

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0721-005038 / Case Ref No: 0421-68931

Appellant Tenant:	Dermot Nestor
Respondent Landlord:	Daniel Buckley and Sons Limited
Address of Rented Dwelling:	Apartment 2, 16 Watercourse Road, Cork, T23XR82
Tribunal:	Nesta Kelly (Chairperson) Andrew Nugent, Michelle O'Gorman
Venue:	Clayton Hotel, Lapps Quay, Cork
Date & time of Hearing:	18 October 2021 at 2:30 p.m.
Attendees:	Dermot Nestor, Tribunal Appellant, Tenant Declan Nestor, Tenant's Representative and Witness Vincent Cunningham, for Daniel Buckley and Sons Limited James Lee, Landlord's Solicitor Garda Josephine Falvey, Landlord's Witness
In attendance:	DTI Stenographers/Loggers

1. Background:

On 11th April 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 2nd July 2021. The Adjudicator determined that:

In the matter of Dermot Nestor (Applicant Tenant) and Daniel Buckley and Sons Limited (Respondent Landlord) the Adjudicator in accordance with Section 97(4)(a) of the Residential Tenancies Acts 2004 to 2021, determines that:

"1. The Notice of Termination dated 15th April 2021 served by the Respondent Landlord on the Applicant Tenant in respect of the tenancy of the dwelling at Apartment 2, 16 Watercourse Road, Cork, T23XR82 is valid.

2. The Applicant Tenant and all persons residing in the above dwelling shall vacate and give up possession of the above dwelling within seven days of the date of issue of the Determination Order."

Subsequently the following appeal was received from the Tenant on 26th July 2021. The grounds of the appeal: Anti-social behaviour, Breach of fixed term lease, Breach of landlord obligations, Validity of notice of termination, Standard and maintenance of dwelling.

The RTB constituted a Tenancy Tribunal and appointed Andrew Nugent, Nesta Kelly, and Michelle O'Gorman as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Nesta Kelly to be the chairperson of the Tribunal ("the Chairperson").

On 18th September 2021 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 18th October 2021 the Tribunal convened a hearing at the Pegasus Suite, Clayton Hotel, Lapps Quay, Cork.

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 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 persons who appealed to the RTB (the Appellant) would be invited to present his case first; that there would be an opportunity for cross-examination by the Respondents; that the Respondents would then be invited to present their 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 oath or affirmation and be recorded by the official stenographer present. She 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 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].

The Chairperson afforded the Parties an opportunity to talk to each other to see if they could negotiate an agreed resolution of the issues in dispute, this without any obligation or prejudice to them. This was accepted, but after a short adjournment, no agreement was reached between the parties.

The Parties giving evidence were sworn in.

5. Submissions of the Parties:

Appellant Tenant's Case:

Preliminary Submissions on behalf of Appellant Tenant:

The Tenant's brother Declan Nestor said that he was representing his brother and was also his witness in the case. He then read out a prepared statement and at the end said that he wished to apply for an adjournment in the case, on the grounds that the landlord was legally represented and that the adjudicator has used "Latin words" in his report which he did not understand. He said he had applied for Legal Aid to the Legal Aid Board, but his application had been refused. His second reason for requesting this adjournment, was on the basis that he was awaiting a report from Cork City Council Inspectorate following a visit to the dwelling on 24th June 2021. The Landlord's solicitor stated that the reason he was there at the Tribunal was because the company was legally bound to act through their solicitor.

The Tribunal then retired to consider these requests and after a period of deliberation, then returned to inform the parties that the request was being refused, the reasons would be set out in the report.

