THE HIGH COURT

[2024] IEHC 574

[2023 No. 149 MCA]

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

BETWEEN:

TUATH HOUSING ASSOCIATION

APPELLANT

-AND-

RESIDENTIAL TENANCIES BOARD

RESPONDENT

-AND-

TETYANA SOROKA AND VASSYL SOROKA

NOTICE PARTIES

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 4th day of October 2024.

1. This is an appeal to the High Court on a point of law from a determination order of a Tenancy Tribunal made on 31 March 2023.

2. What is the extent of the duty imposed on landlords by s.12(1)(b) of the Residential Tenancies Act 2004 (the 2004 Act)? Can a landlord who lets an apartment in an apartment block avoid the statutory obligation to repair the structure of that dwelling where repair will be futile because damage is being caused by defects in other parts of the building? Does absence of a legal right to enter onto other parts of a building to fix such defects afford an answer to a tenant's claim based on s.12(1) of the 2004 Act?

3. By s.123(5) of the 2004 Act: "[t]he High Court may, as a consequence of the determination it so makes, direct the Director of the [Private Residential Tenancies Board] to cancel the determination order concerned or to vary it in such manner as the Court specifies and the Director shall cancel or vary the order accordingly; if the cancellation or variation directed to be made relates to a determination of the Tribunal not to deal with the dispute in accordance with section 85, the Board shall, in addition, refer all or part, as appropriate, of the dispute to the Tribunal for

determination by the Tribunal and the provisions of this Part shall, with any necessary modifications, apply to that determination."

4. By s.123(4) of the 2004 Act, the determination of the High Court on such an appeal shall be final and conclusive.

5. Section 12 of the 2004 Act sets out a landlord's statutory obligations to a tenant holding a residential tenancy. The sources of these obligations may be found within the express words of s.12(1)(a) to (i) of the 2004 Act or in other legislation.

6. Section 12(1) of the 2004 Act provides that: "[i]n addition to the obligations arising by or under any other enactment, a landlord of a dwelling shall- ...

(b) …carry out to-

(i) the structure of the dwelling all such repairs as are, from time to time, necessary to ensure that the structure complies with any standards for houses for the time being prescribed under section 18 of the Housing (Miscellaneous Provisions) Act 1992, and

(ii) the interior of the dwelling all such repairs and replacement of fittings as are, from time to time, necessary so that the interior and those fittings are maintained in, at least, the condition in which they were at the commencement of the tenancy and in compliance with any such standards for the time being prescribed, …

(g) without prejudice to any other liability attaching in this case, reimburse the tenant in respect of all reasonable and vouched for expenses that may be incurred by the tenant in carrying out repairs to the structure or interior of the dwelling for which the landlord is responsible under paragraph (b) where the following conditions are satisfied-

(i) the landlord has refused or failed to carry out the repairs at the time the tenant requests him or her to do so, and

(ii) the postponement of the repairs to some subsequent date would have been unreasonable having regard to either –

(I) a significant risk the matters calling for repair posed to the health or safety of the tenant or other lawful occupants of the dwelling, or

(II) a significant reduction that those matters caused in the quality of the tenant's or such other occupants' living environment,

(h) if the dwelling is one of a number of dwellings comprising an apartment complex-

(i) forward to the management company, if any, of the complex any complaint notified by the tenant to him or her concerning the performance by the company of its functions in relation to the complex,

(ii) forward to the tenant any initial response by the management company to that complaint, and

(iii) forward to the tenant any statement in writing of the kind referred to in section 187(2) made by the management company in relation to that complaint."

7. The term "dwelling" is defined in s.4(1) of the 2004 Act as meaning "a property let for rent or valuable consideration as a self-contained residential unit and includes any building or part of a building used as a dwelling and any out office, yard, garden or other land appurtenant to it or usually enjoyed with it".

