

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0119-003516 / Case Ref No: 0918-48363

Appellant Landlord:	Mona McGarry
Respondent Tenant:	Kenneth Togher, Aoife McGarry
Address of Rented Dwelling:	26 Smithfield Gate, Smithfield, Dublin 7, D07Y773
Tribunal:	Helen-Claire O'Hanlon (Chairperson) Finian Matthews, Louise Moloney
Venue:	Tribunal Room, RTB, 2nd Floor, O'Connell Bridge House, D'Olier Street, Dublin 2
Date & time of Hearing:	15 April 2019 at 10:30am
Attendees:	For the Appellant Landlord: Mona McGarry, Landlord Geraldine Keary, Keary Estates, Agent for Landlord Tim Dixon BL, Legal Representative for Landlord Dympna Devenney BL, Legal Representative for Landlord Eamon Keogh, Builder, Landlord's witness For the Respondent Tenants: Kenneth Togher, Tenant Aoife McGarry, Tenant
In Attendance:	Stenographers

1. Background:

On the 14th of September 2018 the Tenant made an application to the Residential Tenancies Board ("the RTB") pursuant to Section 76 of the Act. The matter was referred to an Adjudication which took place on the 8th of November 2018. The Adjudicator determined that:

The Respondent Landlord shall pay the total sum of €9,440.00 to the Applicant Tenants within 28 days of the date of issue of the Order, being damages of €9,440.00 for the consequences of the unjust deprivation of possession of the dwelling 26 Smithfield Gate, North King Street, Smithfield, Dublin 7 as a result of the failure of the Landlord to do the refurbishment or renovation works within a reasonable time after the service of the notice of termination.

Subsequently an appeal was received from the Landlord.

The RTB constituted a Tenancy Tribunal and appointed Helen-Claire O'Hanlon, Finian Matthews and Louise Moloney as Tribunal members pursuant to Section 102 and 103 of

the Act and appointed Helen-Claire O'Hanlon 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 the 15th of April 2019 the Tribunal convened a hearing at the Tribunal Room, RTB, 2nd Floor, O'Connell Bridge House, D'Olier Street, Dublin 2.

2. Documents Submitted Prior to the Hearing Included:

1. RTB File

3. Documents Submitted at the Hearing Included:

Air BnB listing. This was not originally submitted by the Respondent Tenants but they sought to admit it as rebuttal evidence against an issue raised in cross examination of their evidence and accordingly the Tribunal received it.

4. Procedure:

The Chairperson asked the Parties present to identify themselves and to identify in what capacity they were attending the Tribunal. The Chairperson confirmed that the Parties had received the relevant papers from the RTB in relation to the case and in particular that they had received the RTB document entitled "Tribunal Procedures" and had read and understood them.

The Chairperson explained the procedure which was normally followed; that the Tribunal was a formal procedure, but that it would be held in as informal a manner as was possible; that the Party who had referred the dispute, the Appellant Landlord, would be invited to present her case first; that there would be an opportunity for cross-examination on behalf of the Respondent Tenants; that the Respondent Tenants would then be invited to present their case, and that there would be an opportunity for cross-examination on behalf of the Appellant Landlord. The Chairperson explained that following this, the Parties would be given an opportunity to make a final submission. The Legal Representative for the Appellant Landlord submitted that the running order should be reversed as it was initially the Respondent Tenants' complaint, and the Respondent Tenants indicated they were happy to go in that order.

The Chairperson stressed that all evidence would be taken on oath or affirmation and be recorded by the official stenographer present and she reminded the Parties present that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of up to €4,000 or up to 6 months imprisonment or both. It was explained to the parties that an opportunity would be afforded for "without prejudice" discussions if the Parties felt that it was possible that an agreement might be reached.

The Chairperson also reminded the Parties that as a result of the hearing that day, the Board would make a Determination Order which would be issued to the Parties and could be appealed to the High Court on a point of law only [per s. 123(3) of the 2004 Act]. The Parties giving evidence were then sworn in.

5. Submissions of the Parties:

Submissions of the Respondent Tenants:

EVIDENCE OF KENNETH TOGHER, THE FIRST-NAMED TENANT:

The first-named Tenant gave evidence that the Appellant Landlord served a Notice of Termination on them on the 19th of September 2017 giving a termination date of 26th of March 2018. He said that on its face the Notice appeared to be valid, and therefore they did not dispute it. He said that it was very stressful and upsetting to have to move out, particularly as the rental market had become so expensive and there was a scarcity of available alternative properties.

The first-named Tenant said that they had not found alternative accommodation by the termination date but they were mindful that they had to move out by that date so they rented storage for their belongings and rented another property on a short term basis in Clonsilla. He said that this property was not available for a long term letting and that they wanted to live in the Dublin 7 area. He said that after some days they found another property in Smithfield which was comparable to the dwelling the subject of this dispute as it was a one-bedroom apartment with no balcony and no parking space. He said it was a bit more clean looking and the appliances and fixtures were in better condition but other than that it was basically the same.