The reasons being:-

1. The Tenant's attention was drawn to paragraph 9 of the Tribunal Procedures document which he said he had read, namely, that requests for adjournments would only be granted in "exceptional circumstances". This reason was not considered to fall into that category.
2. Paragraph 12 of the Tribunal document states, in relation to legal costs, they would not be awarded by the Tribunal and that the Tenant had been informed about the date of the hearing several weeks in advance. The Tenant's attention was drawn to paragraph 9 of the Tribunal Procedures document which he said he had read, namely, that requests for adjournments would only be granted in "exceptional circumstances". This was not considered to fall into that category. Section 104 (4) (e) of the Act, also states that the Tribunal can only grant adjournments if "substantial grounds arise".

The Tribunal notes that the Appellant applied for legal aid, but this application was refused. In establishing the RTB it was the intention that legal representation would not be necessary and disputes would be resolved 'cheaply and speedily'. Legal representation is not necessary before the Tribunal and the Tribunal notes that the Appellant had ample time within which to seek legal representation and that he was ably represented by his brother at the appeal. Paragraph 12 of the document states, in relation to legal costs, they would not be awarded by the Tribunal and that the Tenant had been informed about the date of the hearing several weeks in advance.

3. The Tribunal takes note of the fact that the visit of an inspector from Cork Council took place on 24th June 2021, after the issue of the Notice of Termination on 15th April 2021.

Evidence of Tenant through his representative brother Declan Nestor.

He said that his brother had kept the dwelling in good condition and had abided by his tenant obligations. He had not caused any damage in excess of normal wear and tear. He said his reputation was being damaged by the landlord's claim of his engaging in anti-social behaviour and the issuing of a 7 day notice of termination. He said that the landlord

was in breach of his obligations under the Act. He said that unknown persons were entering the dwelling without his knowledge.

He referred to the commencement of the tenancy in 2017 when he said the Landlord was refusing to complete HAP forms, and he had to attend their offices. He also said that he had been intimidated, threatened and harassed by the landlord. He said there was dry damp in the dwelling and that he had suffered illness through mould and damp. He said he had not had any hot water or gas for the last 8 months. He said the landlord was entering the dwelling without permission and no rent book had been furnished and he was seeking €20,000 in damages. He described the layout of the house and said the gutter of the flat roof was blocked, there was dry damp everywhere, and there was no bathroom ventilation. His washing machine was broken and that the Landlord was in breach of the lease by not attending to his complaints regarding the defects in the dwelling. He categorically denied each and every allegation made by the landlord regarding his anti-social behaviour in interfering with the fire alarms, pipes and intercom in the dwelling. He said the fabric of the building was not watertight. He said someone had also entered the dwelling and damaged television sets. He had not had any communications relating to the Garda visits. The flooding of the furniture shop was nothing to do with him. He said that twice in May this year, he asked the landlord to fix the hot water. He agreed that there had been earlier RTB adjudications in relation to the Landlord's need to gain access to the dwelling. There was a camera pointing at his dwelling, the fire alarm was not working, neither was the shower and gas. In the winter of 2017-18, he had to stay with his brother as he had no heating and the agent had been informed of these defects. Under cross examination he said that the account with pre-paid power was in credit. He referred to reports he had submitted, referring to flooding in the locality. He was awaiting a report from Cork City Council following an inspection visit on 24th June 2021. He also wanted to complain that the RTB would not allow his video evidence to be submitted. He ended his evidence by stating that it was his intention to go to the High Court under Section 123 of the Act.

Respondent Landlord's Case:

In his submission, Mr Lee stated that the Landlord had been forced to take action as a result of water damage to the furniture store below the dwelling. This was not the first time that this had occurred. There had been no entry without prior notification, save one instance at the Garda's request. The furniture shop was owned by a third party and their claim for damages was going before a RTB adjudication hearing on 21st October 2021. He said that the flooding in the area did not cause the damage, it came and from the tenant's dwelling. Further, water had not flowed from the flat roof as alleged by the tenant. The damage to the dwelling was far in excess of normal wear and tear. He said the dry damp in the dwelling was caused by the tenant's own deliberate action in interfering with the pipes. He referred to the fact that he learned that the first notice of termination of 6th April 2012 was contrary to the Covid Regulations, leading to the second notice being issued on 15th April 2021. They were fearful for the safety of the other 5 tenants in the building especially after receiving the report from Rosebel Safety Fire dated 16th April 2021 (as per the evidence submitted in the case files) in relation to the deliberate damage to the fire alarm and no smoke detectors in the dwelling. He referred to the supporting documents in the case files, together with that of the damage to the furniture shop, caused by the tenant's action in interfering with the water pipes in his kitchen. The tenant