8. This definition is similar to the definition of "house" in s.1(1) of the Housing (Miscellaneous Provisions) Act 1992 (the 1992 Act). "House" is defined in that provision as "any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant thereto or usually enjoyed therewith".

9. Section 18 (1) of the 1992 Act, as amended by s.8 of the Housing (Miscellaneous Provisions) Act 2009 (the 2009 Act) states: "[t]he Minister may make regulations prescribing standards for houses (including any common areas) let or available for letting for rent or other valuable consideration and it shall be the duty of the landlord of such a house to ensure that the house complies with the requirements of such regulations." By s.18(2): "[a] person authorised by a housing authority for the purposes of this section may at all reasonable times enter and inspect a house to which regulations under this section apply."

10. By s.18(7) of the 1992 Act, as amended by s.8 of the 2009 Act: "[r]egulations under this section may, in particular, but without prejudice to the generality of subsection (1), make provision in relation to all or any one or more of the following: (a) the class or classes of houses or tenancies in respect of which the prescribed standards shall apply; (b) the maintenance of the house [and any common areas] in a proper state of structural repair and in good general repair".

11. By s.18(8) of the 1992 Act, as inserted by s.8 of the 2009 Act: "[f]or the purposes of subsection (7)(b) 'a proper state of structural repair' means sound, internally and externally, with roof, roofing tiles and slates, windows, floors, ceilings, walls, stairs doors, skirting boards, fascia, tiles on any floor, ceiling and wall, gutters, down pipes, fittings, furnishings, gardens and common areas maintained in good condition and repair and not defective due to dampness or otherwise."

12. By s.18(9) of the 1992 Act as inserted by s.8 of the 2008 Act: "[i]n this section and sections 18A and 18B- 'common areas' means common areas, works and services

that are appurtenant to houses and enjoyed therewith and that are in the ownership or under the control of the landlord".

13. The Housing (Standards for Rented Houses) Regulations 2019 (S.I. 137 of 2019) were made in exercise of the powers given by s.18 of the 1992 Act. By regulation 2(2): "[a]ny requirement of these Regulations with respect to repair shall be construed as requiring a standard of repair that is reasonable in all the circumstances and, in determining the appropriate standard of repair, regard shall be had to the age, character and prospective life of the house." By regulation 4(1): "[a] house to which these Regulations apply…shall be maintained in a proper state of structural repair." Regulation 4(2) defines "proper state of structural repair" as having the meaning set out in s.18(8) of the 1992 Act.

14. These Regulations replaced the Housing (Standards for Rented Houses) Regulations 2017 (S.I. 17 of 2017) which contained identical provisions to those set out in Regulations 2(2) and 4(1) of the Regulations of 2019. These in turn replaced identical provisions in the Housing (Standards for Rented Houses) Regulations 2008 (S.I. No. 534 of 2008) and the Housing (Standards for Rented houses) (Amendment) Regulations 2009 (S.I. No. 462 of 2009).

15. Tetyana Soroka and Vassyl Soroka have lived in an apartment on the ground floor of a block of apartments on Macken Street, Dublin 2, since 2006. Tuath Housing Association (Tuath) are their landlords.

16. Their letting agreement dated 2 August 2006 defines "the Apartment" by reference to its number in the apartment block, without giving any details of structural elements comprised in the letting. It recites a head lease dated 4 August 2006 from Dublin Docklands Development Authority and others.

17. This head lease is a standard-form long lease used for sales of the Apartments and Duplexes in the blocks comprising the "Estate." The parties to the head lease include a management company.

18. It defines each apartment as "ALL THAT ….together with the ceilings and floors of the said Apartment AND TOGETHER WITH All Conducting Media cisterns tanks radiators sewers drains pipes wires ducts conduits windows and doors used solely for the purposes of the said Apartment/Duplex but no others… EXCEPTING AND RESERVING from the demise the main structural parts of the building of which the said Apartment/Duplex forms part including the roof foundations and external parts thereof but not the glass of the windows and sliding doors of the said Apartment/Duplex nor the interior faces of such of the external walls as bound the said Apartment. ALL INTERNAL WALLS separating the Demised Premises from any

other part of the Estate shall be party walls and severed medially and shall be used repaired and maintained as such."

