APPROVED **[2023] IEHC 229**

THE HIGH COURT

2022 No. 206 MCA

BETWEEN

REGINA FITZPATRICK

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

SINÉAD BRETT

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 May 2023

INTRODUCTION

1. This matter comes before the High Court by way of an appeal on a point of law from a determination of the Tenancy Tribunal of the Residential Tenancies Board. The determination of the Tenancy Tribunal had been to the effect that a notice of termination, which had been served in respect of a statutory tenancy, was valid. The relevant determination order is dated 29 June 2022.

NO REDACTION REQUIRED

2. The appeal is taken by one of the two tenants of the property, Regina Fitzpatrick. The other tenant, Aston Dendrick, is not a party to the appeal.

3. By virtue of Order 84C of the Rules of the Superior Courts, the appropriate respondent to the appeal is the Residential Tenancies Board (formerly known as the Private Residential Tenancies Board). For ease of exposition, I will refer to the appellant as "***the Tenant***"; the decision-maker as "***the Tenancy Tribunal***"; and the Residential Tenancies Board as "***the RTB***" or "***the Board***". The landlord, who is a notice party to the appeal, will be referred to as "***the Landlord***".

4. The gravamen of the appeal is that the Tenancy Tribunal should not have upheld the validity of the notice of termination in circumstances where the Landlord is said to have indicated to the Tenant that she would not accept rent in the form of a housing assistance payment from the local authority. This indication was given at a time well *after* the notice of termination had been served and had become effective. The Tenant nonetheless contends that this represents a prohibited form of discrimination under Section 6 of the Equal Status Act 2000.

CHRONOLOGY OF EVENTS

5. Insofar as relevant to the issues arising on the statutory appeal, the factual background can be summarised as follows:

27 July 2017	The Landlord and the Tenants entered into a tenancy agreement. The rent payable was €1,470 per month. A security deposit of €1,300 was paid in advance.

1 August 2021	Warning notice served stating that a sum of €4,223 was owing in rent arrears
31 August 2021	Notice of termination served
30 September 2021	Notice period under notice of termination expires
7 December 2021	Adjudication hearing
16 December 2021	Landlord provides letter to Tenant for social welfare purposes
26 January 2022	Adjudicator finds in favour of Landlord
4 February 2022	Tenant files appeal against the Adjudicator's decision
3 March 2022	Landlord sends WhatsApp message stating that she will not be accepting housing assistance payment
8 June 2022	Hearing before the Tenancy Tribunal
29 June 2022	Determination order
8 August 2022	Tenant files appeal in Central Office of High Court
2 May 2023	Appeal listed for hearing before the High Court
3 May 2023	Appeal heard and judgment reserved

TERMINATION OF PART 4 TENANCY

6. It may be of assistance to the reader in understanding the nature of the dispute before the Tenancy Tribunal in the present case to pause here and to summarise the statutory requirements governing the lawful termination of a Part 4 tenancy for non-payment of rent. These are to be found under the Residential Tenancies

Act 2004 as amended, in particular, by the Residential Tenancies and Valuation Act 2020.

7. A landlord may terminate a tenancy on the grounds, *inter alia*, that the tenant has failed to comply with their obligation to pay the rent provided for under the tenancy agreement on the date it falls due for payment. The landlord is required, first, to give written notification to both the tenant and the RTB ("*the warning notice*" or "*the warning letter*"). The warning notice must specify the amount of the rent due and allow the tenant a period of twenty-eight days within which to pay the arrears of rent. The purpose of sending the warning notice to the RTB, as well as to the tenant, is to allow the Board to provide the tenant with such information in writing as will enable them to obtain advice from the Money Advice and Budgeting Service ("*MABS*").

8. If the tenant fails to pay the arrears of rent within the period allowed, then the landlord may proceed to serve a notice of termination on the tenant. The period of notice to be given by the notice of termination is twenty-eight days. The notice of termination must also be sent to the RTB. The Board will then inform the tenant of their right to refer a dispute as to the validity of the notice of termination for resolution: see Section 39A of the Residential Tenancies Act 2004.