The first-named Tenant said that he rented a car parking space separately which was near the dwelling under dispute. He said that the apartment faces onto the street, and has wall to ceiling windows, so it was possible to see what was going on in there when passing. He gave evidence that no work was done and nothing was changed in the property for several months. In or around August 2018 he said that he could see people were staying there. He said that at the time of the Pope's visit, when the whole area was closed off, he saw two young men leaning out the window smoking. He said that they were wearing shorts and t-shirts. He said that on another day he saw someone sitting inside with a laptop. He said that in September 2018, he saw that some work had been done because new blinds had been put up in the windows. He said that was within six months of the end of the tenancy. The first named Tenant submitted that even though nothing had been done in the dwelling for months, any works which were carried out had been completed within six months of termination and the dwelling was occupied by other people. He said that he could see as he was passing there every day that the curtains were pulled in the mornings and closed in the evenings, and the lights were on at night time.

In respect of the renovations which the Landlord had listed as having been carried out, the first named Tenant submitted that many items were listed as renovations when in fact they were necessary repairs which had not been carried out during their tenancy.

He gave evidence that for the first few years of the tenancy he had always dealt with the Landlord's husband. He said that he would come in person and collect the rent and the Tenants got on very well with him. He said the water pump in the hot press leaked in 2013 or 2014. He said that although the pump was replaced, he had shown the Landlord's husband that there was water damage under the flooring. He said that the carpet in the hall was damp and stained and the flooring and skirting boards showed signs of damage. He said that the flooring was marked and the paint was peeling on the skirting boards. He said that these issues were not repaired and he pointed out to the Landlord's husband a year or so later that it had got worse. He said that the floors were

misshapen, the boards had started to lift and separate and in fact created a trip hazard at the door saddle. He asserted, however, that the problems were still not repaired.

He said that the couch was in bad condition from the time they moved in. He said that the springs were gone in the couch and that this was raised with the Landlord but nothing was done about it. He said the couch deteriorated during the tenancy and was completely unusable in 2018. He said other issues in the property were that the toilet cistern would not refill properly after the water pump was replaced, and the oven door was cracked, causing heat to escape and making the handle of the oven door burning hot. Additionally he said that the hob was rusted and used to spark. He said that the S-bend of the kitchen sink was leaking which caused swelling and damage to the carcasses of the kitchen units. He said that they had to keep a bowl underneath the sink and empty it periodically. He said that the washing machine stopped working shortly before they vacated.

The first named Tenant gave evidence that there had been a dispute about an invalid rent review in 2015 which caused some tension in the relationship, so they did not make complaints after that. He said that they were happier to remain at the lower rent and not make a fuss.

He said that it was in or around 2016 when the Landlord's husband told him he wouldn't be dealing with the property anymore and that instead the Agent, Ms Keary, would be coming to collect the rent. He said that this took place for a while, and then the Tenants switched to direct lodgement of the rent.

He said they got an email from the Agent in or around June 2017 telling them that she had arranged for a Mr McCormack to inspect and survey the dwelling. He said that they were not told what the purpose of the survey was but he was in attendance when Mr McCormack came and he was taking measurements throughout the dwelling. He said that they had a discussion about the flooring, it was apparent that water had gone in underneath the whole floor as it was swollen and uneven, and in parts had completely lifted. The Tenant said that they felt it was likely the Landlord was considering ending their tenancy, and all of the faults and defects were brought to the attention of the Agent at that stage.

He said that it had been their intention to continue residing in the dwelling indefinitely, until they received the notice. Once they received the notice, they started preparing to leave but could not look for alternative properties too far in advance because it would have been unrealistic to ask potential landlords to hold a tenancy for months until they were ready to move.

In terms of costs incurred, the first named Tenant gave evidence that they had to pay €900 for one month on the short term let in Clonsilla. He said that they moved in there on the 26th of March 2018 when they had to vacate the dwelling. He said that they found a long-term property subsequently and signed a lease for that apartment on the 5th of April 2018, and moved in there on the 12th of April 2018. He said that the rent for that property was €880 per month higher than they had been paying in the dwelling. He submitted that it has been a huge burden to them to find an extra €880 every month.

He said that the storage which they had rented in "U Store It" cost €190 per month. He said that they had to take it for three months but accepted that in theory he could have reduced the storage cost to €110 per month if they had not taken their time to consider what items in storage were to be disposed of. He said that they had also had to rent a

moving van for two days at a cost of €240 which was not a cost he should have had to incur in 2018.

