

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0519-003731 / Case Ref No: 0319-52893

Appellant Landlord:	Cornelius Murphy
Respondent Tenant:	Saidur Rahman
Address of Rented Dwelling:	72 Cahernane Meadows, Muckcross Road, Killarney, Co. Kerry, V93D3H7
Tribunal:	Anne Leech (Chairperson) John Keaney, James Egan
Venue:	Committee Room 1, Cork City Council, City Hall, Anglesea Street, Cork
Date & time of Hearing:	02 July 2019 at 2:30pm
Attendees:	Cornelius Murphy, Appellant Landlord Saidur Rahman, Respondent Tenant
In Attendance:	Stenographers

1. Background:

On 11/03/2019 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 11/04/2019. The Adjudicator determined that:

The Respondent Landlord shall pay the total sum of €6,700.00 to the Applicant Tenant within 28 days of the date of issue of the Order, being damages in the sum of €5,000.00 for the unlawful termination of the tenancy, plus the unjustifiably retained security deposit of €800.00, plus damages in the sum of €400.00 for breach of landlord obligations in failing to return promptly the deposit and damages of €500.00 for failure to comply with landlord obligations under the Housing (Rent Book) Regulations 1993, as amended, in respect of the tenancy of the dwelling at 72 Cahernane Meadows, Muckcross Road, Killarney, Co Kerry, V93D3H7.

Subsequently an appeal was received from the Landlord.

The RTB constituted a Tenancy Tribunal and appointed Anne Leech, John Keaney, James Egan as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Anne Leech 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 02/07/2019 the Tribunal convened a hearing at Committee Room 1, Cork City Council, City Hall, Anglesea Street, Cork.

2. Documents Submitted Prior to the Hearing Included:

1. RTB File

3. Documents Submitted at the Hearing Included:

None.

4. Procedure:

The Chairperson asked the Parties to identify themselves and to identify the capacity in which they were attending the Tribunal. She asked the Parties to confirm that they had received the relevant papers from the RTB and that they had received the RTB 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 party who appealed the decision of the Adjudicator to the Tribunal, the Appellant Landlord would be invited to present his case first; that there would be an opportunity for cross-examination by the Respondent Tenant; that the Respondent Tenant would then be invited to present his case, and that there would be an opportunity for cross-examination by the Appellant Landlord. 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 oath or 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 is an offence punishable by a fine of up to €4,000 and/or up to 6 months imprisonment or both.

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

The Chairperson also informed the Parties that if it seemed that they might be able to resolve their dispute by agreement, the Tribunal would facilitate any such negotiations however their efforts did not resolve matters. The Parties giving evidence were then sworn in.

5. Submissions of the Parties:

Appellant Landlord's submissions:

The Appellant Landlord said the Respondent Tenant owed arrears of rent and that the last time he received payment was 10th September 2018. When questioned by the Tribunal he confirmed the rent during the tenancy had been paid in cash, monthly in advance. He said he usually called to the dwelling to collect it. He said he did not make a formal record of the payments he had received and he did not give receipts to the Respondent Tenant.

The Appellant Landlord claimed the rent went in to arrears in or about 19th September 2016. He said some payments were made after this time. He said his Solicitor had sent a registered letter to the Respondent Tenant on 16th May 2018 seeking payment of the

arrears. When questioned by the Tribunal about the District Court Decree for rent arrears of €1,650 dated 9th January 2018 contained in the RTB case files, he said his Solicitor had issued the paperwork for this. When it was put to him by the Tribunal that it was not possible for District Court proceedings to be issued for arrears of rent under €20,000, that the District Court Decree was procedurally incorrect and that his case for rent arrears should have been lodged with the RTB, he said his Solicitor had issued the paperwork. He said he never recalled signing an Affidavit of Debt in the case. He claimed arrears of rent of €5,350 were also owed from August 2018 to 1st March 2019 the date the Tenant vacated the dwelling. He said this was calculated as €750 for seven months. When asked by the Tribunal for proof of the total rent arrears, the Appellant Tenant said he had handwritten slips of papers with various dates and amounts of payment. He said his wife had completed this record. He admitted he found it hard to follow the details on it. When asked by the Tribunal, the Respondent Tenant said he did not consent to entering the slips of paper in to evidence. When asked by the Tribunal, the Appellant Landlord said he did not have bank records of the rent payments as the rent was always paid by cash in hand and that was the agreement he had reached with the Respondent Tenant. He referred to texts seeking payment of the arrears of €5,250 which he had sent to the Respondent Tenant and which were contained in RTB case file 2. He claimed this was proof that The Respondent Tenant owed arrears of rent.

