

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0422-005455 / Case Ref No: 0122-74950

Appellant Landlord: Daniel Toher

Respondent Tenant: Valerie Maillet

Address of Rented Dwelling: 89 Sorrento Road, Dalkey, Co. Dublin, A96XC64

Tribunal: Healy Hynes (Chairperson)
Karen Ruddy, Owen Donnelly

Venue: Virtual

Date & time of Hearing: 19 October 2022 at 10:30 a.m.

Attendees: Dan Toher (Landlord)
Martin Dowling (Landlord Witness)
Ken Togher (Landlord Legal Representative)
Valerie Maillet (Tenant)
Stacey Smith, Threshold (Tenant Representative)
Sheila O'Reilly, Threshold (Tenant Representative)

In attendance: Audio recording technician

1. Background:

On 17/01/2022 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 15/03/2022. The Adjudicator determined that:

"In the matter of Valerie Maillet [Applicant Tenant] and Daniel Toher [Respondent Landlord], the Residential Tenancies Board, in accordance with section 121 of the Residential Tenancies Act 2004, determines that:

1. The Respondent Landlord shall pay the sum of €250.00 to the Applicant Tenant for the breach of obligations pursuant to s.12(1)(a) and s.134 of the Residential Tenancies Act 2004 in respect of the dwelling at 89 Sorrento Road, Dalkey, Dublin, A96 XC64.
2. The Respondent Landlord shall pay the sum of €1,012.66 to the Applicant Tenant as part of the unjustifiably retained deposit in respect of the former tenancy at the dwelling above.
3. The Respondent Landlord shall pay the sum of €250.00 to the Applicant Tenant for unlawful termination of the tenancy pursuant to section 115(2)(d) of the Residential Tenancies Act 2004.
4. The Respondent Landlord shall pay the said sums to the Applicant Tenant within 14 days of the issue of the Determination Order."

Subsequently a valid appeal was received from the Landlord by the RTB.

The RTB constituted a Tenancy Tribunal and appointed Karen Ruddy, Owen Donnelly, Healy Hynes as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Healy Hynes 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 19th October 2022 at 10:30 the Tribunal convened virtually on Microsoft Teams.

2. Documents Submitted Prior to the Hearing Included:

RTB Tribunal case files.

3. Documents Submitted at the Hearing Included:

None.

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 PRTB document entitled "Tribunal Procedures".

The Chairperson explained the procedure which would be followed: that the Tribunal was a formal procedure but that it would be held in as informal a manner as was possible; that the person who appealed (the Appellant) would be invited to present his case first; that there would be an opportunity for cross-examination by the Respondent; that the Respondent would then be invited to present her case, and that there would be an opportunity for cross-examination by the Appellant.

The Chairperson explained that following this, both parties would be given an opportunity to make a final submission.

The Chairperson stressed that all evidence would be taken on affirmation and be recorded by the official stenographer present and he reminded the Parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of €4,000 or up to 6 months imprisonment or both.

The Chairperson also reminded the Parties that as a result of the Hearing that day, the Board would make a Determination Order which would be issued to the parties and could be appealed to the High Court on a point of law only [reference section 123(3) of the 2004 Act].

All parties giving evidence duly took the affirmation.

5. Submissions of the Parties:

Appellant Landlord's Case:

The Appellant Landlord's legal representative opened by saying that he acknowledged that Section 25 of the Act, applied in the tenancy, that the dwelling is one of two, combined in the same building. He stated that it was originally constructed as one unit and has since

been divided into two. The Appellant Landlord resides in one of the two dwellings and the Respondent Tenant was notified of this in advance.

It was their initial belief that the application of Section 25 excluded the entirety of the Act but it was now accepted that Section 3 of the act Applies.

The Appellant Landlord then opened his submissions. He stated that in or around mid-August 2021 he advertised the property for rent. He wanted to rent to one person as the friend he was sharing his dwelling with was ill.