THE PROCEEDINGS BEFORE THE TENANCY TRIBUNAL

9. A full transcript of the hearing before the Tenancy Tribunal on 8 June 2022 has been exhibited as part of this statutory appeal. It is apparent from the transcript that the Tenant accepted that she was in arrears; apologised for this; and explained that she had intended to discharge the arrears once the proceeds of an

inheritance, which she had come into, had been paid over to her. The Tenant did not advance any specific argument to the effect that the notice of termination was invalid.

10. The Tenancy Tribunal nevertheless carried out its own assessment of whether the statutory requirements for the lawful termination of a Part 4 tenancy on the grounds of non-payment of rent had been complied with. The Tenancy Tribunal concluded that the notice of termination was valid. The reasons for this finding are set out as follows in the Tenancy Tribunal's determination:

> "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 Notice of Termination dated the 31 August 2021 served by the Respondent Landlord on the Appellant Tenants in respect of the tenancy at 66 Roscaoin, Roscam, Galway is valid.
>
> Reasons:
> Pursuant to section 16(a)(i) of the Residential Tenancies Act, 2004, as amended ('the 2004 Act') a tenant must pay to the landlord the rent provided for under the tenancy concerned on the date it falls due for payment.
>
> As the tenancy is longer than 6 months in duration it is therefore a Part 4 tenancy under the Act.
>
> Section 67(2) (aa) of the Act provides that a tenancy may be terminated by 28 days' written notice if a tenant is in arrears of rent provided that before issuing the Notice of Termination the Landlord has given a notification to the Tenant and the RTB of the rent arrears and the arrears have not been paid within 28 days of service of the notification. It was agreed that a warning letter was sent to the Tenants on the 1 August, 2021 which stated that €4223.00 rent arrears was owing. This warning letter was e-mailed to the RTB and the RTB confirmed that they received the warning letter on the 1 August, 2021. It was also agreed between the parties that a Notice of Termination was served on the 31 August

> 2021 with a termination date on its face of the 30 September 2021. By letter dated the 6 September 2021 the RTB confirmed that they received a copy of the Notice of Termination on the 31 August 2021. Both parties agreed that €14,311.62 rent arrears were owed at the date of the hearing as per the Statement of Rent arrears at page 11, of Casefile 2. The Notice of Termination complied with Section 62 and Section 66 of the Act and was signed by the Landlord. The service of the Warning letter and Notice of Termination complied with Section 6 (1) of the Act, and the Tenant, Ms. Fitzpatrick, accepts that she received these documents.
>
> The Notice of Termination served on the 31 August 2021 is valid and the Tenants were overholding from the 30 September 2021.
>
> No rent has been paid by the Tenants for a significant period of time and in the circumstances where the Landlord has indicated that she relies on the rental payments to discharge her mortgage and she has found the whole situation very stressful, the Tribunal proposes to award the Landlord €500.00 for the stress and inconvenience she has suffered due to the failure of the Tenants to pay any rent since October 2021."

11. The Tenancy Tribunal went on then to consider the separate issue of whether the Tenant had been in breach of other obligations under the tenancy agreement. These findings are not directly relevant to the appeal to the High Court.

12. The case which the Tenant seeks to advance in the statutory appeal to the High Court is entirely different to that made at the hearing before the Tenancy Tribunal. It is now alleged that the Tenant has been discriminated against and that the tenancy has been terminated because the Landlord refused to accept housing assistance payment ("*HAP*"). The Tenant relies on what she says are copies of an exchange of messages on the WhatsApp platform. In particular, reference is made to the following exchange wherein the Landlord is recorded as having declined to accept housing assistance payment:

> "Hi Sinead, social welfare have asked for a letter or e-mail from you saying you would accept HAP as a payment for housing from me in the future as there exceptional need

> payment is only a short term payment and they will pay it for a few months only. When they receive this they will release money including back payment. Sorry for delay
>
> Regina, so that we are very clear, I will NOT be accepting HAP. I await receipt of the Determination Order from the RTB under which you will be required to vacate my house and pay all monies owing to me. I intend to proceed to enforce the Determination Order through the courts if you fail to adhere to the provisions, and the timelines, set out in the Determination Order. Sinéad"

13. This message is dated 3 March 2022, that is, a number of months after the notice of termination, the subject-matter of the appeal, had been served and had become effective. The tenancy was lawfully terminated on 30 September 2021.