When asked about the events preceding the departure of the Respondent Tenant and his family from the dwelling, the Appellant Landlord said that the Respondent Tenant had been ready to leave as the electricity in the dwelling had already been disconnected due not paying electricity bills. He said he went to the dwelling on 28th February 2019 seeking payment of rent arrears. He said the Respondent Tenant's wife let him into the dwelling but the Respondent Tenant was not there. He said he asked her when she would be leaving the dwelling and he said that she had said they would be gone in two hours. He said he came back two hours later, she was packing up and the Respondent Tenant was not present. When he came back two hours later he said it was in the evening and it was dark. He said the Respondent Tenant was in the dwelling. He said the Respondent Tenant ran after him with a hammer after he had been asked by him for rent money. He said the Respondent Tenant asked him for the return of his deposit. He said he ran out of the house and called the Gardai. When the Gardai arrived he said he went back into the dwelling and informed them that he was not leaving until he got his money from the Respondent Tenant. He said the Gardai brought the Respondent Tenant in to the kitchen and after some time they returned and informed him that the Respondent Tenant and his family would leave the dwelling. He said he agreed with the Gardai that they could stay that night in the dwelling and be gone from it by 6pm next day. He said the next day he saw the Respondent Tenant drive away from the dwelling and he had received no payment from him. When questioned by the Tribunal the Appellant Landlord said he did not recall if he had sent the Respondent Tenant a Notice of Termination at any stage.

In addition, the Appellant Landlord claimed the Respondent Tenant had on one occasion changed the locks on the dwelling without his prior consent. He said he discovered this when he went to the dwelling to decorate it while the Respondent Tenant was away even though the Respondent Tenant had asked him not to come in to the dwelling while he was away.

The Appellant Landlord claimed the Respondent Tenant had also sub-let the dwelling. He referred to newspaper advertisements contained in the RTB case files as proof of this. He

said he had attended the dwelling on one occasion when the Respondent Tenant was not there. When he went inside he claimed a third party in the dwelling asked him who he was. He said he asked the same question of the third party who replied that he was renting a room in the dwelling from the Respondent Tenant. When questioned by the Tribunal the Appellant Landlord said he did not make an issue of it with the Respondent Tenant at the time and he then informed the Tribunal that he was not going to make a claim about it now.

Under cross-examination by the Respondent Tenant, the Appellant Landlord confirmed that he had never given the Respondent Tenant a receipt for rent payments. He also agreed that some payments had been made when the Respondent Tenant's wife attended where his, the Appellant Landlord's, wife worked and handed her the rent. When further questioned, he agreed that he had been asked by the Respondent Tenant for his bank details but he agreed he had never given them to him as he said that the agreement he had reached with the Respondent Tenant was that the payments would be cash in hand. He also claimed he had only been asked for his bank details after the Respondent Tenant stopped paying rent.

Respondent Tenant's submissions:

The Respondent Tenant claimed that when he vacated the dwelling there was no rent outstanding. He confirmed the cash in hand payments of the rent during the tenancy and the payments by his wife attending the place of work of the Appellant Landlord's wife. He said he had asked for the Appellant Landlord's bank details some years prior to the time the Appellant Landlord had said the request was made of him. He said the response by the Appellant Landlord was that the rent was to be paid cash in hand only. He said he was a taxi driver, was married and had three children aged 13, 12 and 5 years. He said he was not in receipt of rent supplement. He claimed that the Appellant Landlord would not allow him get rent assistance as the latter would not sign the application papers. He also claimed that the Appellant Landlord had wanted him out of the dwelling so that he could get higher rent from new tenants.

The Respondent Tenant said that when he received the letter of demand in May 2018 from the Solicitor for the Appellant Landlord he wrote back to her denying the claim. He said he sought from her proof of the claim. He said in November 2018 the Appellant Landlord's wife came to the dwelling aggressively demanding arrears of rent. He said she had informed him that he would have to leave the dwelling and it would be his last month in it. He said he had received the District Court proceedings but said he had not responded to them. He said for the last two years he had been looking for some place else to live.