had access to the gas meter and it was a matter between him and the supply company in relation this complaints about the gas supply.

Evidence of Vincent Cunningham.

He said the dwelling was in a good condition when the tenant moved in, the dwelling was about 30 years old. They had replaced the washing machine at the tenant's request. They had to go to the RTB on previous occasions to gain access to the dwelling to allow work men to enter. The water damage came from under the sink as the waste pipe from the sink and washing machine has been pulled out. A press had been pulled from the wall and the fire alarms had been tampered with by being stuffed with tissue paper. The company servicing the alarms could not gain access. He said that the cost of restoring the apartment would be in the region of €15,000-€20,000, as the place would have to be gutted. He said that none of the other 5 dwellings were in such a state of disrepair.

Evidence of Garda Josephine Falvey.

She said that she went to the dwelling on 6th April 2021 as a result of water entering the furniture store below the tenant's dwelling. She knocked on the door and found that there was a couch across the door blocking entry. She saw that wiring had been pulled from the wall and the intercom had been pulled out. On entering the kitchen she saw that the fan was covered in grease and was red hot; she said as a result of this she thought that there could be someone dead in the next room, thus causing her to force open the other door. She said the place was very dirty and the sink was blocked with grease and full and she saw an escape of water. She said the place was non habitable. She saw no evidence of any alleged break in. She made a second visit, as she was so concerned about the tenants residing in the building, but was not able to gain entry, although she could hear music coming for the tenant's door. She ended her evidence by stating that in her opinion it was deliberate criminal damage to the dwelling.

Final Submissions:

Landlord's Submission:-

Mr Lee stated that the tenant had caused deliberate damage to the dwelling and that it was a danger to his neighbours with fire, smoke alarms and intercom been interfered with and the consequences to the Landlord were very serious in relation to the deliberate damage to the dwelling. He said the issue before the Tribunal was as to the validity of the notice of termination.

Tenant's Submission:-

He stated that it was his intention to go to the High Court under Section 123 of the Act in relation to the actions of the RTB.

6. Matters Agreed Between the Parties

The following matters were agreed between the Parties:

1. The tenancy commenced on 1st February 2017.
2. The monthly rent was €700.00.
3. A deposit of €700.00 was paid at the commencement of the tenancy.
4. The tenant remains in occupation of the dwelling.

5. There are no outstanding arrears of rent.

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.

7.1 Finding:

The Tribunal finds that the Tenant has a Part 4 tenancy within the meaning of the Act. The Tribunal finds that the Landlord gave the Tenant a Notice of Termination dated 6th April 2021 stating reason of "serious... anti-social behaviour" and giving a termination date of 14th April 2021. The Tribunal finds that the Landlord gave the Tenant a Second Notice of Termination dated 15th April 2021 stating reason of "serious... anti-social behaviour" and giving a termination date of 22nd April 2021. The Adjudicator finds that the Notice of Termination dated 15th April 2021 is valid. The Tribunal thus finds that the Tenant is over-holding at the dwelling.

Reasons:

1. The Tribunal is satisfied on the balance of probabilities, taking particular note of the sworn oral evidence from the Landlord's witnesses, namely, especially that of the independent witness Garda Josephine Falvey, together with supporting evidence in the case files, in particular that of Rosebel Safety Tech Fire Limited dated 16 April, 2021 and the Garda statement of Vincent Cunningham dated 14 April, 2021 that the Tenant deliberately caused substantial damage to the dwelling thus endangering the safety of the other tenants in the building, thus necessitating his urgent removal from the dwelling.

