APPROVED **[2021] IEHC 561**

THE HIGH COURT

2021 No. 223 MCA

IN THE MATTER OF SECTION 123 OF THE RESIDENTIAL TENANCIES ACT 2004

AND IN THE MATTER OF AN APPEAL

BETWEEN

REGINALD CARROLL

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

AND BY ORDER OF THE COURT

TERRY ROWLAND
MARGARET ROWLAND

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 3 September 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for an interlocutory injunction in support of a statutory appeal pending before the High Court under the Residential Tenancies Act 2004. The principal issue to be addressed in this judgment is whether the tenant under a residential tenancy should be allowed to remain in occupation of the

dwelling pending the final determination of the statutory appeal. The appeal is against a finding to the effect that the landlords are entitled to recover possession of the dwelling.

STATUTORY REGIME

2. To assist the reader in understanding the detailed discussion which follows, it is necessary to rehearse, at this early stage of the judgment, the statutory provisions governing the termination of residential tenancies.

3. Part 4 of the Residential Tenancies Act 2004 ("***the RTA 2004***" or "***the Act***") affords important statutory protections to a person who has been in occupation of a dwelling under a tenancy for a continuous period of six months. Such a protected tenancy is referred to under the Act as a "***Part 4 tenancy***".

4. A tenancy of a dwelling may not be terminated by the landlord or the tenant by means of a notice of forfeiture, a re-entry or any other process or procedure not provided for under Part 5 of the RTA 2004 (section 58). A Part 4 tenancy may only be lawfully terminated by the service of a valid notice of termination.

5. A tenant, who has been served with a notice of termination, and wishes to challenge the validity of same is entitled to invoke the dispute resolution mechanisms under Part 6 of the RTA 2004. These include, relevantly, the right to refer the dispute for determination by the Residential Tenancies Board ("***the Board***"). The legislation provides for mediation, adjudication and an appeal to the Tenancy Tribunal. The Tenancy Tribunal is an independent tribunal operating under the auspices of the Board.

6. It should be explained that once a determination is made by the Tenancy Tribunal, it will be embodied subsequently in a written record prepared by the director of the Board. This written record is referred to under the RTA 2004 as a "***determination order***". The

determination order is then issued to the parties concerned by the director. There is a statutory right of appeal to the High Court on a point of law against a determination order.

7. The legislative intent underlying the dispute resolution mechanisms under the Residential Tenancies Act 2004 has been described as follows by the Supreme Court in *Canty v. Attorney General* [2011] IESC 27 (at paragraph 13):

> "The Act of 2004 established the Board whose principal function is the resolution of disputes between landlords and tenants of dwellings to which this Act applies. It was intended that the Board's dispute resolution function would replace the role of the courts in relation to such matters in tenancies. The process before the Board has two stages: stage one is either mediation or adjudication and is confidential; stage two is a public hearing by a Tenancy Tribunal. The Tribunal consists of three people drawn from the Board's Dispute Resolution Committee. A mediated agreement or the determination of an adjudicator or of the Tribunal will result in a determination order of the Board. The determination of the Tribunal may be appealed to the High Court within 21 days, but only on a point of law. The Circuit Court* enforces the determination orders of the Board pursuant to s.124 of the Act of 2004."
>
> *NOTE: The enforcement jurisdiction is now conferred on the District Court: see Residential Tenancies (Amendment) Act 2015, sections 57(a) and (c).

8. It will, obviously, take a certain amount of time to carry out and complete these various stages of decision-making. The RTA 2004 expressly addresses the legal entitlements of

the parties in the interregnum prior to a final, binding determination as follows. Section 86 provides that a termination of the tenancy concerned may not be effected pending the determination of a dispute that has been referred to the Board (but subject to that determination when it is made). Section 123 of the RTA 2004 provides that a determination order, i.e. the order embodying the terms of a determination of the Tenancy Tribunal, shall become binding on the parties concerned *unless* an appeal in relation to the determination is made to the High Court before the expiry of the relevant period. The "***relevant period***" is defined under subsection 123(8) as meaning the period of 21 days beginning on the date that the determination order concerned is issued to the parties. Having determined an appeal, the High Court has jurisdiction to make consequential orders directing the Board's director to cancel or vary the determination order as originally made.

