Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0823-006554 / Case Ref No: 0523-85265

Applicant Landlord:	Tomas Treacy
Respondent Tenant:	David Murphy-Reeve
Address of Rented Dwelling:	Apartment 8, Kirwan's Corner, Kirwans Lane, Galway, H91V650
Tribunal:	Eoin Byrne (Chairperson) Karen Ruddy, Helen-Claire O'Hanlon
Venue:	Virtual
Date & time of Hearing:	14 December 2023 at 10:30 a.m.
Attendees:	For the Applicant Landlord: Tomas Treacy (Applicant Landlord). For the Respondent Tenant: David Murphy-Reeve (Respondent Tenant), Sinead Roche (Threshold, representatives for the Respondent Tenant).
In attendance:	RTB appointed stenographer/logger.

1. Background:

On 9 May 2023, the Landlord made an application to the Residential Tenancies Board ("the RTB") pursuant to s. 76 of the Residential Tenancies Act 2004, as amended ("the Act"). The matter was referred to mediation which took place on 24 July 2023. This was unsuccessful.

Subsequently a valid Tribunal application was received from the Landlord by the RTB on 3 August 2023 and thereafter approved by the Board. The RTB constituted a Tenancy Tribunal ("the Tribunal") and appointed Eoin Byrne, Karen Ruddy and Helen-Claire O'Hanlon as Tribunal members, pursuant to ss. 102 and 103 of the Act and appointed Eoin Byrne to be the chairperson of the Tribunal ("the Chairperson").

On 21 November 2023, the parties were notified of the constitution of the Tribunal and provided with details of the date, time and venue set for the hearing. On 14 December 2023, the Tribunal convened a virtual hearing at 10:30 a.m. using Microsoft Teams.

2. Documents Submitted Prior to the Hearing Included:

RTB Tribunal case files.

3. Documents Submitted at the Hearing Included:

There was no further documentation submitted at hearing.

4. Procedure:

The Chairperson asked the parties present to identify themselves and to identify in what capacity they were attending the Tribunal. The Chairperson confirmed with the parties that they had received the relevant papers from the RTB in relation to the case and that they had received the RTB document entitled "Tribunal Procedures".

The Chairperson explained the procedure which would be followed. In particular, he outlined that the Tribunal was a formal procedure but that it would be held in as informal a manner as was possible, that the person who applied (the Applicant Landlord) would be invited to present his case first, that there would be an opportunity for cross-examination on behalf of the Respondent Tenant, that the Respondent Tenant would then be invited to present his case, and that there would then be an opportunity for cross-examination by the Applicant Landlord. The Chairperson explained that following this, both parties would be given an opportunity to make a final submission. He reminded the parties that the hearing was a de novo hearing, being a full rehearing of the case.

The Chairperson stressed that all evidence would be taken on affirmation and be recorded by the official stenographer present and he reminded the parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of €4,000 or up to 6 months imprisonment or both.

The Chairperson also reminded the parties that as a result of the hearing that day, the Board would make a determination order which would be issued to the parties and could be appealed to the High Court on a point of law only. Prior to commencing evidence, the Chairperson reminded the parties that it was open to them to reach an agreement. The Chairperson advised the parties of the benefits of reaching an agreement and advised them that any agreement reached would be capable of being confidential while retaining the enforceability of an order of the RTB. The Chairperson indicated that, if the parties wished to discuss matters among themselves, the Tribunal would leave the virtual meeting and allow them to discuss matters among themselves on a without-prejudice basis. The parties availed of the opportunity but were unable to reach an agreement.

All parties intending to give evidence entered an affirmation. The Tribunal asked the parties what matters could be noted as agreed. The list of matters referred to below were noted as agreed.

The Tribunal also noted its awareness that there had been a recent adjudication hearing between the parties concerning an alleged unlawful eviction. The Tribunal noted that the only matters properly before it, on the basis of the papers before the Tribunal, related to the validity or otherwise of a notice of termination and alleged rent arrears. The Tribunal also indicated that any issues in respect of the alleged unlawful termination of the tenancy were not properly before it, and that where the validity of the notice of termination and the question of alleged rent arrears had been before the mediator in the present proceedings, those two issues appeared to be the issues properly before the Tribunal. Accordingly, all parties before the Tribunal addressed those matters only.