Prior to the signing of the agreement with the Respondent Tenant, the Appellant Landlord advised the Respondent Tenant that it was a room rental agreement and the Residential Tenancies Act does not apply.

He continued in evidence that the building is of the format of a studio where he used to play music. The cottage in which he lives was extended to the rear and is joined by a wooden structure to the studio.

On 15th November 2021 the Appellant Landlord said he met with the Respondent Tenant to collect rent. At this time, he gave verbal notice in respect to a can of petrol being brought into the premises. He said he would begin viewings on 1st January 2022. The notice was served in hard copy by printing off the email contained on Tribunal Case File, 1 Page 52.

On questioning by the Tribunal, the Appellant Landlord said that it was still his position that the notice of termination was in compliance with the Act.

The Appellant Landlord said that he and the Respondent Tenant used the same kitchen at the back of the cottage and the Respondent Tenant had access to same via the open walkway. He continued to say that they also shared the same entrance to the side of the house.

The Appellant Landlord said that he took the Respondent Tenant on at the beginning of Covid regulations as she was a single tenant. There were to be less than two visitors to the property. He said that on moving in day the Respondent Tenant's boyfriend wanted to move in but he was only allowed at the weekends.

In respect to the Respondent Tenant's concerns in respect to the application of the RTB legislation, the Appellant Landlord said he told her to get legal advice. The "room rental agreement" was then signed.

He continued that after this the visitor situation changed and that over 7-10 weeks, he claimed 100+ people visited the Respondent Tenant. They were coming, according to the Appellant Landlord, for training as well as family & friends.

He said that the other resident became sick as a result of all the visitors and subsequently died.

The Appellant Landlord told the Respondent Tenant that he was unhappy with the way the other tenant was treated, in particular by two boys who visited for a training session.

After this incident, the Appellant Landlord said that he told the Respondent Tenant it was risky to have others in the property and to refrain from bringing in people. This, according to the Appellant Landlord, was not received well by the Respondent Tenant.

On 24th October the Appellant Landlord arranged to have a new wooden worktop installed in the property. During the course of this installation, the Appellant Landlord saw a red petrol can in front of the cooker and had his builder move it outside. This, he said was a

fire hazard. The following afternoon the Appellant Landlord said that he contacted the Respondent Tenant and advised her he had found the can and to not bring it back in. 48 hours later the Appellant Landlord said the can was still in the bin area under the gazebo. The Appellant Landlord said that he told the Respondent Tenant if the can was not removed, he would terminate the tenancy. As nothing happened, the Appellant Landlord drafted a warning letter as contained in Tribunal Case file 3 Page 6 and left it at the dwelling for the Respondent Tenant. He said that 12 hours later the can was gone.

The issue in relation to the two boys visiting the property occurred soon after this. The Appellant Landlord said he sought an apology from the Respondent Tenant for the matter and as this was not forthcoming, he terminated the tenancy by issuing the notice. This was done by sending an email on 16th November 2021 which was then printed off and left at the dwelling. The contents of said email are contained on Tribunal Case File 2, page 17.

In respect to the deposit retention, the Appellant Landlord said that as he was not allowed to view the property prior to termination so he therefore lost three weeks rent. He gave back half the deposit as a gesture of goodwill but his entire costs were €2,685. He went on to say that the rent included electricity, parking, broadband, bins and a cleaning service. He said he was also claiming for: -

Stains on the new worktop cost €550 to be fixed. (Tribunal case file 3 page 5). The Satellite system cost €250 to be fixed as cables had been cut.

There was a charge for overage of utilities, €27 ESB, €13 bins. €30 parking.

A WIFI charger never returned which cost €15 and he said cooker knobs had to be replaced at a cost of €23.00. He said halogen bulbs were supplied at the commencement of tenancy and on termination 3-4 bulbs were broken. He said the movers damaged a door frame when the Respondent Tenant's belongings were being moved.