9. The combined effect of section 86 and section 123 is that a termination of a Part 4 tenancy may not be lawfully effected where a statutory appeal has been made to the High Court within time and remains outstanding. Until the appeal proceedings have been decided, there will not have been a final, binding determination of the dispute. The initial determination order made by the Board is subject to variation or even cancellation by the High Court. It is only where the determination order is either affirmed or varied by the High Court that it becomes effective. It can then be enforced before the District Court.

10. Put otherwise, a determination order as initially issued by the Board will only become binding, without any involvement of the High Court, if the 21 day period prescribed has lapsed without an appeal having been made under section 123 of the RTA 2004.

PROCEDURAL HISTORY

11. These proceedings concern a Part 4 tenancy which had been entered into between Reginald Carroll ("***the Tenant***") and Terry Rowland and Margaret Rowland (collectively, "***the Landlords***") in March 2020. The Landlords purported to serve a notice of termination on the Tenant on the grounds, *inter alia*, of anti-social behaviour on the part of the Tenant. The Tenant sought to challenge the validity of the notice of termination. This challenge was rejected by the Tenancy Tribunal in a detailed determination of June 2021. The Tenancy Tribunal held that the Tenant had been guilty of anti-social behaviour, including the making of threats against the Landlords. The Tenancy Tribunal's determination was duly embodied in a formal "determination order" by the director of the Residential Tenancies Board. The affidavit evidence from the Board establishes that the determination order issued to the parties on 4 August 2021. The Tenant then made an appeal to the High Court within the 21 day time-limit prescribed.

12. The Tenant has filed an affidavit averring that, on 24 August 2021, he returned home from work to find that the Landlords had re-entered the dwelling. Mr. Rowland, one of the landlords, has confirmed on affidavit that he removed the locks from the front door by using a drill and replaced them with new locks. Mr. Rowland avers that he thought that the dwelling had been vacated by the Tenant. This averment is made notwithstanding that Mr. Rowland had been aware from the previous day that the Tenant had invoked his statutory right of appeal. There was an altercation between the Tenant and the Landlords on the evening of 24 August 2021 which seems to have resulted in the Landlords locking the door against the Tenant. An Garda Síochána were called to the scene. Both sides make serious allegations of threats and assault against the other. The

Landlords succeeded in excluding the Tenant from the dwelling, notwithstanding the existence of the statutory appeal.

13. The Tenant then made an *ex parte* application at a vacation sitting of the High Court on Wednesday, 25 August 2021. The application came before me as duty judge. I made an order granting an interim injunction; and granted the Tenant liberty to serve short notice of motion for an interlocutory injunction returnable to the following Monday (30 August 2021).

14. The terms of the interim injunction were as follows:

> "And upon service of this Order upon him **IT IS ORDERED** that the said Terry Rowland is to vacate the property the subject matter of these proceedings (being Mullaghderg Mountain Pasture Burtonport in the County of Donegal F94 K3H7) no later than midnight on this 25th day of August 2021 and to deliver up possession thereof and the keys to any new locks fitted thereto forthwith to the Applicant Reginald Carroll"

15. The considerations which informed the decision to grant this mandatory order on an *ex parte* basis were as follows. First, the merits of the case for interim relief appeared to be very strong. The provisions of section 123 of the Residential Tenancies Act 2004 are clear, and preclude the termination of a Part 4 tenancy pending the determination of a statutory appeal. The appeal appeared to have been made within the 21 days allowed. Secondly, in any event, the balance of justice lay in favour of allowing the Tenant to re-enter the property immediately. The interim order was only to last for a short number of days and the prejudice to the Tenant, i.e. of being evicted from what he claims is his lawful home, would be disproportionate to any possible prejudice which might be

suffered by the Landlords in being precluded from retaking possession of the property for a matter of days.

