

**Private Residential Tenancies Board**

**RESIDENTIAL TENANCIES ACT 2004**

**Report of Tribunal Reference No: TR1213-000530 / Case Ref No: 0313-04958**

**Appellant Landlord:** Timothy Fitzpatrick

**Respondent Tenant:** Peter Buckley

**Address of Rented Dwelling:** 01, Corfree Court, Loch Gowna , County Cavan

**Tribunal:** Vincent P. Martin (Chairperson)  
John Tiernan, Thomas Reilly

**Venue:** Cavan District Court, Cavan Courthouse, Cavan

**Dates & times of Hearing:** 14th March 2014 (Tribunal Room, PRTB)  
28th March 2014 (Tribunal Room, PRTB)  
4th April 2014 (Tribunal Room, PRTB)  
22nd April 2014 (Tribunal Room, PRTB)  
30 May 2014 (Cavan District Court)

**Attendees:** Attendees:  
For the Appellant Landlord:  
Timothy Fitzpatrick (Appellant Landlord)  
Jenny Fitzpatrick (daughter of Appellant Landlord)  
Alan Crossan, Solicitor, Crossan Hanratty & Company  
  
For Respondent Tenant:  
Peter Buckley (Respondent Tenant)  
Sharon Crowe (spouse of Respondent Tenant)  
Peter Downey, Solicitor, Eagleton Downey Solicitors

**In Attendance:** Representative of Gwen Malone Stenographers

**1. Background:**

On 07/03/2013 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 11/11/2013. The Adjudicator determined that:

The Applicant Tenant's application regarding breach of the Respondent Landlord's obligations in the standard and maintenance of the dwelling, that the rent was more than market rent, that the Respondent Landlord invalidly withheld the security deposit and that the tenancy was unlawfully terminated is upheld.

The Respondent Landlord shall pay the total sum of €12,800 to the Applicant Tenant, within 84 days of the date of the issue of this Order by the being damages of €3,000 regarding breach of the Landlord's obligations in the standard and maintenance of the dwelling, the entire of the unjustifiably retained security deposit of €4,000 together with damages of €2,000 for the consequences of retaining the said deposit, damages of €1,800 for charging rent greater than the amount of market rent, and €2,000 for the distress and inconvenience regarding the unlawful termination of the tenancy in respect of the tenancy of the dwelling at 1 Corfree Court, Lough Gowna, Cavan.

Subsequently the following appeal was received:

Landlord: received on 11/12/2013. The grounds of the appeal: Deposit retention, Standard and maintenance of Dwelling, Damage in excess of normal wear and tear, Breach of tenant obligations, Invalid Notice of termination; Approved by the Board on 17/12/2013.

The PRTB constituted a Tenancy Tribunal and appointed Vincent P. Martin, John Tiernan, Thomas Reilly as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Vincent P. Martin 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 14/03/2014 the Tribunal convened a hearing at Tribunal Room, Private Residential Tenancies Board, O Connell Bridge House, D'Olier Street, Dublin 2.

Dates of Hearing:

14th March 2014

28th March 2014

4th April 2014

22nd April 2014

30th May 2014

Venue: Tribunal Room, Private Residential Tenancies Board, O Connell Bridge House, D'Olier Street, Dublin 2,

and Courthouse, Farnham Street, Cavan (on 30th May 2014).

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

1. PRTB File

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

- A DVD video recording, a map and plan of the Dwelling, an extract from the PRTB rental index and a copy of an income levy certificate 2010 were submitted by the Respondent Tenant.
- A booklet comprising, inter alia, a draft copy of the contract for sale, quotations for works to be carried and photographs were submitted by the Appellant Landlord.

#### **4. Procedure:**

The Chairperson asked the Parties present to identify themselves and to identify in what capacity they were attending the Tribunal. He introduced the members of the Tribunal to the Parties. 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 as informal as possible; that the person who appealed (the Appellant Landlord) would be invited to present his case first; that there would be an opportunity for a cross-examination by the Respondent Tenant; that the Respondent Tenant would then be invited to present his case and that an opportunity would then follow for cross-examination by the Appellant Landlord. He also said that at the end of the hearing, both the Appellant Landlord and the Respondent Tenant would be given the opportunity to summarise their evidence and/or make final submissions.

He said that members of the Tribunal might ask questions of both Parties from time to time. He also stated that the Parties must follow any instructions given by the Chairperson. He directed that neither Party should interrupt the other when oral testimony was being given. He stated that all evidence would be taken on oath and he reminded the Parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable on conviction by a fine of €4,000 and/or up to 6 months imprisonment or both.

The Chairperson stated that the evidence of the Tribunal hearing would be recorded by an official stenographer present and that a transcript of the proceedings would be produced based on that audio recording. It was pointed out to the Parties herein that it was the policy of the PRTB to have an official stenographer present at all tribunal hearings and the said purpose of same was to furnish a transcript of the proceedings to the tribunal members in order to assist them in their deliberations as the transcript gave an accurate record of what was said by all persons during the course of the hearing. He informed the Parties that if they wished, they could apply to the PRTB to be furnished with a copy of the said transcript for a fee to be agreed with the PRTB. 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 appealed to the High Court on a point of law only [reference section 123(3) of the Act].

The Chairperson said that he would be willing to clarify any queries in relation to the procedures then or at any stage during the course of the Tribunal. He asked the Parties if they had any queries about the procedure. There were none.

The persons who indicated their intention to give evidence to the Tribunal were then sworn in.

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

The Respondent Tenant's Case:

FIRST PRELIMINARY APPLICATION BY THE APPELLANT LANDLORD OBJECTING TO THE RESPONDENT TENANT ADMITTING DVD VIDEO EVIDENCE OF THE GROUNDS OF THE DWELLING AND ADJACENT LAND TO THE DWELLING:

Alan Crossan Solicitor acting for the Appellant Landlord stated that his grounds for making this application were as follows:

- (i) The said DVD video evidence was not submitted to the PRTB inside the required ten-day period before the commencement of hearing hereof.
- (ii) The dispute resolution application for an adjudication hearing made in this case by the then Applicant/Tenant was not instituted until twenty-three months after the termination of the tenancy and it was unclear when the video footage was recorded.
- (iii) He submitted that there was oral commentary of the Respondent Tenant thereon accompanying the video recording which was prejudicial and unfair to the Appellant Landlord.
- (iv) When informed that the photographs submitted by the Respondent Tenant when initially making his Dispute Resolution Application to the PRTB consisted of still photographs taken from the same video evidence, Alan Crossan submitted that the DVD video is then unnecessary because the photographs (still photography) were taken from the video were already submitted and therefore it is unnecessary to have the additional evidence of the entire video recording.

Submission by the Respondent Tenant in support of the Tribunal accepting the evidence:

- (i) Most of the said video evidence was already submitted to the Adjudicator in advance of the adjudication hearing but the Adjudicator at that time took the decision not to look at it.
- (ii) He stated that the majority of the photographs (photographic evidence) are directly taken from the video and accordingly were before the Adjudicator.
- (iii) He submitted that the oral commentary thereon by the Respondent Tenant accompanying the video recording which may be of assistance to the Tribunal and was not prejudicial.
- (iv) The Respondent Tenant confirmed that he carried out the video recording himself and most of it was done in January 2011. There was some further recording in April 2011 and at all material times he was residing at the Dwelling house.

## SECOND PRELIMINARY APPLICATION ON THE PART OF THE APPELLANT LANDLORD:

Alan Crossan stated that he was seeking to have a booklet which he prepared to be admitted in evidence on the grounds that there is nothing new in the booklet with the exception of a copy of the contract for sale which accompanied the letting agreement and he submitted that there was nothing prejudicial about admitting this prepared booklet. He also stated that the booklet contained quotations for works to be carried out which the Respondent Tenant received regarding restorative works which still had to be carried out as a result of damage that was done to the property during the Respondent Tenant's occupation and that the booklet also contained photographs of the pumping station located on the grounds/land adjacent to the Dwelling which were photographed from the front of the Dwelling and at the rear of the Dwelling. Alan Crossan, Solicitor stated that he was seeking to have these documents admitted (admittedly late) but stated that his client, the Appellant Landlord had engaged his professional legal services only a few days before the commencement of this hearing.

THIRD PRELIMINARY APPLICATION MADE ON BEHALF OF THE APPELLANT LANDLORD SUBMITTING THAT THIS CASE WAS IMPROPERLY BEFORE THE TRIBUNAL:

(i) Alan Crossan submitted that this case involved a draft contract with an option to purchase. The Dwelling was referenced on the lease and also referenced on the contract. He stated that taking account that it was a fixed term tenancy and the issues which are the subject matter of this dispute occurred during the life of a fixed term tenancy and that at no time was any formal notification given by the Tenant to the Landlord regarding what the Tenant contended were breaches of the tenancy which allegedly occurred. He said that no opportunity was given to the Landlord to rectify the issues which were the subject matter of the Tenant's complaint. He submitted that it appears that everything is predicated on the fact that there was an unlawful termination of the tenancy in circumstances where there was a fixed term tenancy and no formal notice to terminate was ever served on the Appellant Landlord and in those circumstances it was not appropriate to refer the dispute to the PRTB.

(ii) He also stated that the Appellant Landlord was not given notice of the date of the original adjudication hearing and thereby was unable to give evidence on that occasion.