14. It should be explained that the RTB had issued a determination order in error on 23 February 2022 in the mistaken belief that an appeal had not been lodged against the adjudicator's determination. Thus, as of 3 March 2022, the Landlord had reasonable grounds for thinking that the process before the RTB had already concluded and that the Tenant had been directed to vacate the premises by 12 March 2022. This is the context in which the reference to housing assistance payment occurred. In the event, this determination order was subsequently withdrawn once the RTB realised that an appeal against the adjudicator's determination had been brought within time.

15. A hard copy of the exchange of WhatsApp messages was before the Tenancy Tribunal but these messages were not referred to by the Tenant at the hearing.

16. One practical consequence of the allegation of discrimination not having been raised before the Tenancy Tribunal is, of course, that the tribunal was not requested to make any findings of fact on the issue. No factual basis has, therefore, been laid for the point of law which the Tenant now seeks to pursue. Indeed, insofar as there is any detailed discussion of social welfare payments at

all in the transcript of the hearing, it indicates that the Landlord had facilitated the Tenant by providing her with an email/letter for submission in support of a claim for social protection payments. A copy of the email/letter of 16 December 2021 had been before the Tenancy Tribunal.

APPEAL ON A POINT OF LAW ONLY

17. The appeal comes before the High Court pursuant to Section 123 of the Residential Tenancies Act 2004. The appeal is by way of an appeal on a point of law.

18. The High Court's jurisdiction in an appeal on a point of law has been explained as follows by the Supreme Court in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment):

> "The applicable principles were helpfully summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, as follows:-
>
> > 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
> >
> > (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
> >
> > (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
> >
> > (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision …'
>
> This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272.
>
> In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decisionmaker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

19. The principles in *Fitzgibbon* have been applied in the specific context of an appeal under Section 123 of the Residential Tenancies Act 2004 in a number of High Court judgments. In *Marwaha v. Residential Tenancies Board* [2016] IEHC 308, the High Court (Barrett J.) summarised the principles as follows (at paragraph 13):

> "What principles can be drawn from the foregoing as to the court's role in the within appeal? Four key principles can perhaps be drawn from the above-considered case-law:
>
> (1) the court is being asked to consider whether the Tenancy Tribunal erred as a matter of law (a) in its determination, and/or (b) its process of determination;
>
> (2) the court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them;

(3) as to mixed questions of fact and law, the court (a) may reverse the Tenancy Tribunal on its interpretation of documents; (b) can set aside the Tenancy Tribunal determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by the Tenancy Tribunal on the primary facts before it could not reasonably be drawn; (c) must set aside the Tenancy Tribunal determination, if its conclusions show that it was wrong in some view of the law adopted by it.

(4) even if there is no mistake in law or misinterpretation of documents on the part of the Tenancy Tribunal, the court can nonetheless set aside the Tribunal's determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn."

20. Finally, it should be emphasised that the point of law must arise from the determination under appeal. The High Court is not hearing the matter *de novo* but rather is considering the legality of the decision of the Tenancy Tribunal. The High Court should normally decline to decide a point of law which had neither been argued before, nor decided by, the Tenancy Tribunal. See, by analogy, *Governors & Guardians of the Hospital for the Relief of Poor Lying-in Women, Dublin v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1 (at paragraph 90 of the reported judgment). See also the judgment of the High Court (Noonan J.) in *Hyland v. Residential Tenancies Board* [2017] IEHC 557 (at paragraphs 25 to 27).