5. Submissions of the Parties:

Applicant Landlord's case:

The Applicant Landlord outlined that he served a notice of termination on 10 August 2022, and that the Respondent Tenant had confirmed receipt of that notice. He outlined that 186

days' notice was provided, in excess of the period required, and that that period was extended by the winter emergency period to 30 April. He outlined that as of 1 May 2023, the Respondent Tenant was thus overholding and had never challenged the notice of termination inside either the 28 days given or the 90 days allowed by the Act and that, as such, the point in that respect was moot. He further indicated that he did not specify individual contractors on the notice where he intended to get a number of smaller contractors and intended to do some of the works himself, and was not aware he had to provide names and other details, as he had perhaps misunderstood the RTB template. He indicated that the planning permission related to fire safety works, supplemental to the other works specified in the notice of termination, and that a number of such works were required.

In respect of alleged rent arrears, he outlined that during the mediation process, the issue of arrears was also discussed. He indicated that during the pandemic, the Respondent Tenant had personal difficulties which led to difficulties in paying rent and that he had empathy and did not go through formal procedures at that stage; he also outlined that he had continued to engage with the Respondent Tenant. He further outlined that he tried to get the evidence relating to the arrears including old Ulster Bank account details. He stated that the arrears figure was €1,836, all arising during the pandemic period, where there were a number of months where full rent was not paid. He accepted that there had been some ambiguity and it was only where the mediator had raised the issue of arrears and that he was not going to go back and chase the arrears. He also accepted that after rent recommenced being paid in full, he did not raise the issue further with the Respondent Tenant.

Respondent Tenant's case:

The Respondent Tenant's representative outlined that the notice of termination was invalid on a number of grounds, as detailed in her submissions, in particular in relation to the details of works, the names of contractors and the references to planning permission, indicating in particular that no planning permission was supplied with the notice of termination. She also indicated that it was not clear from the case file if the planning reference provided actually related to the present property. She stated that all issues in respect of the notice of termination were dealt with in her written submissions.

In respect of the alleged rent arrears, the Respondent Tenant himself directly stated that there were periods during the Covid-19 pandemic where he paid only partial rent, and that was on foot of an agreement that when he obtained employment again, he would pay full rent again. He accepted that there were months when less than full rent was paid but stated that the figure of €1,836 claimed was too high and that he did not know off the top of his head how many months he did not pay full rent. However, he further indicated that he was never asked when that sum would be paid back and was never provided with a figure in that respect. He outlined that the discussions that had taken place during the pandemic related only to how much he could afford to pay and that there was never any mention of money being outstanding.

Closing submissions:

The Applicant Landlord reiterated that he believed he had followed the appropriate process and adhered to legislation, including appropriate notice periods and that he had given proper notice prior to the termination of the tenancy.

The Respondent Tenant's representative submitted that the notice was invalid, the Respondent Tenant was never overholding, that the issue of arrears had never been raised

during the tenancy and was not supported by paperwork, and that there was no evidence to support that aspect of the claim.

6. Matters Agreed Between the Parties:

The parties agreed that the address of the dwelling is Apartment 8, Kirwan's Corner, Kirwans Lane, Galway, H91V650; that the tenancy commenced on 9 January 2020; that the rent at the end of the tenancy was €918 per month; that a deposit of €500 had been paid at the outset of the tenancy and was retained by the Applicant Landlord; that the tenancy ended on 29 July 2023; and that what was headed as a notice of termination was served by the Applicant Landlord on the Respondent Tenant on 10 August 2022 by regular post and by email.

7. Findings and Reasons:

Having considered all of the documentation before it and having considered the evidence presented to it by the parties, the Tribunal's findings and reasons therefor are set out hereunder.

Finding 1: The Tribunal finds that the notice of termination with a date of service of 10 August 2022, served by the Applicant Landlord on the Respondent Tenant, is invalid.