Replying submission by Peter Downey on behalf of the Respondent Tenant to the Appellant Landlord's second and third preliminary application:

(i) He stated that in relation to the Landlord's objection to having the video footage admitted in evidence because it was outside the ten day recommended timeframe before the commencement of this hearing, he stated that all evidence was actually submitted in time and the fact that the solicitor for the Appellant Landlord only came on record late last week is not an issue for the Respondent Tenant and if he had a difficulty he should have made an advance application and/or notification to the PRTB seeking an adjournment.

In reply to this comment, Alan Crossan said:

"Absolutely not. Very happy to go ahead."

(ii) In reply to Alan Crossan's submission about the delay in bringing this action, Peter Downey stated that there was no bar to his client bringing the action at the time which he did. The general Statute of Limitations in a case like this would be six years and that his client is well within that timeframe.

(iii) In relation to the application by the Appellant Landlord to submit a booklet, Peter Downey stated that he objected to this new booklet being furnished so late, which he stated amounted to forty one pages and he was opposing that it should be submitted at this late stage on much the same basis/grounds as submitted by the Appellant Landlord in his objections to their video evidence being submitted. When Alan Crossan was asked by the Tribunal to state when the photographs in his booklet (which he is seeking to have submitted in evidence) were taken, the Tribunal were informed that the photographs were taken in the past number of days. Peter Downey submitted to the Tribunal that because these photographs were taken only in the last couple of days, they should not be submitted in circumstances where the Respondent Tenant vacated the property in April 2011.

Ruling by the Tribunal in relation to the three preliminary applications:

- In relation to the first application made by the Appellant Landlord seeking to have a DVD video recording deemed inadmissible on the grounds that it is potentially highly

prejudicial, the Tribunal notes that his opposition to the admission of the DVD did not include challenging the provenance of same and the Tribunal being satisfied that the Respondent Tenant recorded this material, has decided to allow it be submitted. The Tribunal also finds that its probative value does not outweigh any potential prejudicial effect. The Tribunal rules that it is admissible on the one condition that the voiceover accompanying the video recording is not heard as same is unnecessary and could be potentially prejudicial.

- In relation to the second application made by Alan Crossan seeking to have his booklet detailing a contract for sale, a quotation for remedial works and some photographs of the pumping station admitted, the Tribunal ruled that notwithstanding it is outside the PRTB's strict ten day recommended timeframe (before the commencement of the hearing), in the interest of doing justice between the parties, the Tribunal has decided to admit the said booklet which may potentially be of assistance to the Tribunal.

The Tribunal reminded the parties that its decision to admit a document in evidence at this stage is solely an admissibility decision and should not be interpreted as a reflection, good, bad or indifferent, on the reliability and/or probative value of the evidence.

- In relation to the third application, namely that the matter is not properly before the Tribunal, the Tribunal is satisfied that the case is properly before the Tribunal and failed to see any statutory provision in the Act which would indicate otherwise but the Tribunal granted liberty to the Appellant Landlord to revisit this issue, if he so decides, in his closing submissions to the Tribunal.

Evidence of Timothy Fitzpatrick (the Appellant Landlord):

The Appellant Landlord explained his non-appearance at the adjudication hearing by stating that the posed notification from the PRTB went to the house currently occupied by his separated wife and that in any event, he was in the United States of America at that time.

The Appellant Landlord stated that the Dwelling was the first of four houses in a development that he built. He stated that because it was the first of four houses to be completed, there were still a lot of road works to be carried out including lighting, finishing houses and sewerage works to be completed. He stated that at the time the Respondent Tenant first occupied the house property prices were beginning to fall. He stated that the asking purchase price of the Dwelling when it was first built was €420,000 but this was dropping rapidly. He stated that the contract price agreed with the Respondent Tenant when he agreed to purchase the house was €285,000. He stated that the deal agreed with the Respondent Tenant was a rent with an option to purchase agreement so that if the Respondent Tenant proceeded to purchase the Dwelling, within or after the lease period of 2½-years, the amount of rent paid would come off the agreed purchase price of the Dwelling.

He stated that although it was the first of four houses to be completed, it was an exceptionally well-finished house to a show house finish standard and that it was furnished. He stated that the Respondent Tenant seemed very happy to enter into the agreement which took the form of a 2½-year fixed term lease.

He stated that the Respondent Tenant viewed the Dwelling and site on several occasions before he occupied the Dwelling and in his opinion he was of the belief that the

Respondent Tenant very much appreciated that it was an incomplete development site. He added that the Respondent Tenant indicated to him that some other members of his family might even purchase one of the other houses in the development at a later stage. He stated that upon the Respondent Tenant taking up occupancy of the Dwelling, there were some initial 'teething problems' within the first couple of months caused by a very hard frost but these were very minor. When asked under cross-examination to comment on the heating system, he stated that he is now residing in this Dwelling and that the heating is as good now as it was then, submitting that it has worked perfectly at all times though he qualified this by saying that it has a complicated digital control system which requires some understanding. He stated that any problem with the heating is not due to a fault or defect in the heating system but due to lack of knowledge on the part of those who are using it and he stated that he personally needed someone to show him how it operated.

When asked by Alan Crossan to comment on the issue of the sewerage system, he stated that it was probably three or four months after the Respondent Tenant first moved into the Dwelling that he was made aware that there was an alleged problem with the sewerage. He stated that the nature of the Respondent Tenant's complaint concerning the sewerage was that there was a pump sump overflowing thereby causing a regular foul smell. He stated that the sewerage was connected to the main public sewerage system and it was always the plan that the sewage from the four houses on the estate would flow into a pump sump and then would be pumped up to the public road and into the main public sewerage system. He stated that whilst it was connected for months before the Respondent Tenant moved into the Dwelling, it was not actively in use because there was no pump in the pumping station and he believes that the source of the Respondent Tenant's complaint concerned the said pumping station. He stated that because there was only one of the four houses occupied at this stage, he was advised that there were not enough discharging into the pump sump and that in such circumstances a pump would burn out because its operation would be triggered by float switches which would be constantly switching on and off. He submitted that he had no other choice at this stage but to carry out the emptying of the sump tank with a slurry tank. He stated that during the said tenancy he was emptying the tank on a regular basis.

In response to a query from the Tribunal the Appellant Landlord said that he had not advised the Respondent Tenant in regard to the absence of a pump and power supply at the pump sump in advance of the letting. In response to a further question from the Tribunal whether or not he considered re-sizing the pump sump and proposed pump to cater for one house where the effluent would be pumped to a rising main, the Appellant Landlord replied by stating that he had not considered same because he was expecting the other houses to be sold. He stated that in response to the first complaint received from the Respondent Tenant, he arranged for the pump sump to be emptied on a weekly basis and not on a monthly basis although he stated that he could not understand how it ever overflowed because it was of such a large volume. He further stated that he agreed to empty the pump sump once a week after receiving communication from Cavan County Council who informed him that a complaint was received from the Respondent Tenant concerning the overflowing tank. He added that when they started emptying it once a week there was nearly nothing in it. He also stated that he was only ever informed of one episode of overflowing. He referred to receipts which showed payment of contributions to the Local Authority for connections to both the public water mains and public sewerage mains. He stated that the absence of the pump was based on an engineering decision as

same could not be justified in circumstances where just one of the four houses was being occupied.

The Appellant Landlord said that he discovered that the Respondent Tenant had vacated the house through a text message on the day that he was leaving. He stated that in this said text message the Respondent Tenant had asked him where he would like to have the keys returned to and in response to this query he stated that he invited the Respondent Tenant to drop the key into his workplace in the nearby village but that the Respondent Tenant declined to do so and instead informed him that he would be leaving the key with his own solicitor to arrange collection. The Appellant Landlord stated that he was very surprised that the Respondent Tenant decided to vacate the Dwelling during the 7th month of a 2½-year lease agreement. He submitted that the Respondent Tenant had no right to leave the Dwelling and that he should have received notification from him concerning any issues he had regarding the lease agreement. When it was put to him by the Tribunal that if the Respondent Tenant vacated the Dwelling after 2½ years (in uncontroversial circumstances), the contract for sale would suggest that he would have his deposit returned in full, Alan Crossan on behalf of the Appellant Landlord stated that this was simply a clerical error in the Contract and the real intention was in such circumstances that the deposit would be forfeited and that he would address this matter in greater detail at a later stage during the course of the hearing. Peter Downey on behalf of the Respondent Tenant stated that it was always the Respondent Tenant's understanding that if he did not proceed to buy the house, he would have his deposit returned in full.

In response to allegations made by the Respondent Tenant that part of the development site was used as a dumping ground, he stated that the nature of many building sites is that they require filling. He said this is a standard part of the process and that he had to get any filling that he could in order that the ground would be brought up to the required level. He strongly denied that there was any domestic waste or household waste ever dumped on the site.

He stated that after the Respondent Tenant had left the Dwelling, he had to change the carpets as they had a dog in the Dwelling (indoors) which was expressly prohibited in the lease agreement. He stated that he incurred €1,200.00 in replacement carpet costs for the Dwelling. He stated that there were smells and stains on the carpets and he could not save any of them and he was seeking compensation for same in the amount of €1,200.00 against the Respondent Tenant in respect of this damage caused to the carpets beyond the level of normal wear and tear.