The Respondent Tenant referred to the events of 28th February 2019. He said he received a telephone call from his wife that she was at home with their 5 year old daughter in the kitchen when the Appellant Landlord entered the dwelling with two men who changed the locks of the dwelling. The Appellant Landlord told her that she and her family must leave the dwelling. He said he subsequently came back to the dwelling and the Appellant Landlord was not there. He said the Appellant Landlord returned with two men. He said the Appellant Landlord was looking for his money and would not leave until he got it. He said he asked the Appellant Landlord for the return of his deposit. He said he did not have a hammer and did not chase the Appellant Landlord with a hammer. He said he called the Gardai who came and told him it was a civil matter. He said one of the Gardai who was a Sergeant reached an agreement with the Appellant Landlord that the

Respondent Tenant and his family would leave the dwelling the next day no later than 6pm. He said he told the Sergeant that he wanted more time to search for a new dwelling but the Sergeant had said "no". He said they stayed the night in the dwelling with the new locks on it. He said the next day, 1st March 2019, with his family they packed their belongings, some of which they put in a neighbour's house. He said he telephoned a homeless service which in turn contacted the Appellant Landlord and he confirmed that the Respondent Tenant had to leave the dwelling. He said the homeless service arranged accommodation for him and his family in a B&B in Tralee for two nights which was during a weekend. He said he told the homeless service that his three children were in three different schools in Killarney and they would need to live there. He said a small apartment was found for them in Killarney. He said he was currently looking for a bigger dwelling to live in.

Under cross-examination by the Appellant Landlord, the Respondent Tenant said that he had informed the Gardai on 28th February 2019 when they were in the dwelling that the rent was up to date. He admitted the rent had been late on one occasion before he went on holidays. Also at that time he said he had been asked by the Appellant Landlord for the key to the dwelling. The Respondent Tenant said he changed the locks of the dwelling as he did not want the Appellant Landlord going in to the dwelling when he was away. He said he had informed the Appellant Landlord that he was not to go in to the dwelling when he was away. He said that the reason he left the dwelling was not due to rent arrears. He said he left as the Appellant Landlord wanted him out to get a higher rent from new tenants.

The Appellant Landlord confirmed, when asked by the Tribunal, that he had changed the locks of the dwelling on 28th February 2019 when he called to the dwelling and the Respondent Tenant was not present. He said he did this as the wife of the Respondent Tenant said they would be leaving the dwelling within two hours. He also confirmed that he had not lodged a previous case with the RTB. He said he had contacted the RTB when the rent initially went in to arrears. He said he also contacted his Solicitor.

6. Matters Agreed Between the Parties

The tenancy commenced on 1st November 2008.

The rent was €750 per month. It was €800 per month in the first two years of the tenancy.

The security deposit was €800 and is retained by the Appellant Landlord.

The Respondent Tenant and his family vacated the dwelling on 1st March 2019.

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 therefor, are set out hereunder.

Finding 1: The Tribunal finds the claim for rent arrears by the Appellant Landlord in this case is not upheld.

Reasons: There was insufficient evidence provided by the Appellant Landlord to prove his claim for rent arrears, which claim was denied by the Respondent Tenant. The Tribunal saw that he had handwritten slips of papers with various dates and amounts of payment

which he said his wife had completed. Apart from the fact that the Respondent Tenant did not agree to accept this in to evidence as it was only produced at the Tribunal, the fact is that the Appellant Landlord's wife was not there to confirm the contents even though it was stated in a note by him to the RTB in case file 2 that she would attend the proceedings.

In addition, the Appellant Landlord admitted he found it hard to follow the details on it. The Tribunal also notes that the Appellant Landlord's evidence that he did not provide receipts for the rent payments. He also said he had no bank records of the rent payments as the rent was always paid by cash in hand. He said this was the agreement he had reached with the Respondent Tenant. There was a conflict of evidence between the parties as to when the Respondent Tenant sought bank details of the Appellant Landlord. The date is irrelevant in circumstances where the Appellant Landlord's response to the request was that the rent was to be paid in cash only. While he referred to his texts seeking payment of the arrears which he said he had sent to the Respondent Tenant, this is also not sufficient evidence to prove his claim. In evidence the Appellant Landlord said he filed tax returns for the rent. In the absence of any other tangible proof perhaps he could have used his tax returns to assist with and possibly prove his computations. As he is seeking arrears of rent he has to prove his case to the satisfaction of the Tribunal. As the rent was paid in cash at his request, not receipted and not documented the Tribunal is not satisfied he has proved his case.