Reasons: As a preliminary matter in this dispute, the Tribunal is satisfied that it was proper and appropriate for the Tribunal to consider the issue relating to the validity of the notice of termination. Firstly, when the proceedings were brought, the case included an allegation of overholding and, as such, the validity of the notice of termination was part of the proceedings. In respect of the mediation, there is no dispute as to the fact that the Respondent Tenant remained in occupation at that time. The validity or otherwise of the notice of termination was thus part of the present proceedings.

While there is a subsequent allegation of unlawful eviction, that does not make any finding as to the validity or otherwise of the notice of termination moot in these proceedings. The validity or otherwise of the notice of termination is a relevant factor relating to the events leading up to the termination of the tenancy, even if the allegation of unlawful eviction is not properly before this Tribunal.

Further, while there is a time limit for referring a dispute as to the validity of a notice of termination to the RTB, the landlord's remedy where a tenant is alleged to be overholding is to bring a dispute to the Board, even if the time limit for challenging a notice has passed, and seek to enforce the notice of termination via those proceedings. As such, while s. 80 of the Act does provide a time period within which to challenge the validity of a notice of termination, a failure to challenge the notice does not mean that the notice is deemed valid; it means only that no challenge was brought. It does not mean that where a landlord seeks enforcement of such a notice that it must be found or be presumed to be valid.

For all those reasons, the Tribunal is satisfied that the issue as to the validity of the notice of termination is properly part of these proceedings.

In respect of the notice of termination as served, the Tribunal is satisfied that it was invalid for a number of reasons. While the Act has been amended a number of times, the Tribunal must have regard to the Act as it stood on the date of service of the notice of termination in this case on 10 August 2022.

Where a notice is served under para. 5 of the table to s. 34 of the Act, as in this case, where a landlord wishes to refurbish a dwelling, there are a number of requirements under the Act.

First, s. 34(a) provides that the tenancy may be terminated "if … (iii) the notice of termination contains or is accompanied by a certificate in writing of a registered professional (within the meaning of the Building Control Act 2007) stating that—

(I) the proposed refurbishment or renovation works would pose a risk to the health or safety of the occupants of the dwelling concerned and should not proceed while the dwelling is occupied, and

(II) such a risk is likely to exist for such period as is specified in the certificate which shall not be less than 3 weeks"

There is no such certificate in the present case. The notice is invalid on this basis.

Second, para. 5 of the table to s. 34 also states "that, in a case where planning permission has been obtained, a copy of the planning permission is attached to the notice or statement".

No planning permission was attached to the notice in this case, on the date it was served. This is what is required. Similarly, there was no statement that planning permission was not required; if planning permission was not required, the notice was also required to comply with s. 35(9)(b), and state "the name of the contractor, if any, employed to carry out the intended works, and … the dates on which the intended works are to be carried out and the proposed duration of the period in which those works are to be carried out". The notice in this case complied with none of this. It is thus further invalid on this basis. While there is a reference to planning permission later, that was obtained subsequent to the service of the notice of termination; the requirement is that a copy of the planning permission be served with the notice of termination.

Third, the notice of termination is also required to specify "the nature of the intended works". The notice in this case refers only to a "bathroom, kitchen & living room refurb". That does not necessarily show that termination of the tenancy was required for those works to be carried out, without the provision of further detail. It does not show works reaching the level of substantially refurbishing or renovating the dwelling in a way which requires the dwelling to be vacated for that purpose. It is for the Applicant Landlord to establish that the notice of termination is valid, based on the works specified in the notice. The level of detail provided does not reach this level. For this reason also, the notice is invalid.

Beyond these three issues, as of 6 July 2022, and amendment effected by the Regulation of Providers of Building Works and Miscellaneous Provisions Act 2022 ("the 2022 Act"), there is no longer a requirement for a tenant to provide a landlord with contact details, in respect of the making of an offer to reoccupy on completion of works. The notice in this case purported to impose an obligation on the tenant, which no longer exists, to provide his contact details to the landlord. That is no longer required. While the question as to whether this makes the notice invalid or not is not necessarily clear, it is nonetheless not in compliance with the Act.

Further, under s. 80 of the Act, as also amended by the 2022 Act, a tenant has 90 days to challenge a notice such as the notice in this case. However, the notice in this case referred to 28 days. Having said that, s. 62(1)(g) of the Act still refers to a 28-day period. That being the case, the notice as served in this case is not necessarily invalid on that basis.

