out on its face.

4. The Tribunal however determines that the circumstances of this case warrant affording the Appellant Tenants a lengthy period within which to vacate the dwelling. The Tribunal finds that the level of disruption to the Appellant Tenant's family should be minimised in circumstances in which it accepts that the Respondent Landlord acquiesced in allowing the Appellant Tenants to treat the dwelling as their long term home, as set out below.

Finding Four

The Respondent Landlord was in not breach of its obligations in respect of the standard and maintenance of the dwelling.

Reasons:

1. The Appellant Tenants gave evidence that the alterations to the dwelling were on the whole by way of improvements to it, rather than repairs required under section 12(1)(b) of the Act, which requires a landlord to effect such repairs as are necessary to ensure that the dwelling complies with any prescribed housing standards or its interior and fittings maintained in the condition they were in at the beginning of the tenancy.
2. The Tribunal accepts the Appellant Tenants' evidence that they undertook these improvements with the knowledge and acquiescence of the Respondent Landlord who gave rise to hopes that they might at some point be able to purchase the dwelling. As such, the Tribunal finds it appropriate to set the timeframe for compliance with its order for vacant possession at 112 days, being the statutory maximum notice period for a Notice of Termination.

8. Determination:

Tribunal Reference TR0714-000751

In the matter of Gregori Dresser, Louise Dresser (Tenant) and Shane McCarthy (Landlord) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

1. The Notice of Termination of the tenancy served on the Appellant Tenants by the Respondent Landlord on the 28 January 2014 in respect of the tenancy of the dwelling at 7 The Boulevard, Burkeen, Wicklow, County Wicklow is valid.
2. The Appellant Tenants and all persons residing in the dwelling shall vacate and give up vacant possession of the dwelling within 112 days of the issue of this Determination Order.
3. The Respondent Landlord shall refund the entire of the security deposit of €1,400 to the Appellant Tenants, on gaining vacant possession of the above dwelling, less any amounts properly withheld in accordance with the provisions of the Act.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on 25/09/2014.

Signed:

A handwritten signature in cursive script, reading "Patricia Sheehy Skeffington".

Patricia Sheehy Skeffington Chairperson

For and on behalf of the Tribunal.