He stated that the dwelling had never been painted during the course of their tenancy until in 2015 they had painted it themselves. He said that the Landlord's husband had agreed a deduction from their rent for this. He said that it is clear from the before and after photographs that much of the works itemised in the Notice of Termination were not done. He said from the photographs it could be seen that the kitchen partition walls were removed and the kitchen units and appliances replaced, however these were all damaged and old in any event. He noted there were new tiles around the bathtub, but the bath, toilet and sink have not been replaced. He also noted that in the living area the laminate floor has not been replaced, only the floor of the kitchen area and the hall has been replaced with tiles and this was where the flooring was water damaged. He accepted there were new tiles in the kitchen and lighting and curtains, but he asserted that all the furniture is the same as before, including the couch he had complained about from the start of the tenancy.

The first named Tenant said that they were never given an offer of reinstatement when the works were completed, although he had sent the Agent an email (page 5 of case file 2) which included his work address, and that was where their deposit was posted back to. Similarly, he said that there had never been any offer to them of vacating temporarily to facilitate works.

In respect of the submission which had been made on behalf of the Landlord that they had delayed in returning the keys which had resulted in the delay in getting the building works started, the first named Tenant said that this was totally untrue. He stated that on the 26th of March 2018 the Agent texted asking were they moving out. He texted back to say he would call her later. The first named Tenant noted that they were entitled to the full 24 hours of the termination date to vacate. He said that he called the Agent on the 27th of March and again on the 29th of March 2018, trying to arrange to meet her to return the keys, but the Agent was unavailable. There were subsequent emails in that regard and the Tenant suggested making an appointment to return the keys but ultimately at the Agent's request he agreed to courier the keys back to her. He said that was on the 4th of April 2018. The first named Tenant said that it was nonsense to contend that the Landlord could not engage the builders because she did not know if the property was vacant. He said that they were gone by the 26th of March. He spoke to the Agent on the 27th and told her that they were gone. He said there was absolutely no delay caused by the Tenants, in fact any delay was because the Agent was too busy with her own house move to come and inspect or collect the keys.

In response to questions in cross examination, the first named Tenant accepted that he had not furnished contact details in writing within 28 days of receipt of the Notice of Termination but he said that at that time he was still residing in the dwelling, and so his contact details were the address of the dwelling. He said that he did not know what his address would be at the end of the tenancy because they had not yet found alternative accommodation, but when they vacated he sent an email to the Agent giving his address for correspondence. He said that the Agent and the Landlord had his phone number at all times.

It was put to the first named Tenant that he had made no attempt in the leadup to the termination date to confirm that they would be vacating the dwelling or arrange to return keys. He said that he did not need to confirm the termination date as it was the date on

the Notice. He said he had rung the Agent twice to try and return the keys and was open to suggestions as to when to meet but the Agent was too busy. He said she had made no attempt between the 27th of March and the 4th of April to collect the keys and so he had sent them to her by courier as agreed.

It was put to him that the electricity usage shown on ESB bills since the Tenants vacated would show that there was nobody living there. In response he stated that their usage when they resided in the dwelling would have been an average of €100 per month.

It was put to him that nobody has lived in the dwelling since the Tenants vacated. The first named Tenant responded that he saw people living there, that he saw the curtains drawn in the evenings and open again in the mornings. He said in addition, he has seen the dwelling advertised on Air BnB. He said that from the advertisements he could see it was the same dwelling as it was exactly the same furniture as when they had resided there. It was put to him that he had absolutely no evidence to support that contention, and at that point the Tenant sought leave to admit the Air BnB listing for the dwelling.

It was put to him that he had not made complaints in writing about maintenance issues in the dwelling until after he had vacated. He responded that the Landlord's husband and the Agent used to come in person to the dwelling so he had raised issues with them in person. He said he also notified the Agent and the builder, Mr McCormack, when he came to survey the dwelling.

EVIDENCE OF AOIFE MCGARRY, THE SECOND NAMED TENANT:

The second named Tenant gave evidence that it was a very stressful for them to have to vacate the dwelling. She said that they had endured great upheaval and anxiety and that it had been unnecessary because the dwelling had then been left idle for months. She stated that they had exceeded their income when they were trying to move, and had to pay rent for their temporary accommodation, rent for their new property and the storage space. She said that they had to use their savings for that, and it significantly depleted their wedding fund. She said that they now have to pay €1,750 per month for their new tenancy, when their original dwelling has been available and was not undergoing renovations.

The second named Tenant said that she also saw people living there. She said that she saw young men hanging out the window smoking. She said that she has seen the dwelling advertised on Air BnB and it is almost exactly the same as it was. She disputed that there were substantial renovations or refurbishments. She said the dwelling still has all the same furniture and the only works that were done were necessary upgrades to defective fixtures. She noted that the couch that the springs were gone in has not been replaced.