21. This limitation on the High Court's appellate jurisdiction assumes an especial importance in the present case in circumstances where the principal point of law sought to be advanced by the appellant is not one which was pursued at first instance before the Tenancy Tribunal.

DISCUSSION OF SUBSTANCE OF THE APPEAL TO THE HIGH COURT

22. It is difficult to identify the precise point of law relied upon by the Tenant in her appeal to the High Court. This is because the originating notice of motion fails to comply with the requirement, under Order 84C of the Rules of the Superior Courts, to state concisely the point of law on which the appeal is made. In principle, the entire appeal might legitimately be dismissed because of the failure to state any point of law in the notice of motion. However, having regard to the fact that the Tenant did not have the benefit of professional legal representation when preparing her appeal, I propose to adopt the pragmatic approach of considering the content of the grounding affidavit with a view to identifying the point of law. A similar approach was taken by the High Court (Noonan J.) in *Hyland v. Residential Tenancies Board* [2017] IEHC 557 (at paragraph 14).

23. It appears from the Tenant's grounding affidavit that the gravamen of the appeal is that the Tenancy Tribunal, by purporting to find that the notice of termination was valid, acted in breach of the requirements of the Equal Status Act 2000. The logic of the argument appears to run as follows. The Equal Status Act 2000 prohibits discrimination in the provision of accommodation on what is described as the "*housing assistance ground*". This refers, relevantly, to discrimination between any two persons on the ground that one is in receipt of housing assistance, and the other is not. In this context, "*housing assistance*" means the payment by a housing authority of rent for a dwelling to a landlord on behalf of a qualified household in accordance with the Housing (Miscellaneous Provisions) Act 2014. The Landlord is said to have discriminated against the Tenant on the housing assistance ground by refusing to agree to accept rent in the form of a housing assistance payment. This alleged act of discrimination is

said to be evidenced by the exchange of WhatsApp messages between the Landlord and Tenant in March 2022. The argument goes on then to seek to hold the RTB liable for this alleged act of discrimination. It is asserted that the RTB is itself the provider of a "*service*" for the purpose of the Equal Status Act 2000. The Tenant also asserts that the RTB, as a public body, is required, under Section 42(1) of the Irish Human Rights and Equality Commission Act 2014, to have regard, in the performance of its functions, to the need to eliminate discrimination.

24. With respect, this argument does not disclose a basis for setting aside the Tenancy Tribunal's determination for the following reasons. First, the argument is not one which was made to the Tenancy Tribunal and is thus inadmissible on appeal. The Tenant never sought to suggest to the Tenancy Tribunal that she had been discriminated against. Rather, it is apparent from the transcript of the hearing before the Tenancy Tribunal that the Tenant accepted that she was in arrears with her rent and that the notice of termination had been properly served. The appeal to the High Court under Section 123 of the Residential Tenancies Act 2004 is confined to an appeal on a point of law. The point of law must arise from the determination under appeal. It is impermissible for an appellant to seek to agitate, for the first time before the High Court, a point of law which could have been raised before the Tenancy Tribunal. It would be inconsistent with the limited nature of the appeal were the High Court to determine *de novo* a point which has not been addressed by the decision-maker of first instance. (See the case law cited at paragraphs 20 and 21 above).

25. Secondly, the events relied upon by the Tenant *postdate* the service of the notice of termination and thus could not properly be considered by the Tenancy

Tribunal in assessing the validity of the notice. The logic of the Tenant's argument appears to be that had the Landlord agreed in March 2022 to accept rent in the form of a housing assistance payment then the Tenant would have been able to discharge the arrears of rent. Put otherwise, the implication is that the Tenant would have been able to remedy the breach of obligation to pay the rent due under the tenancy agreement. The flaw in this argument is that the statutory scheme stipulates that any remedial action must be taken prior to the service of the notice of termination. In the case of the non-payment of rent, the arrears of rent must be paid within twenty-eight days of the receipt of the warning letter or warning notice under Section 67 of the Residential Tenancies Act 2004.

