APPROVED **[2023] IEHC 491**

THE HIGH COURT

2023 No. 206 MCA

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT 2004

BETWEEN

CARINE KAPIHGA IYABA

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

DUBLIN SIMON COMMUNITY

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 August 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 on the grounds of anti-social behaviour, was valid. The relevant determination order is dated 1 February 2023.

2. 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, the Dublin Simon Community, will be referred to as "***the Landlord***". The Landlord is a notice party to these proceedings.

3. The originating notice of motion names a number of other notice parties as follows: the Minister for the Environment, Heritage and Local Government; Ireland; and the Attorney General. It seems that these parties were joined as *legitimus contradictor* to the plea that the statutory procedures available to challenge the legality of a notice of termination do not provide an effective remedy. If and insofar as the Tenant wishes to challenge the compatibility of the relevant provisions of the Residential Tenancies Act 2004 with either the Constitution of Ireland or the European Convention on Human Rights, it will be necessary for her to institute separate proceedings. Such a challenge cannot be mounted within the context of a statutory appeal on a point of law. These notice parties were released from the proceedings, by consent, on 10 July 2023.

APPEAL ON A POINT OF LAW ONLY

4. 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.

5. The High Court's jurisdiction on 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:-
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> > '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 …'
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> 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)."

6. 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;
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> (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."

7. 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).

8. This limitation on the High Court's appellate jurisdiction assumes an especial importance in the present case in circumstances where a number of the points of law sought to be advanced by the appellant are not ones which were pursued at first instance before the Tenancy Tribunal.

TERMINATION OF TENANCY FOR ANTI-SOCIAL BEHAVIOUR

9. 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 tenancy for anti-social behaviour under the Residential Tenancies Act 2004 ("***the RTA 2004***").

10. Section 16(h) of the RTA 2004 imposes an obligation upon a tenant of a dwelling not to behave within the dwelling, or in the vicinity of it, in a way that is anti-social. The subsection imposes a further obligation upon a tenant not to "*allow*" other occupiers of, or visitors to, the dwelling to behave within it, or in the vicinity of it, in a way that is anti-social.

11. The term "*behave in a way that is anti-social*" is defined, under Section 17(1) of the RTA 2004, as follows:

> "(*a*) engage in behaviour that constitutes the commission of an offence, being an offence the commission of which is reasonably likely to affect directly the well-being or welfare of others,
>
> (*b*) engage in behaviour that causes or could cause fear, danger, injury, damage or loss to any person living, working or otherwise lawfully in the dwelling concerned or its vicinity and, without prejudice to the generality of the foregoing, includes violence, intimidation, coercion, harassment or obstruction of, or threats to, any such person, or
>
> (*c*) engage, persistently, in behaviour that prevents or interferes with the peaceful occupation—
>
> (i) by any other person residing in the dwelling concerned, of that dwelling,
>
> (ii) by any person residing in any other dwelling contained in the property containing the dwelling concerned, of that other dwelling, or
>
> (iii) by any person residing in a dwelling ('neighbourhood dwelling') in the vicinity of the dwelling or the property containing the dwelling concerned, of that neighbourhood dwelling."

12. If the behaviour of a tenant falls within paragraph (a) or (b) of the above definition, then this is treated as an "*excepted basis for termination*". The tenancy can be terminated on seven days' notice and without affording the tenant an opportunity to remedy the breach of their obligations. If, conversely, the behaviour falls within paragraph (c) above, then the tenant must be served with

a written notice by the landlord identifying the failure to comply with their obligation in respect of anti-social behaviour, and stating that the landlord is entitled to terminate the tenancy if the failure is not remedied within a reasonable time specified in that notification.

13. The following aspects of the statutory concept of "*anti-social behaviour*" should be noted. First, a tenancy may be terminated where the landlord can establish, to the satisfaction of the Tenancy Tribunal, that a tenant, occupier or visitor has engaged in behaviour that "*constitutes*" the commission of an offence. This is an unusual provision in that it purports to allow a public authority to reach a concluded view on the guilt or innocence of an individual other than in the context of a criminal trial. The Tenant in the present case has not brought a direct challenge to the constitutional validity of this provision: she does, however, argue that given the gravity of such a finding, the Tenancy Tribunal is required to apply the criminal standard of proof.