Similarly, while the notice appears to bear an electronic signature, given the number of other invalidities, the Tribunal is not required to determine whether that alone also invalidates the notice of termination. Under s. 62, a notice of termination should be signed.

Ultimately, there are a number of more serious defects with the notice of termination, in particular the first three issues outlined above. While the later issues may be more minor, the first three issues are undoubtedly more serious and go to the core of the notice. They cannot be regarded as merely slips, omissions or defects in the notice of termination. A person receiving such a notice is entitled to know the nature of the works proposed in more detail, along with appropriate timescales, and whether planning permission is or is not required. These are not minor. These enable the recipient to plan properly and know when they will be required to vacate and for how long, given that the dwelling should be made available to them again once works have been completed. It also enables a recipient to know whether the works specified meet the test and that the landlord has a bona fide intention to "substantially refurbish or renovate the dwelling … in a way which requires the dwelling to be vacated for that purpose". These are all issues which should be apparent to the recipient of such a notice, in order to allow them to plan properly or to challenge the bona fides of the intention, if appropriate. For all these reasons, it could never have been appropriate in the present case to consider the application of the so-called "slip rule" in s. 64A of the Act, or to allow service of a remedial notice under s. 66(2A) of the Act. The issues are material and prejudice the notice in a material way.

Accordingly, the Tribunal is satisfied that it is appropriate to determine that the notice of termination in the present case was invalid.

In circumstances where there are further allegations of events post-dating the date of the mediation in this case, and where those are quite distinct from the issues in this case, it would not be appropriate for the Tribunal to comment further. The Tribunal notes only that those matters were not properly part of the present proceedings and were a matter for the adjudicator in that other case. While the issues as to the validity of the notice and alleged rent arrears were before this Tribunal, those other matters were not and could not have been before this Tribunal.

Finding 2: The Tribunal finds that the Applicant Landlord has not proved that he has any entitlement to payment of any alleged arrears of rent in respect of the tenancy in this case.

Reasons: The claim of the Applicant Landlord in this case relates to alleged arrears of rent occurring during the Covid-19 pandemic.

In respect of this issue, the Tribunal should note that the default position is that where there is an agreed rent, there is ordinarily a liability to pay rent unless validly reviewed. Where there is no valid review, a landlord is entitled to payment as agreed.

However, while that is something of a default position, that is not to say that it necessarily applies in every case. In the present case, the claim of the Respondent Tenant is in effect that he paid less rent during the pandemic period, that this was agreed between them, that he was never advised that the Applicant Landlord viewed the short payments as arrears, and that the tenancy continued, such that the Applicant Landlord should not be entitled to any payment in this case. His representative further submitted, in effect, that the claim is not adequately supported by the available evidence.

Ultimately, in the present case, the Tribunal is satisfied that the course of dealing between the parties demonstrates that there was an agreement of this manner entered into between

the parties. The evidence shows that the Respondent Tenant paid less rent, and that this was agreed between the parties. The Respondent Tenant remained in occupation and, when he regained employment, paid the full rent again. The Applicant Landlord himself accepted that no sums were sought during the tenancy and that his position changed only since the mediation in the present case.

This is unequivocal evidence, from the Applicant Landlord himself, that the position in respect of rent had been agreed around the time of the pandemic. That was a time of uncertainty for all parties. Both sides gained from the agreement. The Applicant Landlord retained a tenant who ultimately resumed paying full rent and remained in occupation of the dwelling, thus not requiring the Applicant Landlord to deal with a vacant dwelling or find a new tenant during a pandemic; the Respondent Tenant gained security of tenure despite the obligation to pay rent and the lack of formal rent review. The primary question for the Tribunal is whether the Applicant Landlord should now be held to this position. It is the Applicant Landlord's claim, in effect, that he is now entitled to resile from this position; the Tribunal must consider if it is permissible.