Moreover, prior to the involvement of the RTB in the case between the parties the Tribunal notes in the RTB case files the previous procedure used by the Appellant Landlord to claim arrears of rent. A warning letter was sent by the Appellant Landlord's Solicitor dated 16th May 2018 to the Respondent Tenant seeking arrears of rent. The next action taken by/on behalf of the Appellant Landlord for rent arrears was the issue of District Court debt recovery proceedings and service of them on the Respondent Tenant by letter dated 19th September 2018. The proceedings also sought recovery of possession of the dwelling. A District Court Decree was obtained in respect only of rent arrears. It was sent to the Respondent Tenant by the Solicitor for the Appellant Landlord on 11th January 2019 who said in her letter that the Judgement Decree was "in respect of rent arrears due and owing and possession of the property". In the Solicitor's letter to the RTB dated 8th April 2019 it was also stated that the "matter has been referred to the Sheriff for enforcement". This letter was sent in advance of the Adjudication hearing on 11th April 2019.

Section 182 of the Residential Tenancies 2004 as amended ("the Act") provides that proceedings may not be instituted in any Court in respect of a dispute that may be referred to the RTB for resolution under the Act unless the claim exceeds €20,000. The claim by the Appellant Landlord for arrears of rent did not exceed €20,000. It was procedurally incorrect on the part of the Appellant Landlord and or his Solicitor to issue the District Court Debt recovery proceedings. The claim should have been lodged with the RTB. In this regard, the Tribunal notes the evidence of the Appellant Landlord that he contacted the RTB when the rent initially went in to arrears, which from his evidence was in or about 19th September 2016. The Tribunal finds it incongruous that the Appellant Landlord contacted the RTB on the matter of rent arrears yet the path on which he proceeded to attempt to initially claim and collect them was through the Courts and the Sheriff and not the RTB.

Further, while the Appellant Landlord sought recovery of the rent arrears through the RTB (which he was entitled to do) it was the Respondent Tenant who initiated the RTB procedure by making his claim that the tenancy was unlawfully terminated. From the RTB case files it appears the District Court proceedings were not responded to by the Respondent Tenant. The Tribunal notes however that it was the second occasion for the Respondent Tenant to have the same complaint made against him. The Tribunal also notes that the Respondent Tenant made his claim to the RTB on 7th March 2019 which was received by it on 11th March 2019. Yet the Solicitor for the Appellant Landlord in her letter to the RTB dated 8th April 2019 said the “matter has been referred to the Sheriff for enforcement”. It is clear to the Tribunal from this that the Appellant Landlord was seeking to have the District Court Decree enforced during the RTB process which had not at that juncture been adjudicated upon. The Tribunal believes that on the face of it there is an abuse of process by or on behalf of the Appellant Landlord and it is noteworthy that his Solicitor did not attend the Adjudication and the Tribunal hearing.

Finding 2: The Tribunal finds that the tenancy was unlawfully terminated by the Appellant Landlord and awards the Respondent Tenant damages in the sum of €7,500.00.

Reasons:

The Appellant Landlord according to his evidence did not recall serving a Notice of Termination on the Respondent Tenant. There was no Notice of Termination in the RTB case files. There was in the RTB case files a warning letter dated 16th May 2018 sent by the Appellant Landlord's Solicitor to the Respondent Tenant seeking arrears of rent. The letter did not refer to service of a Notice of Termination if the arrears were not paid. The next actions taken by/on behalf of the Appellant Landlord are as set out in the second paragraph of the reasons for Finding 1. The District Court Decree did not, as claimed by the Appellant Landlord's Solicitor in her correspondence, order possession of the dwelling. From the RTB case files it appears there was tension between the parties after the service of the District Court proceedings. After the District Court Decree was served on the Respondent Tenant by letter dated 11th January 2019, there was an incident in or about 18/19th February 2019 regarding an alleged attempted change of locks of the dwelling by the Appellant Landlord resulting in the Respondent Tenant changing the locks for the safety of his own family. On 28th February 2019, it is clear from the evidence of the parties that there was a further incident at the dwelling at which the Gardai were called.

The Appellant Landlord admitted in his evidence that he changed the locks of the dwelling on 28th February 2019 when he called to the dwelling and the Respondent Tenant was not present. The Tribunal does not accept the reason he gave for changing the locks which was that the wife of the Respondent Tenant said they would be leaving the dwelling within two hours. The Tribunal accepts, on the balance of probabilities, the evidence of the Respondent Tenant that his wife was on her own with a small child in the dwelling when the Appellant Landlord arrived with two men and changed the locks. The Tribunal also accepts the evidence that she was told by the Appellant Landlord she must move out of the dwelling. The Tribunal does not accept the Appellant Landlord's assertion that the Respondent Tenant and his family were preparing to move out of the dwelling. The Respondent Tenant had to seek the assistance of a homeless service when he vacated it and this is not consistent with the assertion of the Appellant Landlord. While there was no direct evidence of the consequences of the actions on the part of the Appellant Landlord regarding the Respondent Tenant's wife, it is noteworthy that she was not the

Respondent Tenant, that she was in the dwelling on her own with a small child and that the locks were changed in her home while the tenancy was ongoing. The Tribunal finds the actions of the Appellant Landlord in this regard were unlawful, unwarranted, unjustified and deplorable.

