THE HIGH COURT

[2020] IEHC 712

[2019 No. 1 MCA]

IN THE MATTER OF SECTION 123(3) OF THE RESIDENTIAL TENANCIES ACT 2004 (AS AMENDED)

BETWEEN

ALVIN PRICE

APPELLANT

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

COLETTE TALBOT

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 3rd day of December, 2020

Background

1. This is an appeal under s. 123(3) of the Residential Tenancies Act 2004 (the Act of 2004) in respect of a Tribunal report and a determination order of the Residential Tenancies Board. The appellant is the landlord of a dwelling at 17 Templemore Avenue, Rathgar, Dublin 6 (the premises).

2. Under a tenancy agreement, the premises were let to the notice party at a rent of €2,200 per month, payable in advance on the twelfth day of each month. In October, 2014, the rent increased to €2,400 per month. The following facts are not in dispute: -

   (i) In January, 2018, the notice party notified the appellant's wife, by text message, that she would be vacating the premises in early March, 2018;

   (ii) The following month, in February, 2018, the notice party informed the appellant's wife, by telephone, that she would be vacating the premises during the weekend of 10 March 2018;

   (iii) On 10/11 March 2018, the notice party vacated the premises;

   (iv) On 13 March 2018, the appellant re-entered the premises and carried out an inspection. Some three days later, the appellant furnished a schedule of dilapidations to the notice party;

   (v) A dispute arose between the appellant and the notice party which was subject to an adjudication hearing under the Act of 2004. This matter was appealed to the Tribunal, referred to in para. 1 above; and

   (vi) The appellant re-let the premises at a rate of €3,500 per month on 1 July 2018.

3. It is also not in dispute that at the time the notice party vacated the premises the rent had fallen into arrears. Further, it was not in dispute that the notice party had not served a notice of termination, as required by the Act of 2004.

Section 37 of the Act of 2004

4. The interpretation and application of s. 37 is the central issue in this appeal. The relevant parts of s. 37 are as follows: -

> "37.(1) *Subject to subsection (3),* a Part 4 tenancy shall be deemed to have been terminated by the tenant on his or her vacating the dwelling if—
>
> (a) …
>
> (b) before or on that vacating the rent has fallen into arrears.
>
> (2) …
>
> (3) …
>
> (4) Nothing in the preceding subsections affects the liability of the tenant for rent for the period that would have elapsed had a notice of termination giving the required period of notice been served by him or her. …"

The tenancy in question was a "*Part 4"* tenancy and had a proper notice of termination been served it would have expired on 4 June 2018.

Report and Determination of the Respondent

5. In the first instance, the adjudicator held that the notice party did not give the 84 days' notice required for termination and so the appellant, under s. 37(4) of the Act of 2004, was entitled to recover the rent for that period. This decision was appealed.

6. The appeal was heard by a "*Tribunal*" established under s. 102 of the Act of 2004. The Tribunal found that the termination of the tenancy had occurred by 12 March 2018, the notice party having vacated the premises and the rent being then 28 days in arrears. The Tribunal further found that the appellant was entitled to 84 days' notice of termination for such period subject to the duty to mitigate his losses (emphasis added). The reasons for this finding was that: -

> "… [t]he Landlord [the appellant] was aware that the rent for February 2018 had not been paid. The Landlord was entitled to deem the tenancy at an end. His email of 12 March 2018 recounting inspection of a vacated Dwelling and requesting a schedule of Dilapidations was consistent with this.
>
> The Landlord could have re-let the Dwelling prior to 01 July 2018. The Landlord was aware since early January 2018 of the specific intention to vacate in mid-March 2018 and that position was confirmed on several occasions in January and February 2018. He would have been in a position to make provisional arrangements regarding future letting plans. …"

The Tribunal, thus, awarded the appellant a sum less than the rent for the period that would have elapsed had a notice of termination been given as required.

7. It should also be noted that there was also a dispute concerning the condition of the premises when vacated, but this is not relevant to the appeal before the Court.

The Appeal

8. An appeal from a Tribunal report and a determination order of the respondent is on a point of law only (s. 123(3) of the Act of 2004). The point of law is as follows: -

> "Whether an entitlement to rent in lieu of notice of termination under section 37(4) of the Residential Tenancies Act 2004 is subject to a duty to mitigate on the part of the landlord and if so, how is that duty to be performed."

Submissions

9. Mr. Conor Feeney BL, on behalf of the appellant, submitted that the respondent erred in law in applying the doctrine of mitigation to the amount of rent recoverable under s. 37(4) of the Act of 2004. Mitigation of loss is a matter which arises in relation to a claim for damages as opposed to a claim for the payment of a debt or a contractual or statutory entitlement. He submitted that this was a distinction recognised by the other sections of the Act of 2004, and referenced s. 78(1)(m): -

> "78 (1)…the matters in respect of which disputes and, where appropriate, complaints may be referred to the Board for resolution include—
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> …
>
> (m) a claim for costs or damages or both by a landlord or tenant for the purported termination of a tenancy otherwise than in accordance with this Act,"

And s. 115 which refers to redress that may be granted on foot of a determination of the respondent: -

> "(d) a direction that a specified amount of damages or costs or both be paid,"

10. Mr. Feeney relied upon what he considered to be the clear wording of s. 37 which provides for a tenancy being "*deemed to have been terminated by the tenant on his or her vacating the dwelling*…" and so a retaking of possession by the landlord is not a surrender as maintained by the respondent. Indeed, s. 58 of the Act of 2004 provides: -

> "(1) From the relevant date, a tenancy of a dwelling may not be terminated by the landlord or the tenant by means of a notice of forfeiture, a re-entry or any other process or procedure not provided by this Part. …"

It was further submitted that if the legislature had intended that the liability to pay rent for the notice period would be subject to mitigating factors, i.e. the landlord re-letting property during the notice period, then a statutory provision would have been made for this in section 37.

