Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0422-005409 / Case Ref No: 1121-74121

Appellant Tenant:	Mandy Place
Respondent Landlord:	Patrick Neilan
Address of Rented Dwelling:	10 Ard Rí, Galway Road, Roscommon Town, Co. Roscommon, F42AC89
Tribunal:	John Keaney (Chairperson) Anne Leech, Elizabeth Maguire
Venue:	Virtual
Date & time of Hearing:	29 June 2022 at 2:30 p.m.
Attendees:	Mandy Place, Appellant Tenant Dermot Neilan, Egan Daughter & Co. Solrs., Tribunal Representative
In attendance:	Epiq Digital Logger

1. Background:

On 22/11/2021 the Tenant made an application to the Residential Tenancies Board ("the RTB") pursuant to Section 78 of the Act. The matter was referred to an Adjudication which took place on 23/03/2022. The Adjudicator determined that:

In the matter of Mandy Place [Applicant Tenant] and Patrick Neilan [Respondent Landlord], the Residential Tenancies Board, in accordance with Section 97 of the Residential Tenancies Act, 2004, as amended, determines that:

1) The Applicant Tenant's application, regarding unlawful termination/illegal eviction in respect of the tenancy of the dwelling at 10 Ard Rí, Ballingard, Galway Road, Co Roscommon is not upheld.

2) The Applicant Tenant's application, regarding deposit retention in respect of the tenancy of the dwelling at 10 Ard Rí, Ballingard, Galway Road, Co Roscommon, is not upheld.

Subsequently the following appeal was received by the RTB from the tenant on 13/04/2022. The appeal was approved by the RTB on 04/06/2022.

The RTB constituted a Tenancy Tribunal and appointed John Keaney, Elizabeth Maguire and Anne Leech as Tribunal members pursuant to Section 102 and 103 of the Act and appointed John Keaney to be the chairperson of the Tribunal ("the Chairperson").

On 07/06/2022 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 29/06/2022 the Tribunal convened a virtual hearing.

2. Documents Submitted Prior to the Hearing Included:

RTB Tribunal case files.

3. Documents Submitted at the Hearing Included:

3 Case Files.

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 with the Parties that they had received the relevant papers from the RTB in relation to the case and that they had received the RTB document entitled "Tribunal Procedures".

The Chairperson then explained the procedure which would be followed: that the Tribunal was a formal procedure but that it would be held in as informal a manner as was possible; the Appellant Tenant would be invited to present her case first; that there would be an opportunity for cross-examination for the Respondent Landlord; that the Respondent Landlord's Representative would then be invited to present the Landlord's case, and that there would be an opportunity for cross-examination by the Appellant Tenant. The Chairperson explained that following the evidence, the parties would be given an opportunity to make final submissions.

The Chairperson explained that all evidence would be taken on affirmation and be recorded by the digital logger present and he reminded the parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of up to €4,000 or up to 6 months' imprisonment or both. The Chairperson noted that the proceedings were being recorded by the appointed digital logger.

The Chairperson also reminded the parties that as a result of the hearing, 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.

The Chairperson indicated that the Tribunal would be willing to consider a short adjournment for the purpose of allowing the parties to try and negotiate a settlement or agreement of the dispute should the parties so wish. This was declined by one of the parties.

5. Submissions of the Parties:

Appellant Tenant's Case

The Appellant Tenant said that because she had been without "mod cons" she felt she had no alternative but to contact the Residential Tenancies Board ("RTB") for advice. She said she was of the view at the time that the Respondent Landlord had no intention of replacing them and he was insisting that the rent and the arrears be paid. She said that the RTB gave her advice with regard to terminating the tenancy if the Respondent Landlord did not fix the faulty appliances.