When the Respondent Tenant returned to the dwelling later that day, his evidence was that the Appellant Landlord subsequently returned to the dwelling, said he was looking for his money and would not leave until he got it. The intervention of the Gardai is proof of the ongoing tension between the parties. While an agreement was reached by the Gardai with the Appellant Landlord that the Respondent Tenant and his family would leave the dwelling the next day, the Tribunal finds that this was not a voluntary vacation of the dwelling by the Respondent Tenant in circumstances where no Notice of Termination had been served by the Appellant Landlord on the Respondent Tenant. The Tribunal finds from the evidence that this was a coercive and unlawful termination of the ten year old tenancy. It was an illegal eviction by the Appellant Landlord, which the Tribunal surmises was possibly unwittingly facilitated by the Gardai, bearing in mind that their general mission is to uphold and maintain the peace. It may be the case that the Appellant Landlord understood the law was on his side by virtue of the District Court Decree, however he did not give evidence of this at the Tribunal. The Tribunal again finds that the actions of the Appellant Landlord were unlawful, unwarranted, unjustified and unacceptable.

The Tribunal accepts the consequences of the Appellant Landlord's actions on the Respondent, that they were rendered homeless and had to stay in a B&B in Tralee, a journey of about 35km away from Killarney. While ultimately they secured temporary accommodation in Killarney, it is noteworthy that at the date of the Tribunal hearing they are still looking for larger and better accommodation four months after the illegal eviction and the unlawful termination of the ten year tenancy of their home.

In addition, as a result of the illegal eviction and the unlawful termination of the ten year tenancy, they have been denied peaceful and exclusive occupation of the dwelling to which is contrary to Section 12(1)(a) of the Act. They have also been deprived of the benefit of the Further Part 4 tenancy they had acquired. In all the circumstances, the Tribunal awards the Respondent Tenant damages in the sum of €7,500.00.

In conclusion, even if it had been proved to the satisfaction of the Tribunal that the Respondent was in rent arrears, this would not alter the fact that the termination of a tenancy in the manner employed by the Appellant Landlord in this case was clearly in breach of the provisions of the Act, which requires that a Notice of Termination be served which Notice must be preceded by a warning letter giving the Respondent sufficient time to pay the arrears.

Finding 3:

The Appellant Landlord shall return all of the €800 security deposit to the Respondent Tenant within 14 days of the date of the issue of the Determination Order to the parties.

Reasons:

Section 12(1)(d) of the Act obliges a Landlord at the end of a tenancy to promptly return to a Tenant any security deposit paid by a Tenant unless there are arrears of rent or damage to the dwelling beyond normal wear and tear. As found earlier in this case, it has

not been proved to the satisfaction of the Tribunal that the Respondent was in rent arrears.

In his evidence the Appellant Landlord did allude to a claim for damages for excess wear and tear to the dwelling. He said that he did not have sufficient evidence with him at the Tribunal hearing to make the claim, that he would pursue it on another day and that his claim in this case was for arrears of rent. The Appellant Landlord is entitled to do this. However, as he did not make the claim at the Tribunal hearing and as the Respondent Tenant said at the commencement of the hearing that he sought the return of his security deposit, the Tribunal directs that all of the security deposit be returned to the Respondent Tenant within 14 days of the date of the issue of the Determination Order to the parties.

The Tribunal makes no finding regarding the allegations made by the Appellant Landlord at the Tribunal hearing of sub-letting on the part of the Respondent Tenant. The Appellant Landlord withdrew this aspect of his appeal.

8. Determination:

In the matter of Cornelius Murphy (Landlord) and Saidur Rahman (Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

The Appellant Landlord shall pay the total sum of €8,300.00 to the Respondent Tenant within 14 days of the date of the issue of the Determination Order to the parties. The amount comprises €7,500.00 damages for the unlawful termination of the tenancy of the Respondent Tenant and €800.00 being the security deposit retained by the Appellant Landlord in respect of the tenancy of the dwelling at 72 Cahernane Meadows, Muckross, Killarney, Co. Kerry V93 D3H7.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 18/07/2019.

Signed:



Anne Leech Chairperson

For and on behalf of the Tribunal.