19. Clause 1.3 of the letting agreement provides that: "[t]he Association agrees to keep in good repair the portions of the Apartment for which it is responsible, and fulfil all its obligations under the Housing (Miscellaneous Provisions) Act 1992, as set out in the Housing (Standards for Rented Houses) Regulations, 1993."

20. The apartment let by Tuath to Mr and Mrs Soroka has always been badly affected by damp and mould caused by water penetration.

21. If s.114(1) of the Housing Act 1966 was still in force, this apartment would not be regarded as compliant with the implied condition that it be "kept by the landlord during the tenancy, in all respects reasonably fit for human habitation".

22. Design and construction faults have resulted in rainwater ingress into the fabric of the apartment block. This water is percolating into the Sorokas' apartment. This defect can only be resolved effectively by repairs which make the apartment block weatherproof. Repairs to the walls and ceiling of their apartment will not solve this water penetration problem.

23. Litigation arising from these issues has been settled. At the time of the Tribunal hearing, repairs to prevent this rainwater ingress into the fabric of the building had not been carried out.

24. In 2021, Mr and Mrs Soroka complained about this problem to the Residential Tenancies Board. They submitted an application claiming breach of landlord's obligations under s.12(1) of the 2004 Act and relied on clause 1.3 of their tenancy agreement. An adjudicator held a hearing and concluded that the water ingress "is caused by a structural issue, which emanates from an area outside the control of the respondent. The respondent is not entitled to effect repairs to remedy the issue and as the respondent has no power to effect a repair, the respondent is not in breach of section 12(1)(b) of the Act or Clause 1.3 of the lease agreement."

25. Mr and Mrs Soroka appealed this decision to the Tribunal. They relied on Clause 1.3 of the lease agreement. They represented themselves at the Tribunal.

26. The Tribunal did not conduct any analysis of the extent of obligations imposed on landlords by s.12(1)(b) of the 2004 Act and the Regulations of 2008, 2009, 2017 and 2019 or of whether the facts proved showed a breach by Tuath of statutory or contractual repair obligations.

27. The obligation to carry out repairs under s.12(1)(b) is confined to "repairs to the structure of the dwelling." What does this mean in the context of an apartment in a block? The roof of the block and most of the surfaces exposed to the weather may be nowhere near that apartment. The apartment may be on an upper floor and rely on structural support from beams and walls outside the structure of the apartment. These are not part of the structure of the apartment for the purposes of s.12(1)(a) of the 2004 Act: see *Edwards v. Kumarasamy* [2016] A.C. 1334 ([2016] UKSC 40).

28. The "structure" of an apartment in the sense of its floor, walls, ceiling and balcony may include elements which are owned by a management company or party structures.

29. The terms on which the landlord owns these structures, or may exercise rights under Chapter 3 of Part 5 of the Conveyancing and Law Reform Act 2009, may not be determinative of the duties of a landlord to keep them in repair. It is conceivable that the statutory duty to maintain "the structure of the dwelling" applies to parts of that structure which are not in ownership of the landlord. This obligation to repair is a continuing obligation and includes an obligation to repair whenever disrepair occurs.

30. In many cases tenants who take letting contracts will be unaware of limitations on their landlord's rights to enter onto property of third parties to carry out works which are necessary to ensure that repairs to the structure or interior of apartments are effective. A landlord who chooses to make a residential letting may potentially assume responsibility for repairing damage to the interior and structure of an apartment caused by factors outside that landlord's control. The nature of a defect emanating from causes external to the apartment may be such that it is impossible to keep that apartment in proper repair.