16. Regrettably, Mr. Rowland did not comply with the High Court order of 25 August 2021. This is so notwithstanding that a copy of the order had been received by both the landlord and his solicitor. It became necessary for the Tenant to make a further application to the High Court on 27 August 2021. On that date, Hunt J. granted an order directing the Superintendent of Milford Garda Station to provide such assistance as required to enforce the earlier order of the court of 25 August 2021. The order further directed that the Tenant was to be provided with keys and access to the property to ensure compliance with the earlier order.

17. The matter next came before me, as scheduled, on Monday, 30 August 2021. As of that date, the landlord, Mr. Rowland, had still not complied with the court order. Counsel for Mr. Rowland has, very properly, acknowledged that his client should have complied with the order and that there is no lawful excuse for his not having done so. Having taken further instructions, counsel was then able to confirm to the court that possession of the property would be given up that afternoon to the Tenant.

18. Counsel sought a short period of time within which to file affidavits in response to the application for an interlocutory injunction, and indicated that his clients would be in a position to have the relevant paperwork completed and filed by close of business on Wednesday. The matter was, accordingly, listed for hearing on the afternoon of Thursday, 2 September 2021. The Landlords were given liberty to issue a formal notice of motion seeking to set aside the interim order.

19. Counsel on behalf of the Residential Tenancies Board appeared, as a matter of courtesy, at the hearing on 30 August 2021. Counsel indicated that her clients did not intend to participate actively in the hearing of the interlocutory injunction. At the request of the

court, however, counsel indicated that her clients would file a short affidavit confirming the date upon which the determination order had been issued to the parties. Counsel also agreed to file short written legal submissions setting out the Residential Tenancies Board's understanding of the legal position pending the hearing and determination of a statutory appeal under section 123 of the RTA 2004.

20. The two motions, i.e. the motion for an interlocutory injunction and the rival motion seeking to set aside the interim order, were heard yesterday afternoon and judgment was reserved overnight. Written legal submissions had been filed by all three parties in advance of the hearing yesterday afternoon. These were then supplemented by oral submission. The Tenant appeared as a litigant in person; the Landlords and the Board, respectively, were represented by solicitor and counsel.

DISCUSSION AND DECISION

21. There is no disagreement between the parties as to the legal position pending the determination of an appeal to the High Court on a point of law. The provisions of sections 86 and 123 of the Residential Tenancies Act 2004 are clear in this regard. The combined effect of these provisions has been summarised, correctly, as follows by the Residential Tenancies Board in its comprehensive written legal submissions:

> "Once a Determination Order is appealed to the High Court within the permitted 21-day appeal period, the terms of the Determination Order are not binding on the parties concerned. Once the High Court determines the dispute in accordance with section 123(5) of the 2004 Act, the original/the revised Determination Order can then be enforced in the District Court pursuant to section 124 of the 2004 Act."

22. The application for an interlocutory injunction is opposed by the Landlords on a different basis. Counsel on behalf of the Landlords submits, in effect, that the statutory appeal is irregular in form and is "doomed to failure from the outset". It is said that no point of law has been identified which might properly ground an appeal under section 123 of the RTA 2004. The court is asked, therefore, to weigh what is said to be the hopelessness of the appeal in the balance in deciding whether or not to grant an interlocutory injunction.

23. With respect, the submissions on behalf of the Landlords tend to conflate two distinct issues as follows. The first, narrower issue concerns the entitlement, if any, of a landlord to proceed to re-enter a protected dwelling pending the determination of a statutory appeal. The second issue concerns the underlying merits of the statutory appeal, and, in particular, the likelihood or not of the Tenant succeeding in his appeal.