In respect of the notice of termination, she said that the works did not take anything like 6 months and that all that was done could have been completed within a few weeks. She said they would have happily facilitated that if they could remain in the dwelling.

In respect of costs and outlays, the second named Tenant gave evidence that they pay an additional €880 per month for rent in their new tenancy. She said the property the Respondent Tenants are now living in is equivalent to their former dwelling, save that the appliances are newer. She said that it is a one-bedroom apartment with no outdoor space, and is "like for like" but double the rent.

The second named Tenant said that they had to rent storage space in "U Store It". She said it was all very physically demanding and stressful. She said that they were haemorrhaging out money and that the dwelling was sitting empty for months. She said that they had to take a short term let in Clonsilla and had to pay the deposit and rent for that property which was €900 + €900 deposit (which was refunded). She said they had to pay for a month, although they were only there for a couple of weeks. She said that there was an overlap, and they had to absorb the cost. She said there was no contact from the Agent before the termination date to arrange inspection or handover of keys. She submitted that it is unfair to say they delayed giving keys back when they had tried a number of times.

In response to cross examination, the second named Tenant said that the first named Tenant had provided his contact details but that in any event, the Agent always had contact details for them both.

It was put to the second named Tenant that they didn't start looking for alternative accommodation until a month before they left. She responded that it is not possible to speculatively book accommodation months in advance and they could not try and secure another tenancy before March 2018. It was put to her that the Act provides for agreement to a shorter notice period with a Landlord, but the second named Tenant responded that they were not obliged to vacate until the 26th of March, and they complied with their obligations. As their rent doubled when they moved, she said it would have made no sense to move earlier and incur higher rent for a longer period.

CLOSING SUBMISSION:

In closing the Respondent Tenants submitted that they moved out on the basis that the Landlord truly intended to carry out substantial renovation works and that she intended that the works would be carried out promptly in line with what had been asserted in the Notice of Termination.

It was submitted that the Tenants were put under a huge amount of pressure and their wedding fund was significantly depleted, meaning that their wedding plans have been delayed. In particular, it was submitted that under their further Part 4 tenancy they would have been entitled to reside there at the lower rent until at least January 2019, which would have been an additional ten months at a rent of €870 per month rather than €1,750. They had accepted the bona fides of the Notice and had moved out promptly in accordance with it. They said that meant they incurred the cost of a short term let of €900 plus the cost of storage, although they said only the cost of one month, being €190, was attributable to the Landlord.

They submitted that the works should have been done in a timely fashion, instead it took five months and even then only a few weeks of work at a cost of €11,000 was carried out, most of which was repairs which should have been done during their tenancy. It was submitted that they had been put under a huge burden unnecessarily, and that there was no reason to require them to vacate if the Landlord did not in fact know what she wanted to do with the property.

The Tenants were referred to the provision under s.56(3) where a determination may be made that damages might be paid, or that tenants be permitted to resume occupation, or both, and were asked if their claim were upheld, whether they were seeking reinstatement. They confirmed that they were not seeking reinstatement, only damages as they were now bound by a fixed term tenancy in another property.

Submissions of the Appellant Landlord:

EVIDENCE OF THE LANDLORD'S AGENT, GERALDINE KEARY:

The Landlord's Agent gave evidence that her remit with regard to this dwelling was to let it in 2011. She said that she was never engaged to manage it, but had collected the rent from January 2017 onwards. She said that if there were repairs to be done, the onus was on the Tenants to contact the Landlord.

She said that she did prepare the Notice of Termination on behalf of the Landlord in September 2017 and also had to collect the keys from the Tenants at the end of the tenancy.

In respect of the works that were done in the dwelling following the tenancy, the Agent said that these were not solely repairs and that although the Tenants had mentioned the flooring when she went there, they had not told her about sparks from the hob or other defects. She said that she is qualified as a surveyor, highly qualified in Health and Safety and reports of sparks from the cooker would have caused her great concern and would not have gone unaddressed. She said that when she visited she would go in as far as the kitchen table. She said that she did not notice any trip hazard in the flooring and the water damage was only at the entrance door. She said that if she had been told about these things there would have been an onus on her to tell the Landlord.

In relation to the inspection in June 2017, she said that was not an inspection per se but rather the Landlord had asked her to go there with a builder that she did a lot of work with and to measure and assess the dwelling because she was thinking of having it upgraded. She said that Mr McCormack went around with a measuring tape but it was not an inspection of the condition of the apartment. She said that they decided to upgrade the kitchen units, get more energy efficient appliances, and replace the flooring. The apartment was built around 2000 and there had been no upgrade of these fixtures since then. She said the works were substantial renovations to upgrade the property and had nothing to do with any damage. In response to a question from the Tribunal as to whether she had any role in the scheduling of the start of the renovation works, she said no. She said that she had organised getting the quotation from Mr McCormack and had then returned the keys to the Landlord. When asked whether she had compiled the list of proposed works in the Notice of Termination based on an assessment of the condition of the dwelling, she said she did not spend much time looking at things in detail.