14. Secondly, a tenancy may be terminated not only where the tenant themselves has engaged in anti-social behaviour but also where the tenant has *allowed* other occupiers of, or visitors to, the dwelling to behave in such a way. The meaning and effect of this provision is one of the principal issues which falls for consideration in this judgment.

15. Thirdly, in order for conduct to come within the concept of "*anti-social behaviour*", it must have occurred within the dwelling or in the "*vicinity*" of it. The Tenant contends that the locus of the alleged anti-social behaviour in this case is at too far a remove from the tenanted dwelling to be said to have occurred in the vicinity of the dwelling. More specifically, it is submitted that it is not

sufficient that an incident may have occurred within the same housing estate within which the tenanted dwelling is located.

TENANCY TRIBUNAL'S DETERMINATION

16. These proceedings concern the validity of a notice of termination which was served by the Landlord on 8 December 2021. The Landlord sought to terminate the tenancy on the grounds of anti-social behaviour as defined under the RTA 2004.

17. The matter came before the Tenancy Tribunal by way of an appeal by the Tenant against an Adjudicator's determination upholding the validity of the notice of termination.

18. The Tenancy Tribunal heard the appeal over two days, on 16 August 2022 and 12 December 2022. A transcript of the hearing has been exhibited as part of these appeal proceedings. The witnesses included, *inter alia*, the Tenant herself and the owner and occupier of a dwelling in the same housing estate. This latter witness will be referred to as "***the Complainant***".

19. As appears from the transcript, the Complainant gave evidence in respect of events on 21 November 2021 as follows. There had been a minor incident earlier in the day involving the Complainant's son and a son of the Tenant. The Complainant's evidence was to the effect that his son had been pushed and hit by the other child. The Complainant then went to the Tenant's house and spoke to two adults. These were the parents of the Tenant who were caring for her children. The Tenant herself had been away in England for a number of months.

20. The Complainant stated that the Tenant's older son, R—, subsequently came to his house, with approximately twenty other people. The Complainant further stated that R— broke his front door and two windows and damaged his van.

21. The Complainant then gave evidence that he had called An Garda Síochána and made a statement to them. The Complainant also gave evidence as to the impact of the incident on his wife and family, saying that they were terrified and woke up during the nights for a month afterwards.

22. A video of the incident, which had been recorded by the Complainant's wife, was viewed by the Tenancy Tribunal.

23. The Complainant was cross-examined by the solicitor acting for the Tenant. It was put to the Complainant that he had shouted at, and directed bad language towards, the Tenant's parents earlier in the day; that the Complainant had assaulted the Tenant's son; and that the Complainant had aggravated the situation at the time of the (second) incident by using a stick. The Complainant denied all of this.

24. The Tenancy Tribunal summarised its findings as follows in its report of 12 December 2022:

> "It is clear that the incident of the 21st November 2021 met both the above definitions of anti-social behaviour. Ascertained from the direct evidence of the neighbour and the footage, this was an incident of real menace and danger.
>
> It was an incident that merited the service of a notice of termination for seven days per section 67(2)(a)(i) of the Act. The Tribunal finds that the notice of termination was served on the dwelling and complied with the requirements of section 62. It is a notice of termination properly grounded on section 17(1)(a) and (b) and otherwise compliant with the Act.
>
> The Tribunal finds that the respondent landlord correctly investigated the complaint made to it by the neighbour. It was never disputed that it was, in fact, the son of the