24. It is only the first of these two issues which is properly before the court on this application for an interlocutory injunction. The objective of the court, in ruling upon an application for an interlocutory injunction or a stay pending an appeal, is to put in place measures to best serve the balance of justice pending the hearing and determination of the full proceedings. The hearing of such an interlocutory application will, by definition, have come before the court in a very short space of time and will do so on the basis of limited paperwork. The time available for the hearing will itself also be short given that there are other urgent cases which equally require to be heard. This is especially so where, as in the present case, the matter comes before the court during the summer recess. Whereas judges continue to work in chambers preparing written judgments and attending to other paperwork, there are only limited court hearings during this period. Urgent matters, such as applications for interlocutory injunctions, continue to be heard throughout this time.

25. The court must attempt, as best it can, in the short time available to determine where the balance of justice lies. The test to be followed in this regard in the case of a stay pending

an appeal has been set out, most recently, by the Supreme Court in its judgment in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42.

26. It will be some period of time before the statutory appeal is ready for hearing: it is necessary first for the parties to exchange affidavits and other paperwork, and, thereafter, to exchange written legal submissions. This will all take time for the parties to prepare. Counsel on behalf of the Residential Tenancies Board has indicated that her clients will require four weeks to file their opposition papers. This is entirely reasonable. Thereafter, the case will have to be allocated a hearing date.

27. The issue which the court is concerned with on this interlocutory injunction application is how best to hold the ring pending the hearing and determination of the statutory appeal. As it happens, the legislation expressly addresses this contingency. The relevant provisions of the Residential Tenancies Act 2004 have been discussed in detail earlier (see paragraphs 2 to 10 above). As explained, the combined effect of sections 86 and 123 is that a termination of a Part 4 tenancy may not be lawfully effected in circumstances where a statutory appeal has been made to the High Court within time and remains outstanding. It follows, therefore, that a landlord is not entitled to pre-empt the outcome of a statutory appeal by demanding that the High Court put him back in possession of the dwelling and allowing him to exclude the tenant. The tenancy cannot be terminated until the appeal has been determined.

28. The underlying merits of the statutory appeal do not arise for consideration at this stage precisely because the legislation provides what is to happen in the interregnum. The position might have been different had the legislation been silent on this point. For example, in the context of a stay application in respect of an appeal from the High Court to the Court of Appeal, one of the matters which can legitimately be considered in the

balance, as explained by *Krikke*, is the likely outcome of the appeal and the relative strength of the parties' cases.

29. At the risk of belabouring the point, this issue simply does not arise in circumstances where the underlying legislation itself provides for what is to happen during the pendency of an appeal. In effect, the Oireachtas has put in place a *statutory stay* pending the determination of an appeal under section 123 of the Residential Tenancies Act 2004. The legislative intent is that a tenant should not be evicted from a dwelling until such time as the dispute resolution mechanisms under Part 6 of the RTA 2004 have been exhausted. These dispute resolution mechanisms include the statutory right of appeal to the High Court on a point of law.

30. Against this legislative backdrop, the arguments made on behalf of the Landlords in respect of the underlying merits of the appeal are irrelevant to the narrow issue presently before the court. This is not to say, of course, that a landlord who is faced with what they genuinely consider to be a frivolous or vexatious appeal is powerless to expedite matters. It is always open to a landlord to bring a motion, within the context of the appeal, seeking to have same struck out *in limine*. For example, where an appeal has been taken outside the time-limit prescribed, and there are no good grounds for extending time, a respondent might legitimately bring a preliminary application before the court in that regard. Similarly, a preliminary application can be brought to have an appeal dismissed as frivolous and vexatious, or, as representing an abuse of process.

31. No such application has been brought before the court in the present case. Moreover, the principal respondent to the appeal, the Residential Tenancies Board, had been excused from active participation in yesterday's hearing precisely because the only issue before the court is that of the interlocutory injunction and/or stay. It would be a breach of fair procedures for the court to embark upon a consideration of the underlying merits of the

statutory appeal, with a view to possibly dismissing the proceedings, without affording the Residential Tenancies Board a reasonable opportunity to file such affidavits and written submissions as it wishes to do so and from hearing from the Board.