26. The Tenancy Tribunal is precluded, in adjudicating upon the validity of a notice of termination, from considering any remedial action taken subsequent to the receipt of the notice. This is provided for as follows under Section 87 of the Residential Tenancies Act 2004:

> "If a dispute referred to the Board relates to the termination of a tenancy for failure by the landlord or tenant to fulfil his or her obligations relating to the tenancy, any remedial action taken by the other party subsequent to the receipt of the notice of termination shall not be taken into consideration by the Board, a mediator, an adjudicator or the Tribunal in dealing with the dispute."

27. On the facts of the present case, the Tenant failed to discharge the arrears of rent during the twenty-eight day period allowed under the warning notice of 1 August 2021. The notice of termination was duly served on 31 August 2021 and the tenancy came to an end on 30 September 2021. It would not have been open to the Tenancy Tribunal to consider the subsequent events of March 2022 in assessing the validity of the notice of termination.

28. Thirdly, and more generally, the Tenancy Tribunal does not have jurisdiction to grant a remedy for any alleged breach of the Equal Status Act 2000. The appropriate remedy for a person who asserts that they have been the victim of a prohibited act of discrimination is to make a claim under the Equal Status Act 2000. The relevant decision-maker is the Workplace Relations Commission. Neither the Tenancy Tribunal nor the Residential Tenancies Board have any adjudicative function in this regard. As is apparent from the provisions of Section 196 of the Residential Tenancies Act 2004, nothing in that Act operates to prejudice the powers under Part III of the Equal Status Act 2000 to award redress in the case of discrimination on the housing assistance ground. This confirms that the two statutory schemes operate in parallel.

29. For completeness, it should be recorded that the evidence does not establish that the Landlord did, in fact, discriminate against the Tenant. The Landlord did not terminate the tenancy on the ground that the Tenant was or would be in receipt of housing assistance. Rather, the tenancy was lawfully terminated on 30 September 2021 on the ground that the Tenant had failed to discharge the arrears of rent then owing.

30. Finally, it is very doubtful that the carrying out of a quasi-judicial function in respect of landlord and tenant disputes constitutes the provision of a "*service*" within the meaning of the Equal Status Act 2000. But even if one were to assume, without deciding, that it might fall within the concept of a "*service*", there is no basis for saying that the RTB has carried out any act of discrimination in respect of the Tenant. The RTB lawfully discharged its statutory adjudicative function in accordance with the express limitation imposed by Section 87 of the Residential Tenancies Act 2004.

31. Similarly, the obligation under Section 42(1) of the Irish Human Rights and Equality Commission Act 2014 arises in the context of the lawful performance by a public body of its functions. Here, the adjudicative function of the RTB is subject to the express limitation imposed by Section 87 of the Residential Tenancies Act 2004.

APPLICATION FOR AN ADJOURNMENT

32. For completeness, it is appropriate to record that the Tenant had applied, through a friend, for an adjournment of the hearing of the appeal. This application was refused in an *ex tempore* ruling on 2 May 2023. The discussion of this issue has been deliberately deferred to this point of the judgment in order to ensure that the reader has a proper understanding of the nature of the proceedings.

33. The intention to apply for an adjournment had first been mooted the week prior to the scheduled hearing date of 2 May 2023. It is the practice in the Non-Jury List that the cases listed for hearing in any particular week are called over on the preceding Thursday. At the call over on 27 April 2023, a friend of the Tenant attended in court and applied for a three month adjournment on the basis of a medical certificate. The Tenant had sent an email/letter to the High Court registrar the previous day enclosing a copy of a medical report. The list judge directed that any application for an adjournment be made to the trial judge on the hearing date.

34. The appeal was subsequently assigned to me for hearing and the Tenant's friend renewed the application for a three month adjournment before me at the outset of the hearing on 2 May 2023. The Tenant's friend presented the court with hard copies of correspondence between the Tenant and the RTB's solicitors, together

with correspondence from the Tenant's general medical practitioner and a signed letter from the Tenant.