2. The Tribunal finds that although the tenant denied all the allegations of anti-social behaviour, he did not put forward any evidence as to how this damage was caused. While the Tenant states that there was dry damp in the dwelling and this had been caused by previous flooding in the locality and by blocked guttering, the Tribunal notes the Landlord's evidence that there was no complaint of dry damp in the furniture shop immediately below the dwelling or from any other occupant of the five other apartments in the complex. Further, no evidence has been submitted of block guttering affecting the dwelling. The Tribunal does not accept this damage was normal wear and tear under the Act [Section 16 (f)]. The Tribunal finds that the nature of the damage was of such a degree to warrant a Section 67(2) (a) period of 7 days, and the nature of the anti-social behaviour was to interfere with the life safety systems which also protect the fabric of the dwelling and the property containing the dwelling in case of fire in a multi-unit property as laid out in Section 17(1) (c) (ii) of the Act.

".....engage persistently in behaviour that prevents or interferes with peaceful occupation...."

(ii) by any person residing in any other dwelling contained in the property containing the dwelling, of that other dwelling "

A 7 day Notice is appropriate given the Tenant needs to be removed from the dwelling, to allow the Landlord urgently to repair the damage caused by the Tenant.

Section 67(1) of the Act.....This section applies when the tenancy is being terminated by the landlord by reason of the failure of the tenant to comply with any of the obligations of the tenant.

(2) Where this section applies the period of notice to be given by the notice of termination is-

(a) 7 days, if the tenancy is being determined by reason of behaviour of the tenant that is-

(i) behaviour falling within paragraph (a) or (b) of the definition of "behave in a way that is anti-social" in section 17(1).

7.2 Finding:

The Tribunal finds that the Tenant has not been able to prove on the balance of probabilities that the Landlord is in breach of Sections 12(1) (a) (b) of the Act, in respect of the matters complained of under this head of anti-social behaviour and breach of Landlord obligations.

Reasons:

The Tribunal finds that significant issues within the dwelling are considered to be of the Tenant's own making amounting to a breach of Section 16(f) of the Act. The Landlord is not liable, pursuant to Section 12(2), for the repairs and maintenance the Tenant requests and the Landlord is not in breach of Section 12(1) (b) as claimed. As to other matters the evidence indicates that the Landlord actually took steps to address the Tenant's concerns including by replacing the washing machine and sent out tradesmen and that is evidence that suggests that the Landlord is in compliance with its Section 12(1)(b) obligations. The Tenant gave evidence that there were issues with the gas and hot water in the dwelling, but it is not proven that the Landlord has interfered with either to stop the supply, nor has the Tenant given evidence to the Tribunal that he put the Landlord on notice of these issues. The Tribunal takes note of the Landlord's denial of the claimed unlawful entry; the evidence in respect of the entries being on emergency Garda requests. The Tribunal does not accept the Tenant's submission that some other person or persons caused the damage to the dwelling.

8. Determination:

In the matter of Dermot Nestor, Appellant Tenant, and Daniel Buckley and Sons Limited, Respondent Landlord, the Tribunal in accordance with Section 108(1) of the Residential Tenancies Act 2004 (as amended) determines that:

1. The Notice of Termination dated 15th April 2021 served by the Respondent Landlord on the Applicant Tenant in respect of the tenancy of the dwelling at Apartment 2, 16 Watercourse Road, Cork, T23XR82 is valid.
2. The Appellant Tenant and all persons residing in the above dwelling shall vacate and give up vacant possession of the above dwelling within seven days of the date of issue of the Determination Order.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 30/10/2021.

N. E. Kelly

Signed:

Nesta Kelly, Chairperson

For and on behalf of the Tribunal.