11. Mr. Micheál O'Connell SC (with Ms. Una Cassidy BL), on behalf of the respondent, put considerable emphasis on what they considered to be the legal consequences of the appellant retaking possession of the demised premises, the notice party having vacated. It was maintained that this was, in effect, a surrender of the lease and, under the general law, the appellant could not thereafter maintain a claim for rent and, from that point

forward, his entitlement was to damages which would be subject to an obligation to mitigate his loss. Mr. O'Connell submitted that s. 37(4) preserved the obligation to pay rent on the basis that a lease continued in existence. This, he submitted, was a "*deeming*" statutory provision. The obligation to pay rent would not survive the lease being brought to an end, which occurred when the appellant retook possession. He referred to a decision of Keane J. (as he then was) in *Tempany v. Royal Liver Trustees Limited* [1984] I.L.R.M. 273, which concerned the legal effects on a guarantor of a lease where that lease has been disclaimed by a liquidator. In that case, the "deeming" provision was s. 290(3) of the Companies Act 1963 (now reflected in s. 615(5) of the Companies Act 2014) which provides: -

> "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person."

The equivalent of s. 290(3) in the UK was considered in *Hindcastle Limited v. Barbara Attenborough Associates Limited and Ors*. [1996] 1 All ER 737 where Lord Lloyd stated the following: -

> "If the problem is approached in this way, the best answer seems to be that the statute takes effect as a deeming provision so far as other persons' preserved rights and obligations are concerned. A deeming provision is a commonplace statutory technique. The statute provides that a disclaimer operates to determine the interest of the tenant in the disclaimed property but not so as to affect the rights or liabilities of any other person. Thus when the lease is disclaimed it is determined and the reversion accelerated but the rights and liabilities of others, such as guarantors and original tenants are to remain as though the lease had continued and not been determined. In this way the determination of the lease is not permitted to affect the rights or liabilities of other persons. Statute has so provided."

12. By application in the instant case, Mr. O'Connell submitted that s. 37(4) of the Act of 2004 has the effect of keeping the lease in existence to enable a landlord to recover rent for the notice period. However, if during that period the landlord takes possession of the premises, then the "*fictional*" lease is brought to an end and so thereafter the remedy available to the landlord is damages, which are subject to a duty to mitigate.

13. Finally, it was submitted by the respondent that if the appellant's interpretation of s. 37(4) was correct, it would permit "*double recovery*" in that, for a period of time, a landlord, such as the appellant, could receive not only rent for the notice period but also rent during the same period or part of it by a newly installed tenant.

Consideration of Submissions

14. Though I acknowledge the sophistication of the submissions made on behalf of the respondent, I do not accept them. The starting point, to my mind, is the wording of s. 37 itself. The tenancy "*shall be deemed to have been terminated by the tenant on his or her vacating the dwelling… before or on that vacating the rent has fallen into arrears*". This covers the facts in the instant case. The wording of s. 37(4) is equally clear, that *"[n]othing … affects the liability of the tenant for rent for the period that would have elapsed had a notice of termination giving the required period of notice been served…".* The rent referred to is a specified sum, i.e. rent for the notice period. That sum is not stated to be subject to any deduction. It is a specified sum arising from a specific statutory entitlement, it is not "*damages*" that may require to be calculated subject to mitigation. It is clear from other sections of the Act of 2004, which I have referred to, that where "*damages*" are involved, there is specific statutory provision for such. If the legislature had intended that the amount referred in s. 37(4) could be subject to a deduction, then such would have been stated.

15. The respondent in its submissions to the Court referred to the following passage from the judgment of Lord Browne-Wilkinson (quoting Gibson J. from the Court below) concerning *"deeming provisions*" in *Marshall (Inspector of Taxes) v. Kerr* [1995] 1 AC 148: -

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so." (Emphasis added)

It seems to me that there would be, if not an injustice, certainly an absurdity in considering s. 37(4) of the Act of 2004 as being a "*deeming provision*". It would mean that a landlord who wished to rely on s. 37(4) would not be permitted to re-enter the dwelling for a period, in this case some 84 days, notwithstanding the fact that the dwelling was now vacant. The landlord would not be permitted to secure the property even though it was vacant.

16. In order for the respondent's interpretation of s. 37(4) to be correct, it would mean that the appellant's re-entry had legal effect in that the lease was thereby determined. For a Part 4 tenancy, this is not permissible. I have already referred to s. 58 of the Act of 2004 which clearly provides that a tenancy of a dwelling may not be terminated by the landlord by a re-entry.

17. It is correct that the appellant's construction of s. 37 could lead to "*double recovery*". That may be permissible but what would not be permissible would be "*double compensation*". That is not the case here.

Conclusion

18. By reason of the foregoing, I am satisfied that the appellant's appeal on a point of law should be allowed. I will hear the parties as to the consequential orders and, in this regard, written submissions should be made within fourteen days of the delivery of this judgment.