The Appellant Landlord and his witness said that there was only one entrance to the dwelling and it was impossible for the Appellant Landlord to come in the old hall door.

The Tribunal member Karen Ruddy asked Mr. Dowling what his profession was to which he replied security consultant.

On cross examination by Stacey Smith, Respondent Tenant's Representative, the Appellant Landlord said the address of the property was 89 Sorrento Road. Reference was made to Tribunal Case file 1 Page 65 containing the Lease agreement which states "the studio", 89 Sorrento Road.

The Appellant Landlord said the genesis is that it started as a music studio and it would be the same as referring to it as bedroom 4.

Legal representative closing:

In closing the Appellant Landlord's legal Representative said that they had met threshold for Section 25 of the act. That the evidence of the Respondent Tenant in relation to the petrol can is inconsistent and if the Respondent Tenant's account is to be believed there was no conflict between the parties. He submitted that the rest of her evidence are allegations without proof. He concluded that his client's losses more than account for deductions, in fact he returned funds he did not have to, to the Respondent Tenant.

Respondent Tenant's Case:

The Respondent Tenant said the address of the dwelling is "The studio" 89 Sorrento Road, Dalkey, Dublin, A96XC64, Ireland and that the lease included alarm monitoring, agency cleaning, 3 months of broadband & residency parking permit, & security services. She said her boyfriend would visit at weekends. She said she had 4 visitors during the stay. She had no idea who Martin Dowling is.

In reference to the entrance, she said there is a wooden gate to side of the garden from the alley. The alley is her entrance.

She said the Appellant Landlord never mentioned covid restrictions during their negotiations on the tenancy and when they met, they did not talk about room agreements. Reference was made to Tribunal Case File 1, Page 70.

The Respondent Tenant said she was afraid to be homeless. She became worried when she was presented with the room rental agreement and did not know the law. She did not like the agreement but it was too late as the Appellant Landlord told her he had turned away others for the unit. She therefore signed the agreement. She immediately contacted Threshold who told her as the unit was self-contained, she was protected by the law.

This evidence was confirmed by the Threshold representative who referred to a colleague's notes.

The Respondent Tenant said her boyfriend visited & helped her move and she is allowed to see who she wants.

The Respondent Tenant said John was renting the studio inside which is also self-contained. She said he was also a tenant and there was another tenant of the Appellant Landlord in the property.

In relation to the allegation of 12-15 people a week visiting her she said this was an attack on her character. She said her boyfriend did bring a jerry can with him as he had a leak in his motorbike which required topping up. This can was empty when he got to her house. She confirmed bumping into the Appellant Landlord at the bins and that the can was removed straight away. She continued to say that there was no warning notice served. She said the notice of termination was served on foot of 2 boys coming to her to buy a mobile phone. She said the Appellant Landlord did not like the look of the boys. They had an argument at this time and the Respondent Tenant said she told the Appellant Landlord he was "interfering with her life." She said the Appellant Landlord told her he would "Think about this" and he then served the notice.

His behaviour she said was harassment. She referenced Tribunal Case File 1 which contained a reference from a past Landlord saying she was a quiet person.

She said that she did not do kids training sessions. In fact, all her sessions were then via zoom. The studio, she said, was soundproof as it was previously used for recording purposes.

In relation to deductions from her security deposit, she referenced Tribunal Case File 1. As regards the satellite box she said she never used it so why would she cut cables. She said she used a fire stick instead.

As regards the worktop, she referenced a video which she said shows no stains on the top.

She also referenced a text she sent the Appellant Landlord, on the day of leaving to come down and check if there is anything. She said the Appellant Landlord could have taken photos.

She said that in the day she left, she and a friend were waiting on the Appellant Landlord. Reference was made to videos on the case file.

In respect of electricity, she said there is one electricity meter for the property, located over the cooker and there was no gas meter.

In respect to parking, she said that she was advised free parking was included in the rent.

In respect to the bulbs, she said halogen bulbs last 3 years and if they blow it's not her problem.