The Tribunal is not satisfied that the Applicant Landlord can resile from this position. It is common case that there were discussions during the pandemic and that both sides agreed to a lower rent for a certain period, and that both sides gained something from that agreement. While the actions of the Applicant Landlord were commendable and indeed not required by the Act, ultimately the Tribunal accepts that both parties acted on foot of the agreement. Their actions, in terms of what is accepted by both parties, demonstrates this, in that lower rent was paid for a period, then the Respondent Tenant regained employment, then full rent was paid, and in particular no back payments were ever sought, prior to the mediation in this case. This, alone, demonstrates that both parties gained from the agreement, and that the Respondent Tenant acted on foot of it by remaining in the tenancy and continuing to pay rent, rather than terminating the tenancy during the pandemic.

As such, the Applicant Landlord is not entitled to resile from that position at this stage. Where parties enter into legally binding arrangements relating to rent and where there is no valid review, they should ordinarily be bound by the rent. However, where a course of dealing follows and one party acts to his detriment on foot of that course of dealing, as in this case where the Respondent Tenant remained in occupation and continued to accrue obligations to pay rent to the Applicant Landlord, including full rent when he obtained employment, the parties should be bound by their agreement. The Applicant Landlord was not entitled to agree to one thing, have the Respondent Tenant act on foot of it, and then resile from that.

As such, the Tribunal is satisfied that the Applicant Landlord is not entitled to the payment of any sum said to be rent arrears arising from the short payments during the Covid-19 pandemic. Accordingly, no such order is made.

Further, in any event, there was no detailed, objective evidence available to the Tribunal, such as bank statements, a rent book or a rent account. While the Applicant Landlord indicated that this was because of the closure of Ulster Bank, ultimately the matter was before the mediator in July 2023, over four months prior to the Tribunal hearing. From then until the date of the Tribunal hearing should have been more than sufficient time to ascertain the exact position and obtain appropriate records; there is no indication as to why this period was not sufficient. The Applicant Landlord similarly did not submit a rent account or record of payments, despite stating the exact sum alleged to be outstanding. That is not a sufficient basis to award any payment. The Tribunal also cannot allow such a lack of

disclosure of the claim to lead to a finding against the Respondent Tenant. A person in that position is entitled to know the case against them, and the alleged amount of the arrears, in order that they can properly challenge them, and review their own records and available evidence. The Applicant Landlord is not entitled to raise the claim for rent arrears without some degree of particularisation before the hearing; while the Tribunal accepts this was never his intention, he cannot be allowed to ambush the Respondent Tenant at this stage.

Further, the very fact that these details were not provided, and in particular the fact that the Applicant Landlord did not seek to obtain or retain relevant records prior to the closure of Ulster Bank, is of itself evidence that he did not have an intention to pursue those short payments, at the very least prior to the closure of Ulster Bank in 2022. That is evidence that there was an agreement between the parties relating to those sums during the pandemic period.

For all those reasons, the Tribunal is not satisfied that it is appropriate to make any order in respect of the payment of alleged rent arrears in the present case, in respect of any rent said to have been foregone during the Covid-19 pandemic.

For the avoidance of any doubt, however, it is also not appropriate for the Tribunal in the present case to make any findings in respect of the deposit in the present case and whether or not it was justifiably retained by the Applicant Landlord. Where the tenancy ended after the date of the mediation and where the issue of the deposit was not considered and could not have been considered during that stage of these proceedings, and where it is fundamentally not related to the issues before this Tribunal, it would not be appropriate for the Tribunal to make any findings in this respect.

The only findings made by the Tribunal are that the notice of termination was not valid, and that the Applicant Landlord has not proved an entitlement to any alleged arrears of rent in the present case, relating to alleged arrears accrued during the Covid-19 pandemic.

8. Determination:

In the matter of Tomas Treacy, Applicant Landlord, and David Murphy-Reeve, Respondent Tenant, the Tribunal, in accordance with s. 108(1) of the Residential Tenancies Act 2004, determines that:

1. The notice of termination with a date of service of 10 August 2022, served by the Applicant Landlord on the Respondent Tenant, in respect of the former tenancy between them of the dwelling at Apartment 8, Kirwan's Corner, Kirwans Lane, Galway, H91V650, is invalid.

2. The Applicant Landlord's claim in respect of alleged rent arrears in respect of the above tenancy is not upheld.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 03/01/2024.

Signed: 

Eoin Byrne, Chairperson
For and on behalf of the Tribunal.