> appellant landlord who was involved in the events of the 21st November 2021, until the second day of this hearing. It was always accepted by the family of the appellant tenant that the young person was involved in the incident. The Tribunal finds that the respondent landlord, and the housing officer in particular, addressed this matter fairly and fully.
>
> The appellant tenant submitted that she had not behaved 'within the dwelling, or in the vicinity of it, in a way that is anti-social or allow other occupiers of, or visitors to, the dwelling to behave within it, or in the vicinity of it, in such a way'. The incident did not occur in the dwelling, but certainly in the 'vicinity' of the dwelling; the appellant tenant and the neighbour live in the same estate. Of course, the appellant tenant was not living at the dwelling at this time and her parents were in loco parentis of her children. Dictionary definitions of 'allow' include not preventing the act in question. The Tribunal finds that the appellant tenant 'allowed' the anti-social behaviour to occur, because her parents, placed in loco parentis, did not prevent the anti-social behaviour from occurring.
>
> It follows that the notice of termination is valid as it was correctly based on serious antisocial behaviour, as defined, in particular by section 17(1)(b) of the Act. The respondent landlord was, therefore, entitled to terminate the tenancy per the notice of termination. The notice of termination ended the tenancy."

DISCUSSION OF POINTS OF LAW

Video evidence

25. The first point of law relates to the reliance placed by the Tenancy Tribunal on video footage of the incident on 21 November 2021. The video footage had been introduced into evidence in the following way. The Complainant gave oral evidence to the effect that the video footage had been recorded by his wife using her mobile telephone. The Complainant confirmed that his voice and that of his wife can be heard on the audio to the video footage. The Complainant confirmed that the Tenant's son can be seen clearly in the video. The Complainant's wife did not give evidence at the hearing.

26. The solicitor acting on behalf of the Tenant had objected, at the outset of the hearing before the Tenancy Tribunal, to the introduction of the video footage by way of evidence. It was suggested, without any obvious basis, that the "*veracity*" of the video could not be trusted. Objection was also taken to the poor quality of the recording, with the suggestion being made that no one could be identified from the video footage.

27. The approach taken by the Tenancy Tribunal was to view the video footage *de bene esse* and then to hear submissions in relation to the admissibility of same. The Tenancy Tribunal ultimately ruled that the video was admissible.

28. In its determination, the Tenancy Tribunal indicated that while the video had been admitted into evidence, same was treated as being supplemental to the oral testimony given by the Complainant:

> "At the hearing, the Tribunal outlined that the video footage was admissible as evidence. The. neighbour gave direct evidence of how it was filmed and can be heard on it. While it was admissible, it was a matter for the Tribunal to decide what probative value the footage had.
>
> The Tribunal finds that the footage captures a terrifying, menacing incident that clearly caused fear to the neighbour and his wife, who is heard crying and has terror in her voice. There is reference to one of the appellant tenant's son in the footage, and this is probative of his presence and prominent role in the incident.
>
> Importantly, the mobile phone evidence was supplemented by the direct evidence of the neighbour, tested on cross-examination. The neighbour witnessed the involvement of the son of the appellant tenant and knew this person. The neighbour identified the young person by name. The Tribunal, therefore, finds that the named son of the appellant tenant played a prominent role in the incident."

29. At the hearing before the High Court, it was agreed that it was open to the court to view the video footage. This is because, just as with the transcript, the video

represents part of the material upon which the Tenancy Tribunal's determination was made and is thus subject to review.

30. For reasons which neither party were able to explain, the version of the video which was provided to the court was redacted. Specifically, the face of one of the principal participants in the video footage had been obscured by pixelation. It is not possible, on the basis of the version of the video footage shown to the court, to reach any concluded position in relation to the identity of that individual.

31. Counsel on behalf of the Tenant has sought to rely on case law in relation to criminal proceedings, citing in particular the judgment of the Supreme Court in *People (DPP) v. A. McD.* [2016] IESC 71, [2016] 3 I.R. 123. It is submitted that there is an obligation to establish the chain of evidence and to explain the context of the video.

32. With respect, the proceedings before the Tenancy Tribunal and before the High Court on appeal are civil proceedings. Accordingly, the principles governing a criminal trial cannot simply be "*read across*" to the proceedings. As explained by the High Court (Barr J.) in *Stulpinaite v. Residential Tenancies Board* [2021] IEHC 178 (at paragraphs 62 and 63), the Tenancy Tribunal has the power to act on documentary evidence and on hearsay evidence:

> "The court is satisfied that the Tribunal has the power to act in an informal way. In addition, it is noteworthy that under the Act it has been given wider powers than those enjoyed by a court. It can subpoena witnesses on its own behalf; it can demand production of documents to it and it can receive unsworn evidence. Thus, it can be seen that the Tribunal does not act in a strictly adversarial scenario, in that it has powers of its own to ensure that the relevant witnesses and documentation are placed before it, so as to be put in a position to resolve the dispute. It can take the necessary steps itself to ensure that it has adequate evidence to decide the dispute.