35. The adjournment application was opposed by the respective counsel acting on behalf of the RTB and the Landlord. I refused the adjournment application and directed instead that the hearing be converted from an "*in person*" hearing to a hybrid hearing, where parties could either attend in court or join the hearing remotely. The hearing was put back until the afternoon to allow the Tenant to join remotely. There was no appearance by or on behalf of the Tenant when the matter was called at 2 o'clock. The hearing was then put back a further 24 hours to allow the Tenant a second opportunity to join remotely. There was no appearance by or on behalf of the Tenant when the matter was called at 2 o'clock on the afternoon of 3 May 2023. Rather than dismiss the appeal for want of prosecution, I indicated that I would hear submissions from the parties in court and then determine the appeal on the basis of the arguments advanced by the Tenant in her affidavit and exhibits. Judgment was reserved until today's date.

36. The factors to be considered in adjudicating upon an adjournment application have recently been summarised as follows by the Court of Appeal in *Minogue v. Clare County Council* [2021] IECA 98 (at paragraph 138):

> "Modest and all as the adjournment application procedure is, the interests of justice do come in to the analysis very strongly. Among the major factors to be considered are:
>
> (i). whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments;
>
> (ii). the lateness of any step sought to be taken by a party;
>
> (iii). the possibility of the adjournment being tactical;
>
> (iv). the extent of real prejudice to the other side;

(v). the views and position of the other side more generally;

(vi). the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court;

(vii). the extent of dislocation and inconvenience to other litigants by time of the court being unnecessarily absorbed – in that regard there is a huge difference between a case that will take one or more days or even a substantial portion of a day and a short matter listed on a Monday; and

(viii). all other relevant circumstances."

37. As appears, the court is required to consider a range of factors including the potential impact of the adjournment upon the party on the other side of the proceedings, and, more generally, upon the orderly administration of justice and upon other litigants. I will address below how these factors play out in the present context.

38. The distinctive feature of the instant proceedings is that the adjournment is sought on medical grounds. More typically, an adjournment is sought in order to allow a party time to adduce further evidence (as in *Minogue* itself) or to take some other procedural step to ready itself for the hearing. It is also relevant that the adjournment is sought by a litigant in person, i.e. a lay litigant who does not have the benefit of professional legal representation. The fact that the litigant will be conducting the proceedings themselves means that participation will be more demanding for them. The debilitating effects of a medical condition have to be assessed in this context: an illness which might not affect the capacity of a represented litigant to give instructions to their lawyers throughout the course of a hearing might nevertheless be such as to undermine the effective participation of an *unrepresented* litigant.

39. The following approach provides a useful framework for the court in adjudicating on an application by a lay litigant to adjourn proceedings on medical grounds. First, the court must carefully consider the medical evidence adduced in support of the application. The court should consider the expertise and independence of the medical practitioner; the extent to which they have had a recent opportunity to examine the litigant; the nature of the diagnosis; the extent to which the medical condition affects the ability of the litigant to participate in the legal proceedings; and the extent, if any, to which these difficulties will have abated on the adjourned date. It should be emphasised, however, that the decision on whether to adjourn the proceedings is a matter for the court alone. The medical practitioner's role is confined to providing expert evidence to the court.

40. Secondly, the court must consider the nature of the proceedings and the demands which participation in same will place on the litigant. For example, a one day hearing based on affidavit evidence is likely to be far less demanding on a litigant than a lengthy trial at which they will be required to give oral evidence and be subject to cross-examination. The court should also consider the extent to which the legal and factual issues have already been addressed in the pleadings and/or affidavits. In cases where the issues have been fully ventilated in the papers, and the trial judge has had an opportunity to read the papers in advance, the hearing itself is likely to be shorter and less demanding on the participants.

41. Thirdly, the court should consider the prejudice which an adjournment would cause to the other side in the proceedings. This will be informed by the length of the delay involved: an alternative hearing date might not be available for a significant period of time. Moreover, as indicated by the Court of Appeal in

Minogue v. Clare County Council, it will also be appropriate to have some regard to the impact of an adjournment upon the orderly administration of justice and upon other litigants.