She said that after receiving the advice she contacted the Respondent Landlord's Representative to enquire as to where she should address her letter and was told to address it to a firm of solicitors, Egan Daughter & Co. She said that she sent a letter by

recorded delivery on 29 October 2021. A copy was not with the case files but she said that the Respondent Landlord's Representative acknowledged receipt of the letter. The letter stated that if the Respondent Landlord did not carry out the necessary repairs within 14 days that she would terminate the tenancy based on this default. As the repairs were not carried out she said that she served a Notice of termination on the Respondent Landlord dated 12th November 2021 which expired on 9th December 2021. She said that she had not wanted to terminate the tenancy without giving the Respondent Landlord the opportunity of remedying the situation. She said she was afraid the Respondent Landlord would change the locks on the dwelling without giving her the opportunity to remove her belongings, so after 14 days she started to remove her belongings, and with effect from 23rd October 2021 transferred the utility bills into the Respondent Landlord's name.

She agreed that she sent a WhatsApp message to the Respondent Landlord's Representative on 16th October 2021 advising that she was staying with a friend and moving her belongings into storage but, she said, she was still in the process of moving her belongings when the Respondent Landlord changed the locks. She said that this was before she was able to return the keys and meant she was unable to recover two antique chesterfield settees, which she estimated to be worth €2,000 and an expensive fitted carpet which had been purchased sometime before the renewal of the tenancy agreement in 2017. She said that she could have reused the carpet.

She agreed that she had sent emails to the RTB on 21st October 2021 advising that she was staying elsewhere, but said that this was because she had lots to organise in connection with her removal.

She said that her view was that the Respondent Landlord wanted her out of the property so that he could sell it and that the property was put on the market for sale very soon after she moved out.

She said that during the course of the tenancy she had replaced most of the furniture which is why she took it with her but that had the Respondent Landlord given her the opportunity, she would have replaced it with second-hand furniture that would have reflected normal wear and tear over the term of the tenancy.

When cross-examined on behalf of the Respondent Landlord, the Appellant Tenant said that she had met the Respondent Landlord's Representative twice during the course of the tenancy. She said that she had not allowed him to inspect the dwelling because the request was not done in a professional manner and the dates suggested were not convenient.

She accepted that the last rental payment made was the sum of €50.00 on 7th July 2021 and that she had not paid any rent since an Adjudication Hearing on 2nd September 2021, nor had she paid the arrears of €2,400.00 as ordered by the Adjudicator. She confirmed that she was in receipt of rent allowance all the while and had kept it to fund her removal.

She agreed that the property was fully furnished at the commencement of the tenancy as set out in the inventory furnished. She said that much of the furniture was broken and replaced and that the Respondent Landlord's Representative was aware of this as a result of his inspections of the dwelling.

She agreed that she had sent the Respondent Landlord's Representative a message via WhatsApp on 14th October 2021 stating that she was no longer in the property and that the contents were being removed imminently.

In her closing statement, the Appellant Tenant said that leaving the dwelling was a costly and stressful process as a result of which she had incurred a loss, including removal costs. She said she was denied the normal six months' notice a landlord would have to give if he wanted her to vacate so that he could sell the dwelling. She claimed she was "fast-tracked" out of the property by the Respondent Landlord so that he could sell it. She said that she had retained the rent to fund the removal which she had to do in less than 4 weeks because she was afraid the Respondent Landlord would change the locks which he in fact did. She said she was asking the Tribunal to compensate her for this.

Respondent Landlord's Case

The Respondent Landlord's representative, Mr. Dermot Neilan, gave evidence on behalf of the named Respondent Landlord. He confirmed that he was the joint-owner of the property with his son and that he was the person who had dealings with the Appellant Tenant in relation to the tenancy.

He said that no rent had been paid by the Appellant Tenant since 8th July 2021 to date and that, despite numerous requests, the Appellant Tenant had failed to allow the Respondent Landlord access to inspect the dwelling.

He said that on 14th October 2021 he received a message from the Appellant Tenant via WhatsApp stating that she was not residing in the property and that she was removing the contents. He said that at the same time she closed all the utility accounts that were in her name.