> The court is satisfied that the Tribunal has the power to act on documentary evidence and on hearsay evidence and can adopt such informal procedures as appear to it to be appropriate as being best suited to achieving a fair resolution in the case. However, the Tribunal must always act within the bounds of fairness. If a party challenges the truth or accuracy of a document, the Tribunal must decide whether it is necessary to have that document formally proved in evidence. Furthermore, the parties to the dispute are given the express right under the Act, to cross-examine any witnesses that may be called to give evidence before the Tribunal. They are also given the right to have the Tribunal issue a subpoena to have witnesses called on their behalf. The court is satisfied that the procedures of the Tribunal, which are set out in the Act and in a document that is circulated to the parties in advance of the hearing, are designed to ensure that, while the hearing before the Tribunal is of an informal nature, it nonetheless adheres to the requirements of natural justice."

33. The Tenancy Tribunal was entitled, in the exercise of its discretion, to admit the video footage as evidence.

34. Moreover, the type of concerns in respect of video footage, which are discussed by the Supreme Court in the decision opened on behalf of the Tenant, are very different to those which arise in the present case. There, the video footage took the form of CCTV footage which had been recorded automatically. The concerns raised at the criminal trial had related to the following: whether the date and timing noted on the recording were accurate; how the camera was mounted, i.e. in a fixed position or rotating; whether the recording captured everything within its line of vision; and, finally, whether the recorded images could be enhanced.

35. No such considerations apply in the present case where the video footage had been recorded contemporaneously by the Complainant's wife. The Complainant, in his oral testimony, was able to give direct evidence as to the circumstances in which the video came to be recorded. The Complainant

confirmed that the video had been recorded on 21 November 2021 and that the person depicted is the Tenant's son. Indeed, there had, initially, been no controversy in this regard. The Tenant herself, at the adjudication stage, had admitted that her son appeared in the video. The Tenant had also admitted that her son was engaging in threatening behaviour. The Tenant offered an apology for his behaviour to the Complainant. (See page 4 of the Adjudicator's report).

36. It was only at the hearing before the Tenancy Tribunal that the Tenant sought to withdraw these admissions. No credible explanation has been provided by the Tenant as to why she had been able to identify her son in the video footage at the adjudication stage but cannot do so now. This issue was only dealt with very briefly in her oral testimony to the Tenancy Tribunal. The Tenant sought to suggest, variously, that she was "*very confused*", that the "*video was very dark*", and that she did not want "*to make any trouble with*" her landlord.

37. Having regard to the fact that the appeal before this court is an appeal on a point of law only, I am satisfied that no error of law has been disclosed in relation to the approach taken by the Tenancy Tribunal to the video evidence. It was open, as a matter of law, to the Tribunal to admit the video as evidence which was corroborative of or supplemental to the oral evidence. There was no requirement that the person recording the video, i.e. the Complainant's wife, be called to give evidence. It was sufficient to the purpose that the Complainant, who was present at the time the video footage was recorded and whose voice can be heard in the video, was in a position to confirm the circumstances in which it had been recorded. The criticism made of the quality of the video footage has to be seen in a context where same had been relied upon as corroborative and supplemental only.

38. It has been pleaded on behalf of the Tenant that there is "*no rational basis*" to conclude that the Tenant's son played a "*prominent role*" in the incident on 21 November 2021. With respect, the oral evidence, supplemented by the video evidence, indicated that the Tenant's son had been present and had threatened the Complainant.

39. It is to be reiterated that the appeal is confined to an appeal on a point of law. The assessment of the evidence is quintessentially a matter for the Tenancy Tribunal, subject to intervention by the High Court in exceptional circumstances where it concludes there had been no evidence before the decision-maker which could reasonably be said to support its findings.