The Agent said that at the end of the tenancy, what should be a normal simple job, the handover of keys, became a big issue because of the actions of the Tenants. She said that she is a very busy person and operates on a paper diary with diaried appointments. She said if she is to meet someone she needs to have that diaried in advance, but that the first named Tenant had instead rung her on Easter Thursday evening, asking her to meet him at the dwelling, when she was nowhere near it. In advance of that, she had texted him on the 12th of March asking what date the Tenants would be moving out, but he replied that he didn't know yet and that he would let her know. Then on the 26th of March 2018, she had texted again asking would they be moved out that day and he replied to say he would be in contact later. She said that she found that very evasive.

In respect of the two phone calls which had been made by the first named Tenant on the 27th and 29th of March, she accepted that she had said she was busy moving house and moving her office. However, she said that she told the Tenant an appointment would have to be made and she could not attend at short notice. Following these phone calls, when

he emailed her on the 4th of April 2018, she said that she was too busy to be chasing keys and said that she had sent him a text asking him to courier the keys. She said she simply couldn't meet him because she was a very busy person. She said that she was hugely frustrated at that stage. She said that if the Tenants had dealt with her in a fair way and handed over the keys on the 26th of March they would have got their deposit back quicker. When asked by the Tribunal whether she had a usual process at the end of a tenancy she said that she did, that she would usually attend and take meter readings.

In relation to the works which were to be carried out in the dwelling, she said it was her understanding that the works started towards the end of July 2018. She said that although the works were scheduled to start on the 2nd of April 2018 when the tenancy had been terminated, this did not occur because the Tenants had delayed in returning keys.

In respect of the Tenants' assertion that the dwelling was occupied, she said that she did go into the dwelling in November 2018 and thought that she must have left the lights on. She said that the dwelling is so bright in the daytime and the recessed lights are so soft, that she did not notice that she had left the lights on. She said the dwelling was unoccupied at the time.

In relation to the energy usage, she referred to the electricity bills which she had submitted and stated that the meter readings were completely inconsistent with someone living in the dwelling. In response to a question as to whether the low energy usage would be consistent with people staying there for short periods as in Air BnB rentals, she said she could not comment in that regard. She was asked whether the dwelling was equipped for residential use when she visited and she said that it was; there was bedding on the bed.

It was put to her that she had prepared the Notice of Termination and the total figure for the proposed works of €30,000 was in no way consistent with the invoice for works actually done in Case File 1 for €11,000. She responded that it would be no surprise in a tendering process for different builders to come back with very different amounts for the same job.

It was put to her that of the six items of proposed renovation works in the Notice of Termination, none of them had been carried out in full, and one of them had not been done at all. She responded that the only remit she had was to arrange for Mr McCormack to do up the quotation and she had no role in the subsequent works which were done by Mr Keogh. She said that it was her understanding that the work is ongoing and that the Landlord still intends to install air-conditioning.

When asked whether she knew anything about the Air BnB letting of the dwelling she said no, that she did not do Air BnB lettings.

EVIDENCE OF THE LANDLORD'S BUILDER EAMONN KEOGH:

The witness said that he lives in Galway and an acquaintance of his asked him to have a look at an apartment which needed some work done in July 2018. He said that he met the Landlord towards the end of July because he was up in Dublin to watch a match in Croke Park. He said she went through what she wanted done and he gave her a rough budget estimate. He said that she agreed to that estimate and that he started work about a week later which would have been the start of August 2018. He explained that he was living in Galway and would have to stay in the dwelling and the Landlord agreed to this.

He said that he then tried to arrange a place to park near to the dwelling so he could get his van in to transport tools, materials or waste to and from the property. He said that he could not get a skip parked there so he had to remove everything piecemeal by hand. He said that there was substantial work to be done. He said that the kitchen was completely walled in and separated from the living area. He said that those partitions were knocked down and he rerouted all the wiring and re-plastered the walls and ceilings.

He said that all the flooring in the lobby and kitchen area was taken up and replaced with tiles. He said that the bathroom was wired for new heated towel rails, he installed recessed lighting, and re-tiled. He said that as the sanitary ware was still in good order so it was not replaced. He said also that he fixed a valve to resolve the problem with the water pressure to the toilet cistern.

He said the dwelling was a building site for about eight weeks and that as he had no storage for tools and materials they all had to be stored in the dwelling. He said it was completely uninhabitable and there would have been nowhere for the Tenants' belongings if they were still occupying the dwelling. He said that there were also times when there were no services as the water and electricity had to be switched off at different times during the works.