He also stated that the ceiling had water damage from an overflow of water from upstairs which may have been overflowing water from the sink, shower or bath and that this water damaged the ceiling underneath. He stated that he now resides in the Dwelling himself, having moved in approximately twelve months ago. He stated that in relation to the damage to the ceiling, the Respondent Tenant had brought this to his attention and upon inspection could not find the cause and he submitted it must have been an overflow from a sink or bath, submitting that there has been no re-occurrence of this leak since. He submitted an estimate of €1,400.00 for the repair of the ceilings and said that he was also seeking this amount from the Respondent Tenant in respect of damage beyond the level of normal wear and tear.

The Appellant Landlord stated that the Dwelling was finished to a very high standard and was 2,100 square feet in size. The Appellant Landlord concluded when giving evidence under direct examination by confirming that the rent was €900 a month.



#### Cross-examination of Appellant Landlord:

Peter Downey on behalf of the Respondent Tenant put it to the Appellant Landlord that it was as a result of a frozen water pipe caused by some very cold weather which occurred during the Respondent Tenant's occupancy of the Dwelling that damage was caused to the particular bathroom where the water came down through the ceiling and in response the Appellant Landlord said that such an assessment of the cause of the damage was not correct. Peter Downey suggested to the Appellant Landlord that the downpipe outside which had frozen caused a water blockage from a particular toilet and as a result the water backed up and caused a leak in the shower. The Appellant Landlord repeated his viewpoint that the inclement weather conditions did not cause the damage to the ceiling although he did accept that it was extremely cold weather at that time. The Appellant Landlord said that as soon as he was informed by the Respondent Tenant about the frozen pipe, it was fixed almost immediately. He denied that there was an overwhelming stench of sewerage emanating from the pump sump and stated that at no stage was there ever a smell, including the past fourteen months when he had been residing in the Dwelling and that he has now reverted to arranging to have the sewerage tank emptied once a month which he said was more than adequate. Under cross-examination the Appellant Landlord denied that there was a smell emanating from the house and stated that on two occasions when he visited the house with the Respondent Tenant standing right beside him, there was no smell. He stated that the distance between the pumping station and the Dwelling was up to about 50 metres and said that it is situated close to the corner of the actual overall building site boundary.

The Appellant Landlord stated that after the Respondent Tenant vacated the Dwelling, he tidied it up, got it looking well and tried to sell it as the bank was putting serious financial pressure on him to sell the house.

The Appellant Landlord denied that any smell deriving from the carpet might be emanating from the sewage problem. The Appellant Landlord stated that before he received the text message from the Respondent Tenant informing him that he had vacated the Dwelling, there were about two prior occasions when the Respondent Tenant did make a complaint about the sewage smell to him. The Appellant Landlord accepts that before entering the agreement the Respondent Tenant was furnished with documentation which included a draft Certificate of Compliance prepared by Claire O'Neill O'Reilly Associate Architects Company which stated, inter alia, "... it is connected to the public sewerage and water supply."

Under cross-examination from Peter Downey, Solicitor, the Appellant Landlord stated that the tank was being emptied once a month until the problem was brought to his attention and then thereafter it was emptied once a week. When questioned further, he stated that to the best of his recollection the complaint may have been made some time at the start of the year and not necessarily in the month of January of 2011. It was put to the Appellant Landlord that a company which he stated had been contracted to empty the pump sump initially once a month and then once a week did neither and that the sump was most likely only emptied about twice in total during the said tenancy - in response the Appellant Landlord denied this.

Application by Peter Downey on behalf of the Respondent Tenant to submit 4 items of late documentation namely,

(a) The first document he sought to submit was an architect's Site Layout map which he stated was a document of public record available on the Cavan County Council website, albeit he confirmed it was a new document not previously submitted to the PRTB.

(b) The second document which he was requesting the Tribunal to be allowed submit (again outside the PRTB ten-day procedural guideline) was a Plan of the Dwelling.

(c) The third document which he sought to submit in evidence was an extract from the PRTB website indicating average rental values in County Cavan at the material time of the tenancy.

(d) The fourth and final document which he sought to submit in evidence comprised the result of a search of properties owned by the Appellant Landlord. In relation to the fourth document, Peter Downey submitted that he would like to rely on it to show that the Appellant Landlord was an experienced landlord who held a number of properties and if the carpets were removed from the Dwelling, there was a possibility that they might have been transferred and currently in use in his other houses. Alternatively he suggested that the invoice for carpets that had been submitted in evidence by the Appellant Landlord could have been in respect of one of his other properties. When asked by the Tribunal did he not consider such a proposition to be mere speculation, Peter Downey denied this.

Submission by Alan Crossan, Solicitor for the Appellant Landlord opposing the application by the Respondent Tenant to seek to lodge the said four documents:

Alan Crossan submitted that on grounds that it was very late and because that he had not had time to consider them, he was opposing the application. Furthermore, he submitted that they lacked any relevance. In reply Peter Downey invited the Tribunal to admit the four requested documents on the grounds that the Tribunal allowed the Appellant Landlord to submit documents late, albeit at the start of the hearing, it was still late (outside the strict ten-day PRTB recommended timeframe) and secondly that they were not prejudicial in any way to the Appellant Landlord. He stated that the documents would assist the Tribunal in appreciating the layout of the house. Following a question raised by the Tribunal, the Appellant Landlord acknowledged that the plan of the house and the site plan, albeit a site plan before the site was developed, did represent the Dwelling and the site. He pointed out that in relation to the plan of the Dwelling that it represented a mirror image of the layout and not the actual layout.

The Tribunal rose for a short period of time to consider the said application and upon resumption ruled as follows:

An application was made by the Respondent Tenant for the admission of four new documents on Day 2 of the appeal hearing. It is standard practice of the PRTB that all documents are submitted within ten days before the commencement of the hearing in order to give both sides adequate time to consider and prepare for the hearing. Notwithstanding same, the Tribunal in the interest of doing justice to the parties and in respect of the first two documents, namely the House Plan from the planning file and the Site Layout map from the planning file, ruled that it was of the opinion that they may be of help in better appreciating some of the evidence that is being put forward in terms of the layout including bathrooms being beside one another and so may be potentially relevant to the Tribunal. The Tribunal therefore ruled that these two documents should be admitted.

In relation to the third document, pertaining to the PRTB Rent Index, the Tribunal was unconvinced of its relevance at that stage, however in considering Section 21(b)(i) of the Act, in the interests of fairness and to give both sides every opportunity to put forward their case, the Tribunal decided to admit it. The Tribunal noted that inside the period of a twelve month fixed term tenancy, there can be no rent review unless in exceptional circumstances and in order to allow the Respondent Tenant to mount that case which he had already indicated to the Tribunal that he intended to do, namely endeavouring to prove to the Tribunal that there was a significant change in circumstances in relation to the Dwelling, on the balance of probabilities, considering the totality of that aspect of his claim which is being made, the Tribunal has decided to admit this third document.

The Tribunal decided not to accede to the request of the Respondent Tenant to admit the fourth document pertaining to the property search from Property Direct which may list properties owned by the Appellant Landlord on grounds that the Tribunal failed to see how it had any relevance at all and stating that the Tribunal was concerned only with matters pertaining to this tenancy at 1, Corfree Court, Gowna, County Cavan and all parties before the Tribunal were treated the same and the fact that a party may own one Dwelling or many Dwellings was not a matter which it considered relevant.

Finally, the Tribunal expressed the view that it would have much preferred if these four requests to admit documentation was made at the outset of the hearing and in the absence of any independent expert evidence, the Tribunal decided to admit three of the four documents and indicated that if the Appellant Landlord requires time to read and consider same, the Tribunal would grant him a reasonable period of time to do so.

The cross-examination of the Appellant Landlord continued: A number of questions were posed by Peter Downey concerning the precise location of the pumping sump and the distance of same from the Dwelling. The Appellant Landlord's interpretation of the map, material distances and boundary walls was different from the proposition being put forward on behalf of the Respondent Tenant. Under cross-examination the Appellant Landlord was also invited to comment on the precise location of the dumping area as alleged on the map and also commented on the number of photographs.

When it was put to the Appellant Landlord that there was no damage done to ceilings as alleged in the area of the house at the time that the Respondent Tenant vacated same, the Appellant Landlord replied that it was the Respondent Tenant that brought this to his attention by inviting him into the Dwelling to show him the damage in the ceiling in the study area. When asked why he decided to replace the carpets and not fix the ceiling, the Appellant Landlord stated that it was a matter of priority as he wanted to show the house with a view to selling it and it was not fit for viewing with the carpets in the condition that they were in so therefore changing the carpets was his main priority. Peter Downey put it to the Appellant Landlord that the Respondent Tenant and his partner will both give evidence that the ceilings were not like that when they left the house and the carpets were fine and in response the Appellant Landlord stated that he disagreed with this viewpoint.

Under cross-examination the Appellant Landlord stated that he did not recall receiving a phone call from the Respondent Tenant about a week before the day he vacated the Dwelling. He reaffirmed his evidence that he received a text message from the Respondent Tenant informing him that he had left the Dwelling and that this text message had been received on the day that the Respondent Tenant had vacated the Dwelling. The Appellant Landlord also denied that he was often not contactable and/or very difficult

to contact during the course of the tenancy stating that his place of employment was in a public house which was located approximately 100 yards from the Dwelling.