He said that after 14th October 2021 he visited the dwelling many times and there was no evidence that the Appellant Tenant was residing in the dwelling. He said he was concerned by this because she had not returned the keys. He said that when he eventually gained access to the dwelling he was astonished to see that all the contents had been removed without any explanation. He said that in relation to the two couches that the Appellant Tenant had left behind that he offered them to a local hospice but that they declined to take them once they saw how worn they were. He said that the fitted carpet referred to was purchased before 2017 and was a foam-backed carpet of inferior quality and would be of no value.

He said that he only secured the property because he was of the view that the Appellant Tenant had vacated. He accepted that he had not contacted the Appellant Tenant before changing the locks but said that this was because it was obvious to him that she had left; she had removed the furniture and closed the utility accounts. He said that the Appellant Tenant had left the property long before she had served the Notice of Termination.

He said that he had looked for the keys from the Appellant Tenant many times before he changed the locks on 12th November 2021. He referred to messages between him and the Appellant Tenant sent via WhatsApp on 24th October 2021 regarding the return of the deposit and the return of the keys on that date.

He said that when he received the Appellant Tenant's letter dated 29th October 2021 he knew that she had already vacated the property and so decided that there was no need to carry out the requested works. He said that he did respond by letter dated 17th November 2021 in which he pointed out to the Appellant Tenant the fact that she had already vacated the dwelling when sending her letter of 29th October 2021.

He said that he had no intention of selling the property at the time, but could not afford to keep it because of the loss of income.

When cross-examined by the Appellant Tenant, the Respondent Landlord's Representative said he was not sure how many tenancy agreements had been signed by the Appellant Tenant but believed it could have been three, with the last one being in 2017. He said that he had been happy for the Appellant Tenant to remain in the property had she continued to pay the rent. He did not agree that the Appellant Tenant had invested money in the property. He maintained that the Appellant Tenant had vacated voluntarily and had not been evicted. He agreed that the dishwasher was faulty due to the unavailability of a part but maintained that the service engineer had advised that the washing machine was in working order. He said that he had installed a new boiler in the property and had always undertaken any repairs requested by the Appellant Tenant.

In his closing statement, the Respondent Landlord's Representative stated that the Appellant Tenant had left the dwelling of her own accord. He said that she had taken all the furniture and had paid no rent. He said that she wasn't asked to leave and that had she continued to pay the rent she would have continued to have quiet enjoyment of the property. He said that the Appellant Tenant had no case.

6. Matters Agreed Between the Parties:

1. The rent is €750.00 per month and is due on the 3rd day of each month.

2. A deposit of €550.00 was paid by the Appellant Tenant to the Respondent Landlord at the commencement of the Tenancy which is still held by the Respondent Landlord.

3. The tenancy began on a date in 2014 and ended on 12th November 2021.

7. Findings and Reasons:

Having considered all of the documentation before it and having considered the evidence presented to it by the parties, the Tribunal's finding and reasons therefor are set out hereunder.

Finding 1: The Appellant Tenant's application regarding the unlawful termination of the tenancy is upheld.

Reasons:

1. The Appellant Tenant had the benefit of a Part 4 Tenancy under the Act.

2. Pursuant to s.58 of the Act, such a tenancy can only be validly terminated by a landlord or a tenant by means of a notice of termination that complies with Part 5 of the Act. The section specifically states that the tenancy cannot be terminated by re-entry or any other procedure not provided for in Part 5.

3. The Appellant Tenant sought to terminate the tenancy pursuant to s.68 in Part 5 of the Act on the grounds of a failure by the Respondent Landlord to comply with his obligation under s.12 (1) (b) (ii) of the Act. This subsection requires a landlord to repair and replace fittings as are, from time to time, necessary so that the interior and the fittings are maintained in, at least, the condition in which they were at the start of the tenancy.

4. The Appellant Tenant stated that the Respondent Landlord was in breach of this subsection because he failed to repair the dishwasher and washing machine in the dwelling and that, in compliance with s.68 (3) of the Act she served a notice on the Respondent Landlord notifying him of his failure and requesting that it be remedied within 14 days. She

said that when the repairs were not carried out within the 14 days that she then served a notice terminating the tenancy with effect from 9th December 2021.