42. Fourthly, it may be appropriate, in some limited instances, to have regard to the underlying merits of the proceedings. If, for example, it is readily apparent from the pleadings and/or affidavits that the party seeking the adjournment has little prospect of successfully prosecuting or defending the proceedings, as the case may be, then the court may be reluctant to grant an adjournment where this would cause prejudice to the other side. This is especially so if the court suspects that the adjournment application is tactical.

43. Finally, the court should consider whether the potential difficulties otherwise presented by the litigant's medical condition can be addressed by some step short of the adjournment of the proceedings. For example, it may be possible to accommodate the litigant by allowing them to participate in the proceedings remotely, i.e. without having to attend in person in the courtroom. The Courts Service subscribes to an online platform which allows litigants, lawyers and judges to participate in hearings virtually. In some instances, it may be appropriate to reduce the length of the daily sittings to avoid overexerting the unwell litigant.

44. I turn next to apply this framework to the circumstances of the present case. The only medical evidence which has been put before the court is a report from a general medical practitioner. The report is dated 24 April 2023 and reads as follows:

> "The above patient, Regina Fitzpatrick, is a registered patient of this practice and known to me. I can confirm that Regina unfortunately suffers from an anxiety disorder, which has phobic components including social anxiety and

> claustrophobia. As is typical of these conditions, her symptoms would tend to be exacerbated by psychosocial stress, and she is currently experiencing a significant amount of this. She anticipates that this stress should ease in the coming months as these situational stressors resolve. She tells me she has an upcoming court appearance, during which she is representing herself. She is hopeful that this might be postponed briefly, such that she will be better able to devote the necessary attention to this. In the context of her diagnosis and acute exacerbation of symptoms, I would like to lend my support to her in this request – both she and I would expect she would be better placed to deal with the significant stress of this court appearance in the coming months as her other life stressors resolve or improve. Please do not hesitate to contact me should you need any further information."

45. The medical evidence does not expressly address the question of the extent, if any, to which her medical condition affects the ability of the litigant to participate in the legal proceedings. It is not suggested, for example, that the litigant would not be physically fit to attend an "*in person*" hearing nor that she would be unable to make oral submissions to the court. Many lay people find participation in legal proceedings stressful, especially in circumstances where they are required to give oral evidence and will be subject to cross-examination. Even allowing that the stress caused by participation in legal proceedings will be all the greater for a person, such as the litigant in the present case, who suffers from an anxiety disorder, this cannot *per se* be a reason to grant an adjournment. The court would have to be satisfied, on the basis of the medical evidence, that the level of stress is such that the litigant could not participate effectively in the proceedings.

46. The medical evidence in the present case does not provide a detailed prognosis nor does it explain why it is that the litigant's medical condition is likely to be different on the adjourned date. There is no practical benefit in adjourning proceedings for a specified period of time unless the medical evidence indicates

that it is likely that the medical condition of the litigant will have materially improved in the interim.

47. A further email was received from an administrator in the medical practice on 3 May 2023 as follows:

> "I have attached our letter* asking for Ms Regina Fitzpatrick's case to be postponed. This is Dr Meadhbh Rice's medical opinion and should be considered. The patient was seen as recently as yesterday and prescribed medications for her mental health. These circumstances make her unfit to appear in court at this time."
>
> *This is the letter of 24 April 2023 cited above.

48. This email does not constitute admissible medical evidence because it has not been written by a medically qualified person.

49. It is next necessary to consider the nature of the proceedings and the demands which participation in same would place on the litigant. The proceedings take the form of an appeal on a point of law from a determination of the Tenancy Tribunal. The limitations upon an appeal of this type have been summarised earlier, at paragraphs 17 to 21 above. The significance of this for present purposes is that the hearing of the appeal will be short and straightforward. The case had been called on for two hours. The appeal will be heard on the basis of the affidavits and exhibits filed and there will be no oral evidence. The papers will have been read in advance by the trial judge. The appellant has already set out the basis of her appeal in her grounding affidavit. The demands of participation would be modest, certainly compared to a plenary hearing which is scheduled to last a number of days. There is nothing in the medical evidence which indicates that the litigant's medical condition would preclude her from participating effectively in the proceedings.