32. The Landlords have also sought to advance an argument that they should be entitled to exclude the Tenant from the dwelling so as to vindicate their constitutional property rights. Mr. Rowland has sworn an affidavit alleging that the Tenant has damaged furniture and fittings in the dwelling and has left the dwelling in a state. Counsel for the Landlords accepts that, in principle, a tenant should not normally be evicted pending the hearing and determination of an appeal. It is suggested, however, that this is an exceptional case and that the court should override the provisions of section 123 of the RTA 2004 by reliance on its general equitable jurisdiction. Counsel cites a hypothetical example of risk of fire damage to a dwelling by a rogue tenant. It is said that in such a hypothetical case a landlord must be entitled to protect their property rights.

33. With respect, the affidavit evidence before the court does not come close to suggesting that there is any risk of significant damage to the dwelling between now and the hearing of the appeal. Even taking the Landlords' evidence at its height—and the Landlords' version is strongly contested by the Tenant—it indicates that the dwelling is in a dirty and unhygienic state and that furniture will have to be replaced. The damage and clean-up cost have been estimated at €15,000. Relevantly, the harm alleged has already occurred. There is no evidence that further harm will be caused by allowing the Tenant to remain temporarily in what has been his home for the past eighteen months, pending the hearing and determination of the statutory appeal. Any risk of further harm can be addressed by requiring an undertaking as to damages from the Tenant, i.e. to make good the cost of remedying any physical harm to the dwelling and its furniture and fittings caused between now and the determination of the appeal.

34. Moreover, insofar as the balancing of equities is concerned, some weight has to be given to the Landlords' own conduct. First, it is not permissible for any landlord to effect a re-entry of a protected dwelling by attending the premises, while the Tenant is out and about, and changing the locks. A tenancy of a dwelling may not be terminated by the landlord by means of a notice of forfeiture, a re-entry or any other process or procedure not provided under Part 5 of the RTA 2004 (section 58). Secondly, the first named landlord, Mr. Rowland, failed to comply with the High Court order of 25 August 2021 for a number of days after it had been served upon him and his solicitor. It would undermine the effectiveness of the statutory regime put in place under the RTA 2004 to protect tenants if such a cavalier disregard of the law were to be condoned by the High Court.

35. In summary, even allowing that the High Court may have an exceptional jurisdiction to exclude a tenant from a protected dwelling pending the hearing and determination of an appeal, this is not a case which justifies such an order.

CONCLUSION AND FORM OF ORDER

36. For the reasons set out above, the Landlords are not entitled to retake possession of the protected dwelling pending the hearing and determination of the statutory appeal. It follows, therefore, that the Tenant's application for an interlocutory injunction will be granted, and the rival application to set aside the interim order will be refused.

37. The formal order will provide that the second and third named respondents are not to interfere with the appellant's possession of the property the subject matter of these proceedings (being Mullaghderg Mountain Pasture Burtonport in the County of Donegal F94 K3H7) nor seek to re-enter the said property, pending the determination of the within statutory appeal or further order of the court.

38. The Tenant will be required to give, on affidavit, an undertaking as to damages in respect of any physical harm to the dwelling and its furniture and fittings caused between now and the determination of the appeal. The undertaking does not extend to any financial loss said to be caused to the Landlords merely by dint of their not having possession of the dwelling.

39. I am mindful, of course, that the Landlords genuinely believe that the appeal is irregular in form and without merit. Accordingly, I propose to make certain directions in relation to case management. The respondents to the appeal, namely, the Residential Tenancies Board and the Landlords, are to file their response to the appeal within four weeks of today's date, i.e. by 1 October 2021. The appeal should, therefore, be ready to be allocated a hearing date this coming legal term. The Landlords also have liberty to bring a preliminary application seeking to dismiss the appeal, if they so wish. Any such motion is to be made returnable before me on 4 October 2021. The case will be listed before me for directions on that date in any event. The costs of the applications heard this week will also be addressed on that date.

40. The parties have liberty to apply.

Appearances

Mr. Carroll represented himself
Úna Cassidy for the first respondent instructed by Eversheds
Mark Finan for the second and third respondents instructed by O'Donnell Sweeney (Donegal)

Approved Garrett Simons