In respect of the floors in the living area, he said the laminate in that area was fine and so it was not replaced. He said that the Landlord did talk about installing air conditioning later on but he said he does not do that type of work anyway.

The witness said that he had keys and he stayed in the dwelling at the time. At the time of the Papal visit he said that his family came and stayed in the dwelling for the weekend. He said that they slept in sleeping bags on the floor and cleaned up afterwards. He said all of the heavy work had been completed at that stage and the dwelling was habitable again. He said that it must have been his family members who the Tenants saw in the dwelling at that time.

In response to cross examination he agreed that the works were finished within 8 - 9 weeks and that six months would have been unnecessary for what he did. He confirmed that he started work on the 5th of August 2018 and he agreed that by the time of the Pope's visit on the 25th and 26th of August 2018, he was able to bring his family to visit as the heavy work was done at that stage. He agreed that 19 days after he had started the heavy work was completed and the water had just been off for a few days.

EVIDENCE OF THE LANDLORD MONA MCGARRY:

The Appellant Landlord gave evidence that her husband had passed away in August 2017 and that she could not cope with the tenancy of the dwelling. She said that the Tenants had highlighted a problem with the water pump in 2013 and as far as she was concerned she thought it had been resolved. She said that her husband had always been very generous and accommodating to the Tenants. She said it was extraordinary to her that there was any issue as the Tenants had always been generously treated and had the benefit of low rent for a long time.

She gave evidence that she asked a builder who was recommended by the Agent to do a pricing schedule for proposed renovation works in September 2017. She said that when the Notice of Termination was served, there had never been any suggestion from the Tenants that they wanted to move back into the dwelling when the renovation works were

done. She said they never told her that so she had no idea there was any pressure on her to get the works done within six months.

The Landlord accepted that she had asked someone to rent the property out on AirBnB after the adjudication hearing, as she was not getting any income from the dwelling. She said all she received was two days income in December 2018. She said that was in circumstances where she had no idea the Tenants wished to return to the dwelling.

In respect of the start date for the renovation works, the Landlord said that by the time the keys had been returned the first builder was unavailable. She said there was by then a construction boom and he was not interested in starting before October. She said that she could not just hire another builder straight away to replace him as she would never deal with people who had not been recommended to her. She said the works are not completed to this day and she felt she should not have to account for it. She said she wanted to finish the works but nobody told her that she had to finish them.

When asked by the Tribunal about having served a Notice which stated that she intended to do the works, she said that she did intend to have them done but she could not get someone to do them. In relation to the works which remain outstanding, she said that she needs to install the air-conditioning and get wi-fi in the dwelling, but she has not the heart or the money to deal with it at this stage.

She was asked about whether there was anyone renting the property after the Tenants vacated, and she said there had been nobody, except for the Air BnB letting in December 2018. She said she could not be bothered with dealing with that and anyway the dwelling was not finished. She was asked what she intended to do with the dwelling once it was finished and she said she probably meant to sell it.

Under cross examination, the Landlord confirmed that she only discovered the first builder would not be available to start the works a couple of days before the Tenants were due to move out. She said there was some messing about the dates and the builder was not lined up. She said that then the builder wanted to get in before the Landlord was due to go away and that did not suit her as she was travelling abroad. The Landlord said that in any event all that was irrelevant because she had no idea the Tenants wished to return.

In respect of the Tenants' Part 4 tenancy, she said she could not offer the dwelling back to them because it was still not completed. She said that the delays in starting the works were because she could not find a builder that she trusted. She said that she had had no rent for a year, and when it was put to her that she could have had the Tenants' rent for that time, she said the Tenants had emailed the Agent with a list of complaints and that it seemed the dwelling was not good enough for them. It was put to her that she could have contacted the Tenants as she had their address but the Landlord said that she did not know what to do with the dwelling. She had only rented it out a few times and had then had it removed from AirBnB.

When asked whether she had at any point contacted the Tenants to suggest that they would vacate temporarily to allow the kitchen to be replaced and the flooring repaired, she said the Tenants could not have lived there while the works were ongoing as it would have been a health hazard, and she had not thought of asking them to move out temporarily to allow the works to be done. She said she did not believe there was any onus on her to do so.

CLOSING SUBMISSION:

In conclusion it was submitted on behalf of the Landlord that she was entitled to terminate the Part 4 tenancy pursuant to the Ground in s.34 that she intended to substantially refurbish the dwelling. It was further submitted that a Landlord is only required to re-offer a tenancy to the Tenants if the contact details condition has been complied with.

It was submitted that this means that a tenant who wishes to be re-offered the tenancy must notify a landlord in writing of the means by which he/she can be contacted within 28 days of service of the notice. Although the Tenants had furnished contact details after moving out, this did not comply with s.35(5).