Peter Downey referred to an extract from a PRTB Index which outlined that in 2010 the average rent per month for a similar sized property in County Cavan was €567.12 and in 2011 it had gone down to €553.03 and asked the Appellant Landlord to comment on same and in reply the Appellant Landlord said that he did accept the figures as they were for all of County Cavan and the location of the Dwelling was in Lough Gowna which was a special sought after place to live submitting that rents might be 40% or 50% less in some other parts of County Cavan. When asked to comment how the figure of €900 rent per month was agreed, the Appellant Landlord stated that he had firstly to get permission from his lender to agree on the figure for the rent to purchase agreement. It was also submitted on behalf of the Appellant Landlord that because of the rent to purchase agreement, any rent paid was to be taken account of in the overall purchase price and therefore this was a further reason why average rent prices for all of County Cavan were unreliable as a comparator in the instant case. He stated that the Respondent Tenant agreed the rent and was willing to pay the said sum of monthly rent to him.

Before the Appellant Landlord concluded his evidence, Alan Crossan requested leave of the Tribunal to renew his application in relation to this case (dispute) not being properly before the Tribunal and in respect of same repeated that this was a fixed term tenancy for 2½ years with an option to purchase and the Respondent Tenant was furnished with and had legal advice at the time concerning the draft lease containing an option to purchase and when the lease fell down through the course of the seventh month of the tenancy, in such circumstances Alan Crossan submitted that the Respondent Tenant was not entitled to seek recourse before the PRTB Tribunal stating,

“In circumstances where he was adequately protected and had security of tenure of 2½ years on the fixed term, that the proper recourse that was open to a tenant was to take action before the Circuit Court based on what he would say was the forfeiture of the lease and in such circumstances the PRTB Tribunal does not have jurisdiction to deal with a fixed term tenancy.”

Alan Crossan, Solicitor on behalf of the Appellant Landlord submitted that despite the Respondent Tenant being in continuous occupation for a period in excess of six months, it was not a Part IV tenancy because instead it is caught in the fixed term tenancy that is offered, namely 2½ years' tenure in the lease.

Evidence of Peter Buckley (the Respondent Tenant)

Examination-in-chief:

The Respondent Tenant stated that when he and his partner first came across the Dwelling as part of a Sunday drive and noticed a For Sale sign outside the said Dwelling, they realised it was a beautiful house. When they met the auctioneer it was confirmed to them that the Dwelling was connected to the mains sewerage and would be pumped into the said sewerage system by means of a pump. He stated they were very interested in purchasing the house on the rent to buy scheme and he accepted that the Appellant Landlord did say at that time that he would have to first consult with his lender.

He accepted that both he and the Appellant Landlord eventually agreed on the sum of €900 per month for rent. He stated that before he moved into the Dwelling it was specifically agreed that fencing would be put in place for his dog and the Appellant

Landlord recommended, if ever required, the name of a local veterinary surgeon for his dog.

He stated that the Dwelling was of show house standard with all the furnishings being at the top of the range. He stated that he believed it was their dream house and the asking purchase price of €275,000 was, in his opinion, very reasonable, considering all the furnishings that came with it. He said that it was always their intention to purchase the house and that he and his wife never envisaged having to leave the house. He stated that at that time they had a five-year-old child and they were anxious to get on the property ladder. He stated that it was their ideal home and their child loved it. He stated that the main reason for vacating the Dwelling was that he could not be expected to live in a house that does not have proper sewage disposal facilities and does not have proper heating. He stated that the smell emanating from the sewage in the pump sump was not so much a smell as it was practically a taste, it being so pungent one could taste it in the air and that everyone who visited the Dwelling commented on it. He stated that initially, the smell was not too bad. He suggested this might be due to the extremely cold weather but it was gradually getting worse and worse. He stated that he complained about the smell on numerous occasions. He stated that he left numerous telephone messages and text messages for the Respondent Tenant and also left some messages for him in the pub that he worked in although he found it quite embarrassing to visit a pub which was located 200 metres approximately from the Dwelling. He stated that the Appellant Landlord was only interested in receiving his monthly rent and ensuring that he bought the place and had no interest in doing anything else. He stated that around the end of February 2011 he tried to contact the Appellant Landlord on numerous occasions but he understood that he was in America at that time and after making efforts to contact him again in the pub, his son arrived at the Dwelling the following day and that he emptied the pump sump and in his opinion this was the first time the sewage was ever emptied out. He stated that on the 17th March 2012 when they returned home to the Dwelling they noticed that the pump sump was overflowing and he stated that he tried to contact the Appellant Landlord immediately. The Respondent Tenant stated that it was not until the 5th day of April 2011 that the Appellant Landlord actually came down to the Dwelling and he stated that the two of them went over to the pump sump and for the first time he learnt directly from the Appellant Landlord (in answer to a question which he asked him) that there was no pump in the pump sump. He stated he was shocked to learn this. He also stated that the Appellant Landlord explained to him the reason why there was no pump, namely, that it would burn out as there was only one of the houses currently occupied. He accepted that he did not contact the Appellant Landlord on many occasions between the 17th March and the 5th April 2011 as he understood that the Appellant Landlord might have been in America at that time and also he had personal and family matters to deal with. He stated it was on the 6th April 2011 that he first made contact with Cavan County Council to report this problem as he was very concerned to see raw sewerage flowing out from the sewerage tank. He stated that the smell made the Dwelling unfit for human habitation and that on the 8th April 2011 he phoned the Appellant Landlord to inform him that because of the smell problem he had decided to terminate the lease and requested his deposit back. He stated that the Appellant Landlord seemed angry upon hearing of their decision. He stated that at this stage as well as their five-year-old child, they now had a three-month-old baby and in his opinion the sewerage problem made the Dwelling completely unsuitable for living in. Before this point in time, the Respondent Tenant stated

that he had already started purchasing bottled water because they did not trust the water system.

At this stage in the proceedings the Respondent Tenant adduced in evidence a DVD video recording and as agreed, the voiceover/commentary which was part of the video recording did not feature as part of this viewing. The Tribunal and both parties, with their legal representatives, viewed the said video evidence which, inter alia, featured the video recording of two persons emptying the sewage from the pump sump with the assistance of a tractor and slurry (suction) tanker. The Respondent Tenant stated that he made this video recording on the 12th March 2011.

The Respondent Tenant then referred to a letter written by Cavan County Council addressed to his then acting solicitors (Baynes & Co. Solicitors) dated the 24th August 2011, which said letter was in reply to a complaint made regarding an overflow of sewage at the site of the Dwelling, stating, inter alia,

“This incomplete development is not connected to the public sewer and in this regard is not compliant with the relevant planning conditions (04/2677, 07/783 & 09/115).”

The Respondent Tenant said he did not accept the evidence given by the Appellant Landlord that the pump sump was emptied initially once a month and then once a week because he stated that if it had been emptied on such a frequent basis, it would have been impossible not to notice persons entering and exiting the development as one would hear vehicles passing by the house in what was a cul de sac. He stated that after the pump sump was emptied on the 3rd or 4th March, the smell initially lessened but it got worse again three or four days later. When queried by the Tribunal whether the smell that he complained of may have resulted from general intensive agricultural practices in this rural area, the Respondent Tenant stated that in his opinion that was definitely not an explanation for the smell.

The Tribunal invited the Respondent Tenant to comment in relation to Clause 12 and Clause 13 of the Planning & Architectural Consultants’ report compiled by Claire O’Neill O’Reilly Associates, which said report was entitled “draft form” and whilst signed, was not dated wherein Clause 12 states,

“I further confirm that house no ..... (sic) is connected to the public sewerage and water supply” and Clause 13 states, “take notice this certificate is issued solely with a view to providing evidence for title purposes of the compliance of the relevant works with the requirements of planning legislation and of building regulations. Except insofar as it relates to compliance with the said requirements, it is not a report or survey of the physical condition or on the structure of the relevant works nor does it warrant, represent or take into account any of the following matters.”

With 13(f) listing one of these following matters as, “issues regarding the water quality, installation and maintenance of the sewerage system.”

In reply the Respondent Tenant stated that he did not know what Clause 13 means and when read in conjunction with all the other Clauses appeared to be a contradiction. His solicitor interjected at this stage saying that the Respondent Tenant was not an expert engineer or lawyer but did not disagree that at the material time when this contract was being considered, albeit a draft contract, the Respondent Tenant had the benefit of expert legal advice.

The Respondent Tenant stated that he took a year's leave of absence from his job at the start of March 2011 and at that stage his financial position was fine as otherwise he would not have taken the said year's leave of absence. He stated that the year of absence was to allow him to help care for his father who was sick at that time. During this time, he did work in a part-time job approximately three days a week as a private investigator. He stated that his financial situation at that time did not in any way influence his decision to terminate the tenancy nor did the downturn in the market. He stated that the reason why he left the property was due to problems with the tenancy including sewage disposal and heating and he stated that by far the main problem was the sewage disposal issue.

In relation to the dumping on the site close to his Dwelling, the Respondent Tenant said this was a source of concern, the debris dumped included glassware which probably came from the public house which the Appellant Landlord owned and managed and he referred to photographic evidence which suggested builders' rubble, lino plastic and numerous other debris was being dumped and on some occasions people who arrived in vehicles to dump the debris would forget to close the gate in the protective safety fencing when they were finished and this presented a danger to his young son if he was ever playing in this area. He stated that this dump was equivalent to an illegal dumping site. He stated that if he had been informed about the debris and level and frequency of dumping which would take place before he signed the contract, he would never have moved in with his partner and young child.