50. The grant of an adjournment would cause material prejudice to the other side. The appellant has sought an adjournment of three months. This would bring us to the start of the August recess. Having regard to this, and to the pressure of business in the Non-Jury List of the High Court, it is unlikely that the appeal would be heard until November or December 2023. Accordingly, the practical consequence of the grant of an adjournment would be to delay the hearing of the appeal by at least six months. This delay has to be seen in a context where the tenancy had terminated on 30 September 2021, and where the appellant has not paid rent since October 2021. The arrears of rent had been in the sum of €14,311.62 as of the date of the hearing before the Tenancy Tribunal in June 2022 and continue to accrue. The Landlord had given evidence to the Tenancy Tribunal to the effect that she relies on the rental payments to discharge her mortgage and that she has found the whole situation very stressful. The interests of justice require that the appeal be heard and determined in a timely manner.

51. Although it is of a lesser order of prejudice, the grant of an adjournment would have caused both the Landlord and the RTB to suffer the cost and inconvenience of additional court appearances. See, generally, *Start Mortgages DAC v. Barry* [2023] IECA 22 (at paragraph 65).

52. Having regard to all of the factors identified above, it would have been disproportionate to adjourn the hearing of the appeal. Rather, the interests of justice were met instead by the putting in place of measures, short of an adjournment, designed to address the exigencies of the appellant's medical condition. The form of hearing was modified from an "*in person*" hearing in a physical courtroom to a hybrid hearing where any of the parties could join remotely using an online platform. This afforded the appellant the opportunity

to participate at the hearing without having to travel up to Dublin and without having to sit in a physical courtroom. The court also read the papers in advance, which meant that the hearing would be shortened thus reducing the length of time for which the appellant would have to participate. The start of the hearing was put back, initially for a few hours and then overnight, to facilitate the participation of the appellant.

53. In the event, the appellant chose not to participate at all and did not attend the hearing in any form. It would have been open to the court to dismiss the appeal in circumstances where the appellant failed to attend to prosecute same. Rather than do this, however, the court has considered the appeal on its merits on the basis of the affidavits and exhibits filed. This ensured that the legal arguments set out in the appellant's appeal papers have been carefully considered and adjudicated upon. Put otherwise, the appellant has been afforded the benefit of an adjudication upon the substance of her appeal notwithstanding her non-attendance.

54. Finally, insofar as the appellant has relied upon an outstanding application for legal aid in support of her adjournment application, it should be noted that she had already been granted an adjournment from 12 December 2022 to 13 February 2023 to allow her time to finalise arrangements with the Legal Aid Board. The appellant had indicated to the court on 12 December 2022 that she intended to address the arrears of rent by the adjourned date.

55. On the adjourned date of 13 February 2023, there had been no meaningful progress in respect of legal aid nor in respect of the payment of arrears. Accordingly, the list judge set the matter down for hearing on 2 May 2023. As explained by the Court of Appeal in *Minogue v. Clare County Council*

[2021] IECA 98 (at paragraph 138), one of the matters to be taken into consideration on an adjournment application is whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and, in particular, whether that party has had the benefit of previous adjournments.

CONCLUSION AND PROPOSED FORM OF ORDER

56. For the reasons explained, in particular, at paragraphs 22 to 31 above, the appeal against the determination order of 29 June 2022 is dismissed pursuant to Section 123 of the Residential Tenancies Act 2004. The determination order, therefore, remains in the terms as it was originally made.

57. The appeal will be listed before me, remotely, on 25 May 2023 at 10:30 am to hear any costs applications.

Appearances

The Appellant failed to attend
Úna Cassidy for the Residential Tenancies Board instructed by Byrne Wallace
Eoin O'Donnell for the Notice Party instructed by Sheehan & Co

Approved