40. If and insofar as the solicitor's reference to the "*veracity*" of the video footage not being "*trustworthy*" was intended to imply that the video footage had been in some way manipulated, there is simply no evidence to support this. The video footage had been provided to An Garda Síochána and there is no suggestion in the subsequent report provided by them pursuant to Section 15 of the Housing (Miscellaneous Provisions) Act 1997 that the guards had any concerns as to the veracity of the video footage.

"Not … allow other occupiers of, or visitors to, the dwelling to behave"

41. The next point of law relied upon is in respect of the proper interpretation of the term "*allow*" for the purposes of Section 16(h) of the RTA 2004. The subsection imposes an obligation upon a tenant of a dwelling not to allow other occupiers of, or visitors to, the dwelling to behave within it, or in the vicinity of it, in an anti-social way.

42. The Tenancy Tribunal interpreted the term "*allow*" as including a failure to prevent the anti-social behaviour from occurring. The Tenancy Tribunal

rejected an argument that the Tenant could not be found to have allowed her son engage in anti-social behaviour in circumstances where she had been absent in England on the date of the incident. Rather, the Tenancy Tribunal found that the Tenant allowed the anti-social behaviour to occur because her own parents, whom she had placed in *loco parentis* to the children, did not prevent the anti-social behaviour from occurring.

43. Even assuming that the Tenant might, in principle, be responsible for the actions of individuals acting in *loco parentis*, this interpretation of the term "*allow*" entails an error of law on the part of the Tenancy Tribunal for the reasons which follow. The term "*allow*" captures both positive acts and omissions. A person who has failed to prevent anti-social behaviour on the part of another person, in circumstances where he or she could reasonably have prevented that behaviour, can be said to have "*allowed*" the other person to behave in that way. Crucially, however, this presupposes that the first person has actual or constructive knowledge of the behaviour of the other person. This presents little difficulty in cases where there is an ongoing pattern of behaviour by the other person. If, for example, the evidence establishes that one of the occupants of a tenanted dwelling has been persistently harassing other people living in the vicinity of the dwelling, then the tenant may be held to have "*allowed*" such anti-social behaviour, i.e. by failing to take reasonable steps to prevent it.

44. In the present case, by contrast, the Tenancy Tribunal only found there to have been a single incident of anti-social behaviour, namely that which occurred on 21 November 2021. There is nothing in the findings made by the Tenancy Tribunal to suggest that the Tenant could reasonably have anticipated this single incident, still less taken steps to prevent same. It follows, therefore, that the

Tenancy Tribunal erred in law in purporting to find that the Tenant was liable for the anti-social behaviour of her son. Specifically, the Tenancy Tribunal erred in its interpretation of the statutory term "*allow*".

45. It should be emphasised that this conclusion by the court has been reached by reference to the very particular circumstances of the present case. The outcome would have been different had the evidence established that there had been other incidents of anti-social behaviour on the part of the child. In such a scenario, the Tenant would have been obliged to take reasonable steps to prevent further anti-social behaviour on the part of her son. A failure to do so would leave the Tenant exposed to an eviction on the grounds of anti-social behaviour by virtue of having "*allowed*" such behaviour on the part of an occupier of the tenanted dwelling.

46. It should also be emphasised that the court's conclusion in this case is not informed by the fact that the Tenant had been out of the country at the time of the anti-social behaviour. Had the anti-social behaviour been reasonably foreseeable, then the Tenant's absence would not necessarily have absolved her of her obligation not to allow anti-social behaviour on the part of her son. It would not necessarily have been an answer for the Tenant to say that the child was in the care of his grandparents at the relevant time. The overarching obligation would remain with the mother, as Tenant, not to allow anti-social behaviour on the part of her son. Whether or not there had been a breach of the Tenant's obligation would depend on the context: if the Tenant had put responsible adults in *loco parentis* with the understanding that they would supervise the child, only for the child to engage spontaneously in anti-social behaviour, then this would not necessarily represent a breach. It should be

emphasised that this court is not required to make any finding on this hypothetical issue for the purpose of resolving the present appeal.