It was further submitted that in any event the dwelling did not become available for re-letting within the period of six months and there was no advertising at all until December 2018. It was asserted that the termination of the tenancy was not to re-let the dwelling, and that AirBnB occupants are Licencees and are not Tenants.

In relation to the complaint of a breach of the termination procedure as provided for in s.56(3), it was submitted that the issue of whether the works were not done within a reasonable time did not arise as there was never a requirement to make an offer to re-let because the contact details were not provided.

It was submitted that the Landlord found herself in a situation where there was a delay in getting back the keys, a ten-day hiatus, and it would not be reasonable to expect a builder to enter a dwelling and start works in circumstances where tenants are still in occupation. It was asserted that a landlord needs unequivocal vacant possession and it was submitted on the evidence that this was not apparent to the Landlord. It was further asserted that the dwelling was clearly not suitable for occupation during the works and it was not reasonable or feasible when works of this nature are to be carried out to make such a proposal as a landlord could not guarantee when the works would be done.

In response to a question from the Tribunal as to unjust deprivation of a tenancy as provided for in Section 56 of the Act, it was submitted that this had not been made out on the evidence but even if it had, any damages for losses incurred must be limited to the time until the works actually did start, at the beginning of August 2018.

6. Matters Agreed Between the Parties

- The tenancy commenced on the 27th of January 2011
- The rent was originally €790 per month, which was increased during the course of the tenancy to €870 per month
- There were no rent arrears in respect of the tenancy
- The security deposit of €790 was returned at the end of the tenancy
- A Notice of Termination was served on the 19th of September 2017, giving a termination date of 26th of March 2018
- The grounds cited on the Notice were substantial refurbishment

7. Findings and Reasons:

Finding No 1:

The Appellant Landlord's termination of the tenancy was unlawful and the Landlord shall pay damages in the amount of €12,700 to the Respondent Tenants for the consequences of unlawfully terminating the tenancy and for the unjust deprivation by the Landlord of the Tenants' possession of the Dwelling.

Reason:

The tenancy in this case commenced on the 27th of January 2011. After six months in occupation, the Tenants acquired a Part 4 tenancy. From the 27th of January 2015, no Notice of Termination having been served upon them within the first six months, the Tenants acquired a further Part 4 tenancy. A Part 4 tenancy or further Part 4 tenancy may only be terminated for one of the Grounds set out in the Table to s.34 of the Act.

The Landlord served a Notice of Termination on the 19th day of September 2017 (during the further Part 4 tenancy) which indicated her intention to terminate the tenancy on the basis that she intended to substantially refurbish or renovate the dwelling in a manner which required the dwelling to be vacated for that purpose.

When relying on this reason for termination, and planning permission is not required, the notice of termination must contain or be accompanied by a statement in writing that complies, inter alia, with the requirements of s. 35(9)(b) of the Act. Section 35(9)(b) requires that the notice specifies the name of the contractor employed to carry out the works, and the dates on which the intended works are to be carried out. It also requires the proposed duration of the period, in which those works are to be carried out, to be stated.

The notice dated the 19th of September 2017 contained the various elements required by s. 35(9)(b) of the Act: It stated the nature of the works; stated that planning permission was not required; and provided information in relation to the offer to reoccupy.

The submission was made on behalf of the Landlord that the Tenants had not complied with the "contact details requirement" in that they had not notified the Landlord within 28 days from the service of the notice of termination of the means by which they could be contacted by the landlord so that the offer could be made to them. However, it should be noted that in fact s.35(5) provides that:

"the contact details requirement being complied with is...a requirement *(which shall be specified in the statement concerned)* [EMPHASIS ADDED] that the former tenant notify in writing the landlord—

(a) within 28 days from the service of the notice of termination concerned..... of the means by which he or she can be contacted by the landlord so that the offer concerned can be made to him or her, and

(b) as soon as practicable after any such change occurs, of any change in the means (as so notified) by which the former tenant can be contacted for that purpose."

The "statement concerned" is the statement which must be contained in the notice, or must accompany the notice, as provided for in s.35. In the instant case, the statement was contained in the notice, but it did not specify what requirement was meant by "the contact details requirement", as required by s.35(5). In addition, the Tribunal notes that in fact the Tenants had complied with paragraph (b) of that section, wherein they did "as soon as practicable" after a change occurred in their contact details, notify the Landlord in writing (through her agent) of that change of address.

The notice contained the requisite elements as set out in s. 62 of the Act. It gave more than the requisite notice period provided for in the table to s.66.

The Tribunal accepts that on its face the Notice of Termination appeared to be valid and the Tenants believed they had no reason to refer a dispute in respect of the validity of the Notice to the RTB in advance of their tenancy ending.

Ground 5 in the Table to Section 34 provides that the Landlord must intend to substantially refurbish or renovate the dwelling, and must intend to do so in a way which requires the dwelling to be vacated for that purpose.