In regards to the cooker knobs, reference was made to photos in Tribunal case File 1 which she said showed there were 2 missing at the start of the tenancy. She may have put another that came loose in a drawer.

In respect to beds, she said she brought her own as the advert said the property was empty. She clarified that there was no base or mattress when she moved in.

In short, she said the termination was invalid and requested return of balance of deposit.

She continued in evidence that the Appellant Landlord was letting himself into the property and she was scared. She tried to prove that the Appellant Landlord was accessing the apartment and went in when she was on holidays.

In relation to stains around the sink she said that if you put wood around a sink it can get stained - it can be poor quality.

In relation to a broken wardrobe mirror, she referenced a video showing the mirror intact.

In relation to damaged black stools she said that they had a chat about stools & the Appellant Landlord was going to replace them and she wanted to get rid of them.

She said that after the tenancy terminated, she moved into a friend's deceased mum's house. This was costing her €1,500 per month in Bray. Her work is on the southside of Dublin and she is now incurring more costs. She did get a good clientele being in Dalkey and she is anxious around her business now. She said that she lost 3 months' work, as a result of the termination, costing her €10,000. On questioning from the Tribunal, she said that she can't prove this.

She disputed the Appellant Landlord's claim for loss of rent.

Cross examination of Respondent Tenant:

On cross examination the Respondent Tenant said that she asked her boyfriend to move the petrol can as soon as she saw it. The Appellant Landlord asked if this was the case why did he serve a warning notice. She said that she saw it with the Appellant Landlord and he did not ask her to move it. They bumped into each other at the bins. In relation to other matters, she said that she contacted Threshold 1-3 days after. She stayed nice with the Appellant Landlord as she did not want to make things worse.

On being asked was she afraid of the cleaning lady the Respondent Tenant referenced texts saying this was part of the tenancy agreement but she did not request the cleaner.

There was a discussion around spy cameras which the Respondent Tenant said she placed in the property which the Appellant Landlord, she said deleted footage from. This happened when she was on holidays after the notice of termination was served.

Reference was made to Tribunal Case File 1 page 87 which the Appellant Landlord said shows alarm logs that he did not enter without permissions. The Appellant Landlord said he only entered with the cleaner and would have sent texts to advise on same.

Respondent Tenant Representative Closing Submission:

The Respondent Tenant's Representative said that the Respondent Tenant had exclusive use of the property and that the RTB had jurisdiction in the matter. She said that the covid allegations had never been brought up previously, that the Respondent Tenant brought her own mattress. She said that the Respondent Tenant was building a base of clients in Dalkey and now has none in Bray. Although she cannot prove €10,000 of losses, she is seeking €3,000, with her deposit back.

6. Matters Agreed Between the Parties:

The following matters were agreed between the Parties:

The address of the property is not agreed.

Tenancy commenced 16/09/2021.

The agreed rent at the start was €1895 per month payable monthly in advance.

Rent was inclusive of utilities - electricity, bins.

A deposit of €1,895 was paid.

A notice of termination was on served 15/11/21 giving 3 months' notice.

The tenancy terminated on 13th December 2021.

The landlord retains €1,012.66 of the deposit.

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 findings and reasons thereof, are set out hereunder.

Finding 1: The Tribunal finds that the RTB does have jurisdiction in this matter.

Reasons:

The Tribunal has examined the submissions of all the parties and finds that the dwelling in question forms a self-contained unit on shared grounds with the dwelling occupied by the landlord. The buildings are not connected to each other as an open gazebo type structure is what connects them. This, the Tribunal finds, is not sufficient to satisfy Section 3 of the Act.

Section 3(2)(g) of the act states that, subject to section 4(2), the act does not apply in a dwelling where: -

(g) "a dwelling within which the landlord also resides".