When asked by the Tribunal was it not obvious when moving into this Dwelling one was going to be beside a building site, the Respondent Tenant replied that yes it was obvious there was a building site, but he would not have expected there would be material dumped and none of this dumping debris was evident at the time that he moved into the Dwelling apart from blocks, some of which were half broken. He accepted that he did not witness the dumping of any household waste, wet waste, kitchen waste or food waste being dumped, however he stated that it was an eyesore and it also caused him health and safety worries. He also accepted that to the best of his knowledge there was no hazardous waste dumped but for all he knew, there could have been such waste dumped there. He stated that he accepted that when one moved into an incomplete building site, there would be a degree of dumping but he stated that people were coming in day in and day out with trailers dumping stuff in the estate that he was living in. When asked by the Tribunal would he agree with the Appellant Landlord's opinion that the bulk of material being dumped was coming from road works and from water scheme works that were ongoing in the area including earth/stones/bits of old walls and old bushes, he stated that in his opinion only 70% of what was being dumped could be categorised in such terms.

At this stage the Respondent Tenant referred to a number of photographs which were taken largely in January 2011 submitting that they show a very different situation to what was there before he moved in. He stated that the photographs showed that there were also blocks and pallets dumped on the site. The Respondent Tenant stated that the frequency of the dumping increased from Christmas onwards and this caused him to phone the Appellant Landlord on the 17th January 2011 asking him for an explanation about what was going on. He stated that the Appellant Landlord told him that it would stop soon but he stated that it did not stop. The Respondent Tenant stated that if he had known the full story and if the Appellant Landlord had been up-front with him about what he described as a Dwelling not being serviced with a proper sewerage system, he would never have signed the agreement.

The Respondent Tenant rejected the explanation put forward by the Appellant Landlord in his evidence that the heating system was very complicated stating that it had never worked properly. He stated that due to the heating system not working properly in the cold winter his family had to sleep in the sitting room with the benefit of heat from the fireplace. When the Respondent Tenant was asked to comment if he had ever opened the front flap of the heating control system, he stated that he did. He stated that he was not furnished with any manual or instructions to assist him in trying to work the heating system and that in any event, despite him admitting that he had no great technical expertise, it was clear to him that the heating system never worked properly.

The Respondent Tenant was asked to comment and give his explanation concerning a number of photographs which the Appellant Landlord had claimed (in the direct examination of the Appellant Landlord) showed damage caused to the ceilings and in reply he stated that there was no such damage whatsoever done to the house up to the time that he vacated the Dwelling.

He stated that the period at Christmas 2010 was particularly cold and there was an incident which was caused by an outside pipe freezing and he contacted the Appellant Landlord to inform him about this problem. In his opinion at that time if a person flushed the toilet upstairs, it flowed back due to the frozen pipe. He stated that this also caused water initially to flow out of the shower tray and this did cause a stain on the study ceiling. He stated that the Appellant Landlord, who on this occasion responded promptly told him not to worry about this damage to the study ceiling as it was only a stain and that he was prepared to paint it. He stated that he accepted there was a stain on the ceiling but that the ceiling was perfect otherwise and there was no other type of damage on the ceiling which said ceiling was directly below the en suite shower. He stated that the stain was never painted over but that it was barely noticeable.

The Respondent Tenant was asked to respond to a quotation submitted by the Appellant Landlord from Erne Valley Construction Limited which valued the repair work to be carried out at €1,400.00 and in reply to same, the Respondent Tenant disagreed with the accuracy of this quotation which he stated was undated and might well relate to some other house, other than the Dwelling in question. The Respondent Tenant was asked whether the scale of the work as described in the quotation was necessary, which included cutting out a square of the ceiling that was adversely affected and skimming and painting it after some of the slabs are taken down and replaced, the Respondent Tenant repeatedly stated that there was no need to carry out such extensive works and/or any works at all for that matter.

The Respondent Tenant also rejected the necessity to replace the carpets as he stated that at the time he left the Dwelling they were in pristine condition and refuted any claim that €1,200.00 as vouched or any amount should be spent on the carpets as he rigorously cared for the carpets and seldom, if ever, would go upstairs wearing shoes or runners. He stated that his partner kept the house in immaculate condition. He stated that although the lease was terminated on bad terms, he was absolutely certain that the Dwelling was left in a spotless condition. He did accept that for the last week of the tenancy there was a second boxer dog that they were minding but that they did not do any damage whatsoever to the house. In reply to a question raised by the Tribunal, he did accept that whilst the Appellant Landlord liked dogs and was aware that they had a dog and erected a fence outside for the purpose of the dog, it was never specified that the



Appellant Landlord expressly consented to allowing the dog and/or dogs indoors. In response to Clause 43 of the Agreement which read,

“not to keep any dog or other animal in or around the premises”

the Respondent Tenant said that he had noticed that clause in the lease but that at that stage his acting solicitor looked to get same rectified and that the Appellant Landlord told them not to worry about it. He added that on the couple of occasions when the Appellant Landlord was outside the Dwelling he observed him playing with the dog and also that the Appellant Landlord definitely saw the dog inside the house and did not object.

The Respondent Tenant gave evidence that he verbally informed the Appellant Landlord on the 8th April 2011 that he was terminating the lease although he did not indicate a departure date in that communication. He said that in response to this the Appellant Landlord told him that if he left the Dwelling he would pursue him for loss of value of the house as he would now have to sell it as a second-hand house and not as a brand new house. He stated that he felt intimidated by the Appellant Landlord's attitude.

In relation to the rent agreed between the parties, the Respondent Tenant said that he initially wanted to offer €800 per month and that the Appellant Landlord wanted €1,000 and the compromise was €900 per month.

He referred to a letter that his acting solicitors at the time wrote to the Appellant Landlord following the termination of the tenancy which stated, *inter alia*,

“Accordingly we request a refund of our client's deposit in the sum of €4,000 within seven days of receipt of this letter. We also request a rebate of the unusually high monthly rent of €900 from October 2010 to April 2011 which was agreed in the context of an option to purchase which cannot now be availed of due to the default on the part of the landlord and which said rent would otherwise not have exceeded general living values for that premises in the area.”

In response to this letter the Respondent Tenant confirmed that he was seeking a refund of some of the rent paid due to the fact that he did not enjoy his stay in the Dwelling at the time due to the serious problems which he has already outlined in evidence.

In relation to the delay in bringing proceedings, the Respondent Tenant stated that he was hoping it would not be necessary and was awaiting a positive outcome from the solicitors' letters which he sent the Appellant Landlord. He confirmed that only one deposit in the sum of €4,000 was paid to the Appellant Landlord, albeit he recalls the Appellant Landlord initially trying to seek a deposit of €10,000.

The Tribunal asked both sides to confirm if it was their understanding that the deposit of €4,000 plays two different roles as such. It acts as a security deposit for the security of the Dwelling in a standard landlord and tenant lease and if everything is fine with no damage or deterioration to the Dwelling and if one does not unlawfully break the lease inside the fixed term period or do not take up the offer at the expiration of the fixed term period, one would get the deposit returned but if one breaches the fixed term tenancy agreement, one would forfeit the €4,000 but if one proceeds to purchase the property, that deposit is taken into account re: the purchase price.

The parties at this stage agreed to disagree with Peter Downey submitting that if the option to purchase was not exercised and there was no unlawful breach of the tenancy, his client should be refunded the €4,000 deposit while Alan Crossan submitted that if the Respondent Tenant did not proceed to purchase, the Appellant Landlord would be

entitled to retain the €4,000 and that he would also be entitled to the €4,000 in the situation where a tenant's breach of the tenancy agreement and his related conduct resulted in a consequential losses suffered by the Appellant Landlord equal or in excess of the amount of the total deposit. Peter Downey, on behalf of the Respondent Tenant did not accept that, theoretically in a situation where the deposit was not under the provisions of Section 12(4) of the Act, one would not automatically be entitled to its return because there was a further hurdle which the Respondent Tenant had to overcome in relation to a breach of a purchase agreement, which said latter disagreement and/or potential dispute would not be a matter for the PRTB. Peter Downey submitted that if the option to purchase were not taken up in a situation where the 2½-year fixed term tenancy theoretically was not breached, the Respondent Tenant would be entitled to a full refund. Alan Crossan, at this stage, referred the Tribunal to the last Special Condition No. 22 in the agreement which stated that,

"The purchase price is the sum of €275,000. The purchaser will have rented the property prior to the completion of the purchase and all deposits and rent paid by the purchaser will be deducted from the purchase price."

Both parties agreed that one function of the deposit is that it was the standard type of security deposit that they were dealing with. Seeking further clarification and consensus from a question asked by the Tribunal, both parties agreed that the €4,000 which was the only sum that transferred between the parties, was paid as security deposit as its function was to cover the Appellant Landlord in the situation where the Respondent Tenant did not meet his obligations of whatever nature but where, as the result of that, the Appellant Landlord incurred expense in accordance with Section 12(4) of the Act, the said expense could be deducted from the said €4,000 and the parties agreed to this interpretation and that if the deposit had a dual role, the second such function relating to the purchase of the Dwelling, was outside the terms of reference which Tribunal could adjudicate upon.