47. Finally, this judgment does not stand as authority for the proposition that a single incident of anti-social behaviour cannot, in principle, justify an eviction. If a tenant has reasonable grounds for anticipating anti-social behaviour by an occupant, then even an isolated incident would be sufficient to justify the termination of the tenancy. For example, if a tenant permitted a known troublemaker to stay in the dwelling and that person engaged in a single incident of anti-social behaviour, the tenant would be liable. Similarly, if one posits a counterfactual where the tenant themselves had been involved in the incident, this would, again, be sufficient to justify the termination of the tenancy.

48. In summary, the statutory language employed under Sections 16 and 17 of the RTA 2004—and, in particular, the phrase "*not ... allow other occupiers of, or visitors to, the dwelling to behave*"—does not have the legal effect of making a tenant strictly liable for the behaviour of occupiers of, or visitors to, the dwelling. Rather, the form of vicarious liability imposed is qualified: a tenant must either have permitted the behaviour or have failed to take reasonable steps to prevent it.

49. The approach of the Oireachtas in this regard can be contrasted with that obtaining in England. There, the provisions in respect of anti-social behaviour under the Housing Act 1985 (as amended) apply without distinction to the behaviour of a tenant or a person residing in or visiting the dwelling-house. There is no requirement that the tenant have permitted or allowed the behaviour.

Standard of proof

50. The next point of law relates to the standard of proof. The notice of termination of 8 December 2021 invoked, *inter alia*, sub-paragraph (a) of Section 17 of the RTA 2004. This subsection defines anti-social behaviour as behaviour that constitutes the commission of an offence, being an offence the commission of which is reasonably likely to affect directly the well-being or welfare of others.

51. It is submitted on behalf of the Tenant that, in circumstances where a finding of criminal wrongdoing has been made against the Tenant's son, the criminal standard of proof applies, i.e. the Tenancy Tribunal was required to be satisfied beyond a reasonable doubt that the Tenant's son had committed a criminal offence.

52. The Tenant submits that the Tribunal erred in law in applying the civil standard, i.e. the balance of probabilities. The Tenant did not cite any authority for this proposition. The Irish Courts have long since set their face against some sort of hybrid standard, whereby a higher onus is imposed in civil proceedings involving serious allegations. This is set out in *Banco Ambrosiano v. Ansbacher Company* [1987] I.L.R.M. 669. The proceedings here are civil in nature.

53. The approach adopted in this jurisdiction is similar to that adopted by other common law jurisdictions, and, more generally, by the European Court of Human Rights ("***ECtHR***"). This point can best be illustrated by reference to a very recent judgment of the United Kingdom Supreme Court: *Jones v. Birmingham City Council* [2023] UKSC 27, [2023] 3 WLR 343. This judgment was delivered in the context of a statutory regime which allows for the grant of injunctions in circumstances, *inter alia*, where a person has engaged or threatens to engage in anti-social behaviour. The UK Supreme Court rejected an argument that the criminal standard of proof should apply. The UK Supreme Court

concluded, following a review of the case law of the ECtHR, that there was no such obligation. It seems to me that the analysis of the UK Supreme Court can be applied, by analogy, to the circumstances of the present case.

"Vicinity"

54. The next point of law concerns the meaning to be attributed to the word "*vicinity*". It will be recalled that Section 16(h) of the RTA 2004 imposes an obligation upon a tenant not to allow other occupiers of, or visitors to, the dwelling to behave in an anti-social way within the dwelling, or in "*the vicinity of the dwelling*".

55. It is submitted on behalf of the Tenant that the Tenancy Tribunal should have made a finding of fact in relation to the distance between the Tenant's dwelling and the Complainant's dwelling. It is said that the Tenancy Tribunal erred in law in concluding that two houses could be said to be within the same "*vicinity*" merely because they are located within the same housing estate.