Section 4(2) states:

(2) The definition of "dwelling" in subsection (1) shall not apply in relation to the construction of references to "dwelling" to which this subsection applies; each such reference shall be construed as a reference to any building or part of a building used as a dwelling (whether

or not a dwelling let for rent or valuable consideration) and any out office, yard, garden or other land appurtenant to it or usually enjoyed with it.

The Tribunal finds that the Respondent Tenant in the matter had the right to peaceful and exclusive occupation of a separate dwelling as defined in the Act.

Finding 2: The Tribunal find that the Notice of Termination served on 15th November 2021 is invalid.

Reasons:

Section 25 allows a landlord to opt out of Part 4 of the Act. In that the protections extended to tenants as a consequence of this section do not apply. That section states:

“This Part does not apply to a tenancy of a dwelling where the conditions specified in subsection (2) are satisfied if the landlord of the dwelling opts, in accordance with subsection (3), for this Part not to apply to it.

(2) Those conditions are—(a) the dwelling concerned is one of 2 dwellings within a building, (b) that building, as originally constructed, comprised a single dwelling, and (c) the landlord resides in the other dwelling.”

The Tribunal finds that the residence of the landlord and that of the tenant, are separate buildings. Whilst they do sit on the same grounds, they are not connected to each other and cannot be construed as the same structure. The gazebo type structure that forms a connection between the two, the Tribunal finds, is not sufficient to satisfy Section 25 of the Act.

As Respondent Tenant did enjoy Part 4 protections therefore there was requirement for the landlord to provide grounds for termination. In addition, all other sections of the Act do apply, in particular Part 5, which sets out the requirements for a valid notice of termination.

This means that a landlord does have to have grounds for termination and is required to follow the protocols of the Act.

The Appellant Landlord in this matter was obliged to serve a valid notice of termination as set out in Section 62(1) of the Act wherein for a notice of termination to be valid it shall—

- (a) be in writing,
- (b) be signed by the landlord or his or her authorized agent or, as appropriate, the tenant,
- (c) specify the date of service of it,
- (d) be in such form (if any) as may be prescribed,
- (e) if the duration of the tenancy is a period of more than 6 months, F121[or the tenancy is a further Part 4 tenancy,] state (where the termination is by the landlord) the reason for the termination,
- (f) specify the termination date, that is to say, the day (stating the month and year in which it falls)—
- (i) on which the tenancy will terminate, and
- (ii) on or before which (in the case of a termination by the landlord) the tenant must vacate possession of the dwelling concerned, (and indicating that the tenant has the whole of the 24 hours of the termination date to vacate possession),

and

(g) state that any issue as to the validity of the notice or the right of the landlord or tenant, as appropriate, to serve it must be referred to the Board under Part 6 within 28 days from the date of receipt of it.

The notice as served on 15th November 2021 was not valid as it did not comply with these sections of the act, particularly it did not refer to the Respondent Tenant's right to refer the matter to the RTB.

Furthermore, the parties are referred to S.65(4) which at the time of service of notice stated that:

"If the duration of the tenancy concerned is less than 6 months, a period of notice of more than 70 days may not be given in respect of it." Therefore, regardless of whether the notice was valid in form and if the landlord had the right to serve a valid notice, the period in question was also not valid.

The Tribunal notes this particularly in relation to its powers under S.64(a) of the Act:

"On the hearing of a complaint under Part 6 in respect of a notice of termination, an adjudicator or the Tribunal, as the case may be, may make a determination that a slip or omission which is contained in, or occurred during the service of, the notice of termination shall not of itself render the notice of termination invalid, if he or she or it, as the case may be, is satisfied that—

(a) the slip or omission concerned does not prejudice, in a material respect, the notice of termination, and

(b) the notice of termination is otherwise in compliance with the provisions of this Act."

As the notice was invalid for a number of reasons, the Tribunal finds that this is not an appropriate matter in which to apply the slip rule.

Finding 3: An invalid termination of tenancy took place on 13th December 2021.