Cross-examination of the Respondent Tenant:

The Respondent Tenant was asked whether or not he accepted that he went through the terms and conditions of the lease agreement with his solicitor before signing same. He stated that he never saw the draft contract which allegedly accompanied the option to purchase in the letting agreement and the first time that he saw the draft contract of sale was on the first day of this appeal hearing. The Respondent Tenant also stated when entering into an option to purchase he did not recall being forwarded a schedule of documents accompanying the unsigned contract apart from the correspondence from the said Claire O'Reilly which he confirmed he did recall reading before entering into the agreement.

He repeated that the only document that he recalls seeing was the document numbered 5 or 6 and that he cannot be sure if his acting solicitors at the time, ever received same but he did recall the solicitor telling him not to worry about matters. He stated that the draft contract to purchase was only intended to come into force two and a half years down the line.

Alan Crossan on behalf of the Appellant Landlord stated that he was not referring to any binding nature of the contract but that it is very much about the interpretation of the letting agreement and the framework of the documentation which was brought into play at the time of committing to the letting agreement. He asked the witness would it never have occurred to him to have the property surveyed and when asked by Alan Crossan should

he not have carried out a survey before signing a lease which contained an option to purchase clause, the Respondent Tenant replied that he did not think it would be normal practice to have a property surveyed when he was leasing that property, however he stated that reflecting back on it now it definitely would have been good practice to have the property surveyed. He accepted that he did consider the entire letting agreement document with his solicitor before entering into the letting agreement.

When the Respondent Tenant was asked whether he was aware that the house prices in Ireland were significantly decreasing at the time, he stated that he would not have been following house prices at that time and because they believed this was their future family home, negative equity concerns did not matter to him as he had already entered a commitment in relation to the purchase price of the Dwelling. He stated that he never once considered leaving the property until he became aware of the problems which are the subject matter of this hearing adding that negative equity concerns were the furthest thing from his mind. He stated that the safety of his family was of paramount concern for him. He repeated that he had no interest or concern about the recession including the tumbling property prices at that time and that in any event he was not locked in and compelled to buy, submitting that he simply had an option to purchase because the contract to purchase was unsigned and was in draft form.

He stated that the smell emanating from the sewerage tank was horrible, it was unbearable and that if this problem had not arisen, he would still be in the house as it was his ideal home.

When asked why he carried out video recording of the dumping of material at the adjacent building site in January 2011, he stated he did so to show it was happening. He felt the dumping was illegal and wrong and he was getting no satisfaction from the Appellant Landlord. He stated he did not bring the video recording to the attention of the Appellant Landlord because the Appellant Landlord knew this dumping was going on. He carried out the video recording three months before he vacated the property and he did so because he asked the Appellant Landlord to stop dumping and if the Appellant Landlord did not stop the dumping at least (with the assistance of the said video recording) he could show him that it had not stopped. He stated that this activity was illegal dumping and he disagreed that it could be described as backfilling. He stated that he did not bring the actual video recording or the fact that he had same in his possession to the attention of the Appellant Landlord because he already knew it as he had verbally informed him on a number of occasions that this dumping as alleged was occurring on a regular basis. He stated that he was very concerned that people were dumping, "all sorts of stuff on the doorstep of the house". He was also concerned that on some occasions the people doing the dumping were leaving the fence open.

In response to the Respondent Tenant having earlier stated that his financial position was good at the time and that he could afford a career break from being an active member of the Irish Defence Forces, albeit he continued to do some more lucrative paying private investigation work, it was put to him by Alan Crossan why he decided not to show any information supporting this and/or to show that he was actively and gainfully employed by a private company at the material time. Alan Crossan said he would have expected him to substantiate his assertion at that material time, namely, that he was earning approximately three times the salary that he was getting when working in the defence forces and Alan Crossan commented that such information should be readily obtainable. At this stage the Tribunal stated to Alan Crossan that it is a matter for the Respondent

Tenant to decide what documentation, if any, he wished to rely on as evidence at this hearing. Alan Crossan stated that he would not make any objection if the Respondent Tenant wished to submit any late documentation in support of his claims supporting his assertion regarding his financial position at the time.

The Respondent Tenant stated that around the time before he entered the lease agreement he went into his local bank and made preliminary enquiries about mortgages and they told him he must first show the bank proof that he would be in a position to pay for rent on a property for a year in circumstances where up to this point his lifestyle did not necessitate him having to keep and build any significant savings in his bank account. He stated that at that stage he had not applied for a mortgage and he did not make any written mortgage application. However the Respondent Tenant stated that he followed the advice which was given to him by the person in the bank which was to commence, inter alia, a track record of saving monies and that following this meeting he felt positive and delighted about it.

The Respondent Tenant stated that at the time when he was encountering the different problems which he was complaining of in relation to the tenancy, namely, heating, lighting, sewerage issues he had not consulted or contacted his solicitor. The Respondent Tenant stated that he had to find out that the main problem was that the sewerage system had no pump in it yet he stated he was previously told on a number of occasions the problem was one concerning manholes and slurry pits.

He stated that it was only after making inquiries he realised that the pump sump was not a septic tank but actually a sewage tank and one without a pump operating or working in any way. He stated that following a meeting with the Appellant Landlord which took place beside the pump sump, he did not receive sufficient comfort or explanation in his answers to the questions that he asked the Appellant Landlord so he contacted a third party, a septic tank installer, and furnished this said third party with photographs in order to ascertain what the problem really was. He stated this third party informed him that the installation was not a septic tank. He stated that as far as he can recall it was not until the 9th May 2011 that his solicitors got involved when they at that stage contacted the Appellant Landlord.

The Respondent Tenant submitted that he did not breach any statutory obligations under the Act and that he had entered into a contract based on information that was not accurate. He stated that he was forced out of the Dwelling due to a pump not working in the sewerage system. He stated that he felt misled when he signed the letting agreement as he assumed and was assured that there was a proper sewerage system in the Dwelling. He accepted that at the time he informed the Appellant Landlord that he was terminating the lease he did so on that same day and he confirmed that he did not give the landlord any timeframe because he alleged that after speaking to an official in Cavan County Council the Respondent Tenant formed the opinion that this was an urgent issue and that he had to get out of the house straight away. He repeated that at the meeting of the 5th April 2011 the Appellant Landlord tried to convince him that it was a septic tank issue but he checked it out himself independently on 6th April 2011 and realised it was a much more serious issue. He stated that on the 8th April he contacted the Appellant Landlord to tell him he was no longer going to stay in the Dwelling.

The Respondent Tenant submitted that as far as he was concerned the Appellant Landlord had constructively terminated the lease by not complying with his obligations. He stated that he did not give the Appellant Landlord any notice of the termination

because as far as he was concerned it was the Respondent Tenant who terminated the lease on him by failing to comply with his obligations. He accepted that he did not ever give the Appellant Landlord written notification of the difficulties he was encountering nor did he afford him in writing an opportunity to rectify same but he insisted that he did inform the landlord on numerous occasions about these problems, albeit not formal written communications. He accepted that when he informed the Respondent Tenant by text message that he was terminating the lease (on the 8th April 2011), he accepted he had not decided the precise date he would actually be vacating the property because he had to firstly find alternative accommodation for his family and storage for his property. He stated that when he moved out of the Dwelling he first stayed in his mother's garage with his partner and two children. He stated that he was very sorry if he did not do everything exactly right as there was a lot going on in his life at that time. He stated that he had just lost their dream home. He stated that he handled things as best he could even if that was not as, "per letter of the law". He said that he vacated the Dwelling on the 15th April 2011.

When asked why he did not seek recourse to the PRTB's dispute resolution mechanisms during the course of the tenancy when the problem as alleged arose, he stated that he did not institute a case in the PRTB until March 2013 as his number one priority was getting his family out of there safely and the return of his deposit was at the very back of his mind. He submitted that because he felt compelled to leave the Dwelling and that the said Dwelling was left in excellent condition, he believed that he should have his full deposit in the sum of €4000.00 returned.

The Respondent Tenant stated to the Tribunal that whilst he and his family left the property on 15th April 2011 the rent was paid up to 4th May 2011. When the Respondent Tenant was asked why he did not make a claim or representation to the Appellant Landlord about market rent during the time he resided in the tenancy, he replied by stating that he had only first received a truthful account about the sewerage problem from the Appellant Landlord during the course of their meeting on 5th April 2011.

#### Section 111(1) of the Act

In the absence of expert evidence in relation to infrastructural installations and in light of significant conflicts of evidence and the potential significance of such matters the Tribunal decided that it would be of benefit to view the Dwelling first hand.

The Chairperson of the Tribunal informed the parties present that the Tribunal had decided to invoke Section 111(1) of the Act in order to enter and inspect the Dwelling on the grounds that an inspection would assist the Tribunal in this case. The Chairperson stated that the Tribunal has a right to inspect the Dwelling and under Section 4.1 of the Act, the Dwelling is a building used as a Dwelling and any outoffice, yard, garden or other land appurtenant to it or usually enjoyed with it and excludes a structure that is not permanently attached to it.