It is clear from the wording of the Section that:

- (a) the Landlord must have the requisite intention;
- (b) the intention must be to substantially renovate and;
- (c) it must be necessary for the dwelling to be vacated for that purpose.

A Landlord is not entitled to terminate a Part 4 or further Part 4 tenancy unless there is a genuine reason for so doing. The works would have to be imminent at the date of termination, in order for there to be the requisite intention. The evidence of the Landlord and the Agent was that a quotation was obtained for works costing in the region of €30,077, which was included with the Notice in September 2017, but from the evidence given there does not seem to have been any follow up with that contractor or further scheduling of works in the run up to the termination date. Nobody was tasked with actually securing his involvement in starting the works upon the vacation of the dwelling. When the Tenants vacated on the 26th of March 2018 the evidence was that the builder was not available to do any of the works, and this was known by the Landlord in advance of their departure. The Landlord stated that it seemed the builder had not in fact been lined up, and then he wanted to start at a time when she was going to be out of the country. As a consequence of this, the dwelling was idle for a period of at least four months, until the Landlord met Mr Keogh.

In circumstances where the Landlord was clearly aware that the works would not be commencing on the 2nd of April, or indeed at any time in the near future, as she had no builder lined up at all, the requisite intention could not have existed. It was open to the Landlord at any stage to withdraw the Notice and notify the Tenants that in fact the works were not scheduled to take place as previously planned, but she did not do so. The Tenants accordingly took steps, in a very difficult rental market, to vacate on the scheduled termination date.

No works on the dwelling were started until in or around the 5th of August 2018. At that stage almost five months had passed. The works themselves, on the evidence of Mr Keogh, were substantially completed within 20 days, that is, by the time of the Pope's visit on the 25th of August 2018.

Section 56(1)(c)(iii) provides for circumstances where works are not done within a reasonable time after the service of the notice of termination OR where the landlord does not comply with the requirement to re-offer the tenancy and s.56 (2) provides that in those circumstances a tenant may make a complaint to the Board that they have been unjustly deprived of possession of the dwelling concerned by the landlord.

The Tribunal is satisfied on the evidence that the works were not done within a reasonable time after the service of the notice. In addition, the Tribunal is not convinced

that the works which were done could be described as substantial renovations as opposed to remedial works. In that regard it was noted that all the furniture remains the same, including a couch which had been damaged for the duration of the seven-year tenancy. Apart from the removal of a partition wall, the layout of the dwelling remains exactly the same. The laminate flooring in the living area is the same. The sanitary ware in the bathroom is the same.

It is clear that the flooring needed to be repaired long before the tenancy ended and the kitchen units and appliances were all past their useful life. In those circumstances, much of the works which were done amounted to necessary repairs, and do not meet the standard of substantial renovations.

It is apparent that, had the Tenants not been unjustly deprived of their tenancy in March 2018, they would have been entitled to remain in the dwelling at rent of €870 per month for at least the remainder of their further Part 4 tenancy, unless that amount of rent was lawfully increased. Having unjustly deprived the Tenants of their Part 4 tenancy, the Landlord is liable for the difference between their rent of €870 and the rent they have to pay in their new dwelling of €1,750 being an additional €880 per month for ten months until the 26th of January 2020.

The Tenants were conscientious in meeting their obligation to comply with the terms of the Notice of Termination and took all steps which were necessary to vacate on their termination date, namely the 26th of March 2018. The Tribunal accepts that the Landlord is therefore liable for the €900 which they paid for the short term letting of the property in Clonsilla. The Tribunal does not make any award in respect of the storage facilities, as these were incidental moving expenses which the Tenants would incur at the time of any lawful termination of their tenancy which may have occurred at the expiry of their Part 4 tenancy.

The Landlord is also liable for proportionate losses for the distress, anxiety and hardship the Tenants suffered as a consequence of the breach of obligations. The Tenants severely depleted their wedding fund, and their plans were consequently delayed, and they also suffered stress and anxiety due to the uncertainty in respect of finding alternative accommodation: Damages for these general losses is assessed in the sum of €3,000.

In total therefore, the Landlord is liable for a total sum of €12,700 made up of €8,800 overpayment of rent for ten months, €900 for the short term letting and €3,000 in general damages.

8. Determination:

In the matter of Mona McGarry (Appellant Landlord) and Kenneth Togher, Aoife McGarry (Respondent Tenants) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

The Appellant Landlord shall pay the sum of €12,700 to the Respondent Tenants within 35 days of the date of issue of the Determination Order, being damages for breach of landlord obligations in unjustly depriving the Respondent Tenants of their tenancy, in respect of the tenancy at 26 Smithfield Gate, Smithfield, Dublin 7.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 08/05/2019.

Signed:



Helen-Claire O'Hanlon Chairperson

For and on behalf of the Tribunal.