Reason:

As set out in Finding 2, the notice of termination served by the landlord was invalid. Therefore, the Respondent Tenant in this matter moved out on foot of an invalid notice, therefore an invalid termination of the tenancy was carried out by the Appellant Landlord.

The Tribunal finds that damages in the amount of €1,000 are appropriate in the matter as the Respondent Tenant incurred such costs as a result of the invalid termination. Particularly the Respondent Tenant's business was substantially interfered with and her new residence is farther from the market she was looking to service in the environs of the tenanted dwelling.

Finding 4: The Appellant Landlord is in breach of obligations in failing to repay deposit.

Reasons:

A landlord is required under S.12(1)(d) to:

"Subject to subsection (4), return or repay promptly any deposit paid by the tenant to the landlord on entering into the agreement for the tenancy or lease".

Where Subsection (4) states:

"No amount of the deposit concerned shall be required to be returned or repaid if, at the date of the request for return or repayment, there is a default in—

(i) the payment of rent, or any other charges or taxes payable by the tenant in accordance with the lease or tenancy agreement, and the amount of rent or such other charges or taxes in arrears is equal to or greater than the amount of the deposit, or

(ii) compliance with section 16(f) and the amount of the costs that would be incurred by the landlord, were he or she to take them, in taking such steps as are reasonable for the purposes of restoring the dwelling to the condition mentioned in section 16(f) is equal to or greater than the amount of the deposit”.

The landlord retained an amount of €1,012.66 from the deposit paid, therefore the Landlord must demonstrate that there were breaches of tenant obligations equivalent, or greater than €1,012.66 at the time.

The accounting referred to by the Appellant Landlord is as follows:

Advertising€100

Thomas €550 (Worktop stripping removal of deep staining & Reapplication of sealer Replacement of Broken thermostat replumbing heating.

Wardrobe repair TV reseal holes & Painting IBS Material.....€51.59 (Thermostat €15.87, €13.80 castors Tec7 €13.15 €8.77 Worktop & TV)

16 Days Loss of Rent Insufficient Notice... €978

Residency Parking Credit 40-10 (3 months).

WIFI Plug Charger removed NOT returned....€15

Gary (Satellite Cable cut Reinstall)....€250 Excess of €177.85- €150 Electricity Credit ...€27.85

Excess of €58.67 -€45 Bin Credit.....€13.66

E Spares 1 Kitchen Hob Button.....€12 Costello's Halogen Bulbs. /Mat.....€40.25 Costello's Sealer for worktop repair..... €30.

As the termination of the tenancy was invalid any costs associated with finding a new tenancy are not a consequence of any tenancy actions. Nor was any “loss of rent” accrued by the landlord.

The Tribunal finds that light bulbs are consumables and not a consequence of tenant breach of obligations.

In relation to costs associated with the worktop, no sufficient evidence was submitted that the condition was one requiring works to remedy.

In relation to excess electricity and bins, the Tribunal finds the deductions are not valid as special condition 11 in the lease relates to overage of costs associated with same. No such independent breakdown of costs was provided by the landlord.

The Landlord shall therefore refund the balance of deposit in the amount of €1,012.66.

The Tribunal finds that damages in the amount of €500 are appropriate for the invalid withholding of said deposit.

8. Determination:

In the matter of Daniel Toher (Appellant Landlord) and Valerie Maillet (Respondent Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

1. The Appellant Landlord shall pay the sum of €2,512.66 to the Respondent Tenant within 14 days of the date of issue of the Determination Order being the sum of €1,000 for unlawful termination of tenancy, the balance of unlawfully retained deposit in the amount of €1,012.66 along with €500 damages for unlawfully retaining the deposit in respect of the tenancy of the dwelling at 89 Sorrento Road, Dalkey, Co. Dublin, A96 XC64.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 08/11/2022.

A handwritten signature in black ink, appearing to read 'Healy Hynes', written over a horizontal line.

Signed:

Healy Hynes, Chairperson

For and on behalf of the Tribunal.