5. Her case is that prior to the expiry of the notice, the Respondent Landlord unlawfully terminated the tenancy on 12th November 2021 by changing the locks.

6. She says that she suffered loss in two ways. First because she was unable to recover two settees and a carpet, and second because she had to incur the costs of the removal. She seeks compensation for these losses and for the stress and inconvenience of moving.

7. The Respondent Landlord's case is that as at 29th October 2021, when the Appellant Tenant sent the letter notifying him of the failure to effect repairs, she had already vacated the dwelling, had changed the utility accounts back into the name of the Respondent Landlord and had removed her and his furniture from the dwelling, with the exception of the two settees and the carpet referred to. The Respondent Landlord's case was therefore that as at 12th November 2021 he was entitled to take the view that the Appellant Tenant had surrendered the tenancy and he was therefore entitled to recover possession and change the locks for security reasons.

8. Pursuant to s.58 of the Act, as at 12th November 2021 the tenancy was still in being. The Appellant Tenant had complied with the requirements of s.68 of the Act and was entitled to terminate the tenancy by reason of the Respondent Landlord's failure to carry out the repairs. The notice of termination was served on 12th November 2021 and did not expire until 9th December 2021 which meant that the tenancy continued until 9th December 2021. The Tribunal accepts that the Appellant Tenant was not living in the dwelling as at 12th November 2021 and is of the view that she had no intention of returning there even if the Respondent Landlord had carried out the repairs pursuant to the notice dated 29th October 2021. The Appellant Tenant had not temporarily removed herself from the dwelling whilst awaiting repairs. She had changed the utility accounts back into the Respondent Landlord's name, she had removed all the furniture and all of her belongings (not just essential items or personal belongings necessary for a short absence from the dwelling), she had sent messages to the Respondent Landlord's representative stating that she was no longer living in the dwelling (not that she had moved out temporarily pending the repairs being carried out). There was inconsistency in relation to the date of one of the WhatsApp messages sent by the Appellant Tenant, but Case File 3 confirms that the message in question was sent on 16th October 2021 advising the Respondent Landlord that she was not living in the dwelling and that the belongings were being removed imminently. Nevertheless, the Tribunal finds that the tenancy of the dwelling was unlawfully terminated on 12th November 2021 by the Respondent Landlord in circumstances where the expiry date of the notice of termination had not yet passed and the Respondent Landlord by his own admission did not contact the Appellant Tenant to clarify her position immediately prior to changing the locks.

9. Pursuant to s.37 of the Act a landlord is entitled to deem a Part 4 tenancy terminated if a tenant has vacated the dwelling and on or before vacating the tenant serves a notice of termination that does not give the required period of notice and the tenant is in arrears. That section does not apply to this situation as both conditions referred to in the section need to be satisfied and in this situation the Appellant Tenant did give the required period of notice, being 28 days for breach of a landlord's obligation.

10. Pursuant to s.69 a landlord or a tenant may agree to a lesser period of notice being given than that required by s.68, but there was no evidence before the Tribunal that a lesser period of notice was agreed by the Appellant Tenant.

11. It is the Tribunal's view that the Appellant Tenant was not "fast-tracked" out of the dwelling as she asserted. It was the Appellant Tenant who initiated the procedure to terminate the tenancy. Had she wanted to remain in the dwelling she would have been entitled to do so until the Respondent Landlord served a valid notice of termination on her for non-payment of rent. There was no evidence to substantiate her claim that at the time she vacated the dwelling she was afraid that the landlord might change the locks before she had the opportunity to recover her belongings. No threats had been made by the Respondent Landlord to recover the dwelling. In fact, the Respondent Landlord's Representative had asked for keys to be returned. The Tribunal notes that the Respondent Landlord did in fact change the locks but this was after he having formed the view, without checking, that the Appellant Tenant had vacated and taken her belongings. The Tribunal's view is that the Appellant Tenant had already vacated the dwelling as at 12th November 2021 and did not suffer any inconvenience or loss as a result of the Respondent Landlord recovering possession as at that date. In those circumstances the Appellant Tenant has no claim for compensation for the stress, inconvenience and expense of vacating the dwelling.