When asked to clarify the matter for the Tribunal, the Appellant Landlord confirmed that the Dwelling and its surrounds have not been altered and the Appellant Landlord agreed not to make any alterations in advance of the visit/inspection. The Tribunal indicated that an appreciation of the overall infrastructural overview especially in the absence of said expert evidence would be of assistance to the Tribunal. Both parties indicated they had no objection whatsoever to the Tribunal inspecting the Dwelling. The Tribunal indicated they would not be prepared to receive any verbal submissions on site (during the

inspection) but submissions, if any, could be made when the Tribunal is then formally reconvened. It was intended to reconvene the Tribunal hearing shortly after the site inspection concludes in a nearby venue to be agreed.

Following an inspection of the Dwelling and its surrounds by the Tribunal members on the 30th day of May 2014, the hearing resumed immediately afterwards at Cavan Courthouse, Cavan. Neither party chose to address the Tribunal and/or make a submission in relation to inspection of the Dwelling and the hearing proceeded with Alan Crossan continuing his cross-examination of the Respondent Tenant.

The Respondent Tenant denied that if the transaction to purchase the Dwelling did not proceed that there was an understanding that he would forfeit his deposit. He repeated his view that it was his understanding that he did not terminate the lease but the Appellant Landlord had terminated the lease and he described events which transpired concerning sewerage problem as an emergency.

The Respondent Tenant repeated his viewpoint that he was entitled to the refund of the deposit of €4,000 because the Appellant Landlord left them living in a Dwelling for six months without any property facilities and in effect constructively terminated the lease by forcing them out of the Dwelling. He added that he did not owe any rent arrears and there were no bills outstanding.

In reply to a question put to him by Alan Crossan, the Respondent Tenant did accept that members of his family visited them at the Dwelling on a regular basis but denied this amounted to them being quite happy to put up with the sewerage problem stating that they always commented upon it. He accepted that the family relatives did stay overnight but that was because it was a long drive as they were not in a position to travel to visit their relatives because they had such a young baby. When it was put to him that he left the landlord high and dry without giving him any formal written notice and an opportunity to rectify the problem on foot of any formal written communication, he denied this saying that the Appellant Landlord was totally responsible for the problem which arose and he also denied that he was responsible for the balance of the term of the lease about 24 month leaving the Appellant Landlord with a residue of rent (rent loss) in the sum of about €22,000.

When asked what steps he took in relation to his decision to transfer his place of work from a Dublin barracks to a Cavan barracks, he stated that he discussed the matter with his family but did not formally apply or discuss it with his superiors in the Defence Forces as he was firstly about to embark on a year's career leave.

When asked would mass goers attending the nearby chapel located close to the Dwelling have been aware of the odour emanating from the sewerage tank he said yes they would together with those attending the local health centre and also the residents in the house beside the Dwelling but when asked he stated that he did not consult with the local community nor was he aware of any disquiet or complaint made by any of the local community concerning the odour issue.

When asked by Alan Crossan, solicitor, on behalf of the Appellant Landlord, whether or not he ever visited the Appellant Landlord at the nearby public house which he worked in, the Respondent Tenant stated that he never visited him at said public house but would have phoned him at work as he had preferred not to visit the Appellant Landlord in his workplace. He also confirmed that he never visited the Appellant Landlord at his nearby private Dwelling which he resided in at the material time. He again stated that as he was

phoning him there was no need to visit him to discuss the matter in his home which he accepted was located somewhere close by at the material time. He stated that he was aware that the Appellant Landlord worked most days in the pub located in the nearby village but he felt intimidated to enter the pub.

Re-examination of the evidence given by the Respondent Tenant:

Peter Downey, solicitor for the Respondent Tenant at this stage applied through the Tribunal for adducing in documentary evidence a document pertaining to the Respondent Tenant's financial position for the year 2010 on the grounds that under earlier examination in chief the Respondent Tenant made reference to his financial position and that the matter had arisen again on foot of the cross-examination which occurred and he was now seeking to admit in evidence a document which would be of assistance to the Tribunal which said document was not available at an earlier opportunity. Peter Downey stated there was no obligation on the Respondent Tenant to produce this documentation but that they were volunteering to do so as a means to show at all material times he was in the financial position to proceed with the contract to purchase the Dwelling. In reply Alan Crossan submitted that this document before the Tribunal is not a P60 as promised but an income levy certificate from a particular employer, namely the Irish Defence Forces, for the year 2010. In those circumstances he submitted it was wholly irrelevant and he would leave it open to the Tribunal to make what it will from it. Alan Crossan did not formally object to its admission and the Tribunal ruled that it to be admitted.

Evidence of Sharon Crowe (witness for the Respondent Tenant):

She stated she was the partner of the Respondent Tenant and that they resided in the Dwelling together. She stated that the smell was always there. There were rooms where the smell would be worse than other rooms and one could get the smell from the top of the road. She stated that the smell emanating from the sewerage was constant. She said she only ever witnessed the sewerage tank being emptied on two occasions. She said that her dreams of finding a new family home were crushed when she learned there was no pump in the pumping station. She stated that in relation to the dumping on the site it occurred more or less every day and some days it could occur up to three times.

She stated the dog was never allowed upstairs and denied the carpets were in any way damaged stating that they were spotless. She stated there would have been no need whatsoever to replace the carpets. She said the only damage to any ceiling was in the study which was a small stain on the ceiling which resulted from a shower tray overflowing in the en suite bathroom upstairs which was caused by an outside pipe freezing in frosty weather. She said their financial situation had always been good and only for the problems which they had encountered they would definitely have proceeded to buy the property.

Cross examination of Sharon Crowe

Under cross-examination Sharon Crowe stated that she could not recall precisely when they started using bottled water but it would have coincided around the time trust had broken down and they had concerns about the sewerage system and in particular the fact that there was no pump in the pump sump. The Tribunal asked Sharon Crowe whether or not it was correct to say that the water was coming from the public water supply and Sharon Crowe replied that that was correct. She stated her concerns about water were not the main reason for moving out but was a factor.

#### Closing submissions:

In Alan Crossan's closing submission he stated, inter alia, that the Respondent Tenant was bound to the terms of the letting agreement which extended to the contract to purchase the property. He stated the draft contract accompanied the letting agreement and it was a document to be executed by the Respondent Tenant in pursuance of the option to purchase. He also submitted the deposit should be forfeited by the Respondent Tenant in light of the absence of written notice of any breaches or problems in respect of the tenancy. He said that the Respondent Tenant was not afforded any opportunity to make good or remedy any of the alleged breaches concerning the maintenance of the Dwelling and that therefore the deposit should not be returned.

He stated that because the Respondent Tenant unlawfully terminated the lease and had not provided any Notice of Termination, he was entitled to be compensated for the loss of rent for the balance of the tenancy in the amount of €21,600 and that he was also seeking costs incurred in bringing this appeal before the Tribunal.

Alan Crossan also submitted that the deposit had a dual purpose in this case, namely to offer a security deposit to the Appellant Landlord in respect of the lease and key money in respect of the option to purchase which would crystallise and form part of the deposit for purchase or exchange or alternatively would remain with the Appellant Landlord in the event the option was not exercised and that therefore the deposit should not be refunded to the Respondent Tenant in circumstances where he did not proceed with the purchase.

In the closing submission made by Peter Downey on behalf of the Respondent Tenant, he submitted, inter alia, that the tenancy was a part 4 tenancy as the Respondent Tenant was in occupation for more than six months. He also submitted that the Appellant Landlord was given adequate notice, time and opportunity to resolve the particular problems which had arisen. He accepted there was no formal written notice of termination of the tenancy but instead he stated the tenancy was constructively terminated by the Appellant Landlord by virtue of his conduct.

He submitted that Section 58.3 of the Act entitles a tenant to terminate a fixed term tenancy where the landlord had breached his obligations. He stated the Respondent Tenant was deprived of his entitlement to peaceful enjoyment of the Dwelling under Section 12(b) resulting from a failure on the Appellant Landlord's part to carry out necessary repairs. He submitted that the Dwelling became uninhabitable as a result of the sewerage problem, the dumping and the heating system was also inadequate. He stated that the Appellant Landlord failed in his obligation to return the deposit promptly. In relation to the market rent claim he accepted the market rent is the rate a willing tenant and willing landlord will agree but in this case he submitted the Respondent Tenant had not given a proper informed consent and therefore would not be considered a willing tenant as he entered the agreement on foot of what he submitted later transpired to be a misrepresentation.

In relation to the draft contract he submitted that, it was just that (a draft contract) and in any event contract of sale is outside the remit of the PRTB and that the Tribunal should confine itself to the terms of the lease and in respect of same the conduct of the parties.



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

Both parties agreed that the tenancy agreement was signed on the 4th October 2010 and terminated on the 15th April 2011.