56. It is useful to pause here and to consider the approach adopted by the Supreme Court to the interpretation of the term "*vicinity*", albeit in the different context of liquor licensing legislation. The Supreme Court in *In the matter of Ward* [1966] I.R. 413 (at 424 to 425) noted that the term "*vicinity*" was imprecise and bore the same meaning as "*neighbourhood*":

> "The words, 'vicinity' and 'neighbourhood,' though differing in derivation, have the same meaning. The phrases, 'in the vicinity of' and 'in the neighbourhood of,' are interchangeable. The Shorter Oxford Dictionary (second edition) explains the phrase, 'in the vicinity of,' as meaning 'in the neighbourhood of,' 'near or close to,' and 'neighbourhood' is defined as 'a district, frequently considered in reference to the character or circumstance of its inhabitants.' In choosing the terms, 'vicinity' and 'neighbourhood,' the Oireachtas was avoiding the use of precise language, and was doing so deliberately. The Oireachtas has however qualified 'vicinity' by inserting the

> adjective, 'immediate'; and this does effect a limitation. The definition of 'immediate' given in the Shorter Oxford Dictionary (item 3) is 'having no person, thing or space intervening, in place, order, or succession; proximate, nearest, next close; often used loosely of a distance which is of no account."

57. It should be emphasised that the meaning of a term in one piece of legislation cannot automatically or unthinkingly be "*read across*" to another. Context is crucial in statutory interpretation. Nevertheless, the meaning attributed to the term "*vicinity*" by the Supreme Court in the context of the liquor licensing legislation is instructive. The Supreme Court held that the terms "*vicinity*" and "*neighbourhood*", although differing in derivation, have the same meaning.

58. The same logic applies to the RTA 2004. This is apparent from subparagraph (c) of Section 17(1) which uses the term "*neighbourhood dwelling*" in the context of anti-social behaviour. In order to justify the termination of a tenancy, the anti-social behaviour must have had an impact upon the neighbourhood within which the tenanted dwelling is located. It would not, for example, be sufficient that a tenant residing in a suburban area had committed a crime in Dublin City Centre. Rather, it is the impact of the anti-social behaviour on those living or working in the vicinity, i.e. neighbourhood, which must be considered.

59. Here, the evidence indicated that the two houses were located within the same housing estate. Counsel on behalf of the Tenant has sought to put forward hypothetical scenarios whereby there might be a considerable distance between two houses on the same estate. With respect, an appeal cannot be determined by reference to hypothesis. This illustrates the difficulty caused by the fact that many of the grounds sought to be relied upon by the Tenant in this appeal are ones which were not raised before the Tenancy Tribunal. This has had the practical effect that the Tribunal did not have to reach a finding of fact in relation

to same. If the Tenant had wished seriously to contend that the locus of the incident was not within the "*vicinity*" of the tenanted dwelling, then this is a matter which should have been raised by her solicitor at the hearing. In the event, the only reference in the transcript to the distance between the two dwellings is where the Tenant suggested that the Complainant's dwelling was approximately five minutes' walk from the tenanted dwelling.

60. In all the circumstances, there is no basis for saying that the Tenancy Tribunal erred in law in concluding that the Complainant's dwelling was in the vicinity of the tenanted dwelling. The Tenancy Tribunal was entitled to conclude, on the basis of the evidence before it, that the incident on 21 November 2021 occurred within the vicinity of the tenanted dwelling. The two dwellings were located within the same housing estate and the distance between same was, at most, five minutes' walk. They were, therefore, within the same neighbourhood.

61. For completeness, it should be recorded that the English judgment relied upon by the Tenant, i.e. *Adler v. George* [1964] 2 Q.B. 7, [1964] 1 All E.R. 628, is of no assistance. The narrow issue in that case had been whether an offence, which prohibited certain conduct "*in the vicinity*" of an air force station, had been committed where the conduct occurred *within* the boundaries of the station. It was held that the words "*in the vicinity of*" were to be read as meaning "*in or in the vicinity of*".

62. No such ambiguity arises under the RTA 2004: the legislation is expressly directed to behaviour "*within the dwelling, or in the vicinity of it*". The judgment in *Adler v. George* does not address the wider question of how the geographical area covered by the term "*vicinity*" is to be delimited.

63. Finally for completeness, it should be recorded that the Tenant requested that the High Court refer a question of law, in respect of the interpretation of "*vicinity*", to the Court of Appeal by way of case stated pursuant to Section 38 of the Courts of Justice Act 1936. With respect, that provision only applies in circumstances where the High Court is hearing an appeal from the Circuit Court. Moreover, Section 123 of the Residential Tenancies Act 2004 provides that the determination of the High Court on an appeal under that section shall be final and conclusive. (This is subject to the possibility of an application for leave to appeal to the Supreme Court pursuant to Article 34.5 of the Constitution of Ireland).