12. Neither party adduced sufficient evidence in relation to the value of the contents of the dwelling that, in the case of the Appellant Tenant, say they were denied the opportunity of recovering, or, in the case of the Respondent Landlord, say were unlawfully taken by the Appellant Tenant and in the circumstances the Tribunal makes no award to either party for these claims.

13. Whilst the tenancy of the dwelling was unlawfully terminated on 12th November 2021, for the above reasons the Tribunal makes no award to the Appellant Tenant.

Finding 2: The Appellant Tenant's claim for the return of the deposit paid at the commencement of the tenancy is not upheld.

Reasons:

1. Pursuant to s.12 (1) (d) of the Act, at the termination of a tenancy a landlord is obliged to return promptly the deposit paid by the tenant. Subsection (4) provides that this obligation is subject to there being no rent arrears or no damage caused to the dwelling in excess of normal wear and tear.

2. On 2nd September 2021 an Adjudicator found that as at that date the Appellant Tenant was in arrears of rent in the sum of €2,400.00. The Appellant Tenant did not appeal that finding and so the award stands. The Appellant Tenant in her evidence accepted that she had not paid any amount of this award.

3. The Appellant Tenant also accepted that she had not paid any rent for the dwelling since the date of the Adjudication on 2nd September 2021. As at the date of the Tribunal therefore there are an additional 2 months and 9 days arrears of rent (for the period from 3rd September 2021 to 11th November 2021) amounting to €1,721.91, being €750 x 2 months plus €750 x 12 x 9/365 days.

4. The Tribunal accepts the Appellant Tenant's evidence that there was a continuous failure on the part of the Respondent Landlord to effectively repair the dishwasher and washing machine. The Adjudicator awarded compensation to the Appellant Tenant for this

up to the date of the Adjudication on 2nd September 2021 and the Respondent Landlord did not appeal this finding. For the period from 2nd September 2021 up to the termination of the tenancy the Tribunal awards the Appellant Tenant the sum of €200.00.

5. In the circumstance, as at the date of termination of the tenancy the Appellant Tenant owed the Respondent Landlord €3,921.91 for arrears of rent, being the €2,400 awarded by the Adjudicator on 2nd September 2021 plus €1,721.91 rent arrears to the date of this Tribunal less €200.00 for breach of landlord's obligation.

6. As there were arrears of rent that exceeded the amount of the deposit then pursuant to s.12 (1) (4) of the Act the Respondent Landlord was entitled to retain all of the deposit.

8. Determination:

In the matter of Mandy Place [Appellant Tenant] and Patrick Neilan [Respondent Landlord], the Tribunal, in accordance with Section 108 (1) of the Residential Tenancies Act 2004, determines that:

1. The Appellant Tenant's application regarding the unlawful termination of the tenancy is upheld.

2. The Appellant Tenant's claim for the return of the deposit paid at the commencement of the tenancy is not upheld.

3. The Appellant Tenant shall pay the total sum of €971.91 to the Respondent Landlord, in 11 equal consecutive instalments at the rate of €80.00 per calendar month, on the 28th day of each month, followed by one further instalment of €91.91 in the immediately succeeding month, commencing the next month after the issue of the Determination Order. This sum represents rent arrears of €1,721.91 for the period from 3rd September 2021 to 11th November 2021 having deducted the entire of the justifiably retained security deposit of €550.00 and having deducted €200.00 damages for breach of landlord's obligation, in respect of the tenancy of the dwelling at 10 Ard Ri, Galway Road, Roscommon, F42 AC89.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 05/07/2022.

Signed: Keaney.

John Keaney, Chairperson
For and on behalf of the Tribunal.