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

Having considered all of the evidence and submissions in this case the Tribunal makes the following findings:

1. The parties herein entered into a letting agreement dated the 4th day of October 2010 incorporating an option agreement in respect of the letting of the tenancy of the Dwelling at a monthly rental rate of €900 for a fixed term period of two years and six months commencing from 1st October 2010.
2. The Respondent Tenant paid security deposit in the sum of €4,000 to the Appellant Landlord and the Appellant Landlord has retained same.
3. The Tribunal is satisfied the letting agreement in respect of the Dwelling in this case is one under which the terms of the Private Residential Tenancies Act 2004 to 2009 fully apply. Moreover the security deposit in the sum of €4,000 paid by the Respondent Tenant to the Appellant Landlord is captured by the terms of Section 12(1)(d) and must, subject to subsection (4) of Section 12, be repaid promptly by the landlord to the tenant. It is not intended solely to be a payment for the grant of an option to purchase or solely as a down payment on the purchase price. The provisions of Section 18 of the Act apply and no provision of the lease or tenancy agreement or contract or other agreement can operate to vary, modify or restrict the application of Section 12(1)(d). Any provision for the forfeiture of deposit either written or implied, is not permissible under Section 18(3) of the Act because it would be inconsistent with Section 12(1)(d). Whereas the letting agreement falls within the jurisdiction of the Residential Tenancies Act 2004 as amended, the additional option to purchase the Dwelling conferred by the letting agreement and/or accompanying agreements and/or express or implied agreements and/or otherwise in this case is outside the jurisdiction of the PRTB and of the said Act. Furthermore the Appellant Landlord in drawing up both the letting agreement and the option to purchase agreement had the opportunity to make the circumstances in which the sum of €4,000 being paid was to be apportioned and the circumstances of any forfeiture. On the basis of the documentation before the Tribunal there was a level of ambiguity in relation to these matters and having consideration for, inter alia, the doctrine of contra proferentem, the Tribunal is of the view that the benefit of the most favourable interpretation should rest with the Respondent Tenant in this case.
4. In relation to the Appellant Landlord's submission stating that this case was improperly before the PRTB on grounds that the PRTB had no right to adjudicate on a two and a half year fixed term tenancy and/or tenancy in the context of a right to purchase, the Tribunal does not accept this argument because to exclude such lease agreements from the application of the Act is potentially open to exploitation by landlords and/or would allow the routine inclusion of unfavourable options as part of leases and thereby avoid the application of the Act in its entirety. The Tribunal finds this letting agreement comes within the terms of the 2004 Act and is subject to it and the incidental option to purchase the Dwelling at the end of the tenancy agreement does not in any way deprive the PRTB of jurisdiction or the Act of its application. For this reason the Tribunal is of the view that the deposit as such is refundable. The submission that the deposit in

this case is “non-refundable” amounts to an attempt at “contracting out” from the terms of the Act in a manner prohibited by, inter alia Section 18 of the Act. Moreover, the Tribunal notes clause 3(q) of the lease agreement signed by the parties and dated the 4th October 2010 provided, inter alia, that on signing the letting agreement the tenant would,

‘pay to the landlord the sum of €4000.00 in respect of and as security for the payment of the rent reserved and compliance with the terms of the said letting agreement which said sum subject to such payment and compliance shall be refunded on the expiration of the said tenancy.

5. The letting was a part 4 tenancy under the Act as the Respondent Tenant was in continuous occupation of the Dwelling for a period in excess of the requisite six month period as the Tribunal finds the tenancy commenced on 5th October 2010 and ended on 15th April 2011.

6. In relation to the claim made by the Appellant Landlord that the Respondent Tenant caused damage and/or deterioration to the ceilings of the Dwelling in excess of normal wear and tear, on the balance of probabilities, the Tribunal prefers the evidence of the Respondent Tenant and therefore exonerates the Respondent Tenant from any blame for causing same noting that the Dwelling was a relatively very new Dwelling and the damage which occurred was probably caused and/or triggered by the inclement weather conditions and/or by defects outside the management or control of the Respondent Tenant

7. In relation to the claim by the Respondent Tenant that the Respondent Tenant carried out unnecessary, inappropriate, excessive and/or illegal dumping which it was submitted by the Respondent Tenant adversely impacted on his peaceful enjoyment of the Dwelling as well as causing him to have health and safety concerns and fears for himself and his family, on the balance of probabilities the Tribunal has not been convinced that same is the case as backfilling and/or dumping of inert material in a new development site like this is an event which the Respondent Tenant knew or ought to have known would occur when he entered the letting agreement and following an inspection of the Dwelling by the Tribunal, the Tribunal finds that the proximity of the dumping area to the actual Dwelling was not within the boundaries of the Dwelling nor was it sufficiently close to cause the tenant and/or his family to suffer damage, inconvenience and/or loss.

8. In relation to the claim by the Respondent Tenant seeking a review of the rent, Section 20 of the Act provides that a tenant or landlord is not entitled to a rent review in the 12 months from the commencement of the tenancy unless there is a substantial change in the nature of the accommodation provided under the tenancy. In this case, on the balance of probabilities, the Tribunal is satisfied there was not a substantial change in the tenancy noting that the tenancy was terminated well inside the first 12-month period. The Tribunal also notes that in relation to this and the other matters complained of by the Respondent Tenant, he did not seek recourse to the PRTB dispute resolution process until March 2013.

9. In relation to the claim by the Appellant Landlord that he incurred loss as a result of having to replace all the carpets upstairs in the Dwelling, the Tribunal finds on the balance of probabilities, that the Respondent Tenant was in breach of his statutory obligation under Section 16(f) of the Act in causing some deterioration in the condition of the Dwelling in excess of normal wear and tear and in respect of same, the Tribunal prefers the evidence of the Appellant Landlord finding that some damage was caused to

the carpets which was most likely as a result of the Respondent Tenant allowing or inadvertently allowing his boxer pet dog inside the Dwelling on occasions. Having considered the evidence of the scale of the damage caused to the carpets and in the given circumstances the Tribunal finds that an award for the replacement of the carpets in the total sum of €1,000 is proportionate, justified and appropriate.

10. In relation to the alleged foul smelling odour emanating from the pump sump as alleged by the Respondent Tenant, on the balance of probabilities, the Tribunal has not been convinced such a problem existed as a constant and serious problem and in any event does not accept that it was to the scale as described by the Respondent Tenant to merit and/or justify him terminating a fixed term tenancy agreement. The Tribunal notes that there was an absence of any expert opinion/evidence to support the Respondent Tenant's claim. The Tribunal is not satisfied this issue amounted to an emergency wherein the Respondent Tenant terminated the tenancy agreement without:

(a) Notifying the Appellant Landlord in writing affording him an opportunity to remedy the problem.

(b) Furnishing the Appellant Landlord the appropriate notice of termination and/or any written notice at all.

Moreover the Tribunal accepts that the Respondent Tenant viewed the Dwelling and site on several occasions before entering the tenancy agreement and should therefore have appreciated that it was an incomplete development site.

However the Tribunal accepts the Respondent Tenant verbally reported the issue of an overflowing sewerage tank which the Tribunal is satisfied at least overflowed on one occasion. This breached Section 12(a) of the Act which confers an obligation on the Appellant Landlord to allow the Respondent Tenant quiet and peaceful enjoyment of the Dwelling. Therefore the Tribunal awards the Respondent Tenant €500.00 in damages for inconvenience suffered. However the Tribunal finds the Appellant Landlord did not breach Section 12(b) of the Act meaning the landlord must carry out repairs in a reasonable manner because the Tribunal is satisfied that the Respondent Tenant was not properly notified of same and/or was not afforded an appropriate opportunity to remedy same.

11. In relation to the claim for damages on the part of the Respondent Tenant resulting from an allegedly substandard heating system in the Dwelling, having considered all the evidence, on the balance of probabilities, the Tribunal is not satisfied that the heating system installed was inadequate or substandard. The Tribunal accepts that there was a degree of difficulty in understanding the controls on the system but does not find that the Appellant Landlord was in breach of his statutory obligation in this regard.

12. The Tribunal declines to recommend awarding costs and/or legal costs as sought by the Appellant Landlord as same are only awarded under the Act in exceptional circumstances and with the consent of the Board of the PRTB and having also regard to practice and precedent, the Tribunal does not deem this to be an appropriate case to award costs under Section 5(1) of the Act.

13. The tenancy was unlawfully terminated by the Respondent Tenant. Following the Respondent Tenant terminating the tenancy and vacating the Dwelling, the Tribunal finds that the Appellant Landlord failed to provide the Tribunal with sufficient evidence of the efforts made by him and/or on his behalf to mitigate his rental losses. However it is clear that the Appellant Landlord suffered some loss as a result of the sudden, unlawful and

unjustified termination of the tenancy agreement including costs incurred to advertise its re-letting and/or to make reasonable efforts, albeit unsuccessful efforts to secure a replacement tenant. Taking into consideration the fact the Appellant Landlord himself moved in to the Dwelling in April 2013, the Tribunal determines that the Appellant Landlord should be compensated the amount of three additional months rent loss, namely, €2,700 (€900 x 3). In the circumstances this is regarded as fair, appropriate and justified compensation.

#### **8. Determination:**

**Tribunal Reference TR1213-000530**

**In the matter of Timothy Fitzpatrick (Landlord) and Peter Buckley (Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:**

The Appellant Landlord shall pay the total sum of €800.00 of the entire security deposit in the sum of €4,000.00 to the Respondent Tenant within 14 days of the date of this Determination Order, being an award of €3,700.00 made in favour of the Appellant Landlord for loss of rent incurred in the sum of €2,700.00 and carpet replacement costs incurred in the sum of €1,000.00 having offset the award of damages of €500.00 awarded in favour of the Respondent Tenant resulting from the Appellant Landlord breaching of his statutory obligations, in respect of the tenancy of the Dwelling at 1 Corfree Court, Lough Gowna, County Cavan.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on 20/08/2014.

**Signed:**



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**Vincent P. Martin Chairperson**

For and on behalf of the Tribunal.