Objective bias

64. The final ground of appeal is that there was objective bias in that the members of the Tenancy Tribunal were on notice of allegations in relation to a subsequent, unproven incident on 26 November 2021. More specifically, the notice of termination refers to an alleged incident on 26 November 2021. It was conceded at the hearing before the Tenancy Tribunal that there was no evidence that the Tenant's son had been involved in that alleged incident. The report of the Tenancy Tribunal indicates that it did not have regard to the alleged incident on 26 November 2021 and that its determination was, instead, confined to the incident on 21 November 2021.

65. Notwithstanding all of this, counsel on behalf of the Tenant submits that the very fact of reference having been made to the incident on 26 November 2021 would have contaminated or affected the decision-making process. The argument is summarised as follows in the written submissions:

> "It is the Appellant's submission that the 'exposure' of the Tribunal to these serious allegations from the outset of the case and throughout most of the hearings could not, in the mind of an hypothetical independent observer, but have left a lasting impression upon the Tribunal that the allegations, despite having [been] formally withdrawn, might possibly, or probably, have been true, or largely true. Furthermore, that independent observer, might well be of the view, that the Tribunal inevitably were of the view, or impression, that there was more to this case than the single incident upon which the Notice of Determination was held to be valid."

66. With respect, no reasonable observer would have reached such a conclusion. The reasonable observer would know that the allegation had been withdrawn and that the fact of this withdrawal is expressly noted by the Tenancy Tribunal. The reasonable observer would also know of the careful consideration given to the case in the Tenancy Tribunal's report. This confirms that the Tenancy Tribunal were fully cognisant of the rules of evidence and placed no reliance on an unsubstantiated allegation which was withdrawn. Accordingly, the test for objective bias is not met.

CONCLUSION AND PROPOSED FORM OF ORDER

67. It was not open to the Tenancy Tribunal, on the facts as found by it, to determine that the Tenant had breached her obligation under Section 16(h) of the RTA 2004 not to "*allow*" other occupiers of, or visitors to, the dwelling to behave within it, or in the vicinity of it, in a way that is anti-social. The Tenancy Tribunal erred in law in its interpretation of the statutory term "*allow*". It follows that the Tenancy Tribunal erred in law in determining to uphold the validity of the notice of termination.

68. Accordingly, the appeal must be allowed. An order will be made, pursuant to Section 123 of the Residential Tenancies Act 2004, cancelling the determination

order of 1 February 2023. This is not an appropriate case in which to remit the matter to the Tenancy Tribunal for reconsideration. The Tenancy Tribunal cannot lawfully uphold the notice of termination on the facts as found by it.

69. As to the allocation of legal costs, my *provisional* view is that the Tenant, having succeeded in her appeal, is entitled to recover her costs as against the Residential Tenancies Board. This reflects the default position under Section 169 of the Legal Services Regulation Act 2015. The proposed costs order would include the costs of the written legal submissions and would be subject to adjudication under Part 10 of the LSRA 2015 in default of agreement between the parties.

70. It is correct to say that the Tenant only succeeded on one of the many points of law advanced on her behalf. However, the pursuit of the unsuccessful grounds did not materially add to the length of the hearing. The case was argued with admirable concision by both sets of counsel. The papers would have had to be opened to the court in detail even if the appeal had been confined to the single issue upon which the Tenant succeeded. Accordingly, my *provisional* view is that this is not an appropriate case in which to apportion costs by reference to time spent on the unsuccessful grounds.

71. If either party wishes to contend for a different form of order than that proposed, they should contact the registrar assigned to this case within 21 days and request to have the matter listed before me on Wednesday 4 October 2023 at 10.45 o'clock.

Appearances

Paul O'Shea for the appellant instructed by Cyril & Company
Úna Cassidy for the respondent instructed by Byrne Wallace LLP

Approved Garrett Simons