31. The provisions of the 2004 Act do not qualify the statutory duties of landlords to effect repairs as and when necessary, by reference to limitations on a landlord's ability to make effective repairs by reason of lack of ownership or control of adjoining premises. There is nothing express in s.12(1)(b) of the 2004 Act which links the obligation to keep the structure or interior of a dwelling in repair to ownership of that structure or right to access onto other property to carry out works.

32. The statutory requirement to maintain "a house" in a proper state of "structural repair" is complied with by requiring "a standard of repair that is reasonable in all the circumstances and, in determining the appropriate standard of repair, regard shall be had to the age, character and prospective life of the house." This qualification may potentially apply to steps taken to repair "structural damage" to an

apartment as a result of an ongoing problem of damp from water emanating from outside the structure.

33. This legal issue was not argued during the course of this appeal and remains to be decided.

34. Instead of considering this issue, the Tribunal decided that Tuath had an obligation to their tenant to pursue the management company of an apartment block to repair structural defects to that block by "practical and legal avenues" with adequate force to repair defects in the apartment block.

35. The Tenancy Tribunal awarded €20,000 to Mr and Mrs Soroka. The Tribunal held that Tuath had a "duty" to "do its best" to procure a remedy and that it failed in this duty.

36. The reasoning which led to these conclusions was set out in both text of the determination and an affidavit sworn by the Chair of the Tribunal on 3 October 2023.

37. Tuath submits that the 2004 Act does not permit a Tenancy Tribunal to impose liability on a landlord for the condition of a dwelling let on a residential tenancy except on the basis of obligations imposed on landlords either by statute or by the terms of their tenancy agreements.

38. I agree with this submission. The 2004 Act does not impose obligations on landlords to press management companies of multi-dwelling buildings to perform their contractual obligations relating to repair of structural or other elements of the buildings for which they are responsible or to sue developers, builders or architects who may be responsible for faulty design or construction of such buildings.

39. It would be impossible to imply such a vague duty into a tenancy agreement. If a tenant of an apartment in a block wishes a landlord to commit to legal pursuit of a management company to comply with its repair obligations or to require that it engage in potentially risky litigation relating to design or construction faults, such terms must be specifically agreed. I do not agree with the submission on behalf of the Tribunal that such terms could be implied into this tenancy on the basis of a test of necessity of the type referred to in *Liverpool City Council v. Irwin* [1977] A.C. 239.

40. The issue which the Tribunal was obliged to decide was whether Tuath was in breach of its obligations under Clause 1.3 of the letting agreement or the provisions of s.12(1)(b) of the 2004 Act or any obligations arising under any enactment other than the 2004 Act.

41. Instead, the Tribunal appears to have proceeded on an assumption that repair obligations imposed by s.12(1)(b) of the 2004 Act did not extend to the circumstance where disrepair to the structure of a residential unit in an apartment block was caused by structural defects in a part of the block which was not owned by the landlord.

42. It took a course of assuming that the parties to the dispute were in agreement that Tuath owed some legal duty to Mr and Mrs Soroka to make efforts to secure that the defects to the apartment block be remedied. It formulated that duty in terms of a test of whether Tuath had pursued this issue with sufficient vigour over the years. The parties were not given an opportunity to comment on this proposed course of action in advance of the decision.

43. In my view this course was not permissible. The Tribunal is a creature of statute. It does not have powers other than those conferred by statute, even where the parties before it may be in agreement that it should proceed on such a basis, which they were not in this case. The 2004 Act requires that the Tribunal apply the law as set out in the tenancy contract and the legislation relating to the landlord's obligation to carry out repairs to the structure of units which are subject to residential lettings and to determine whether statutory and contractual repairing obligations were complied with.

44. The appropriate order in this appeal is to cancel the order which embodies the terms of the determination of the Tribunal and to remit this matter back to the Tribunal for rehearing and decision in accordance with law. This is a case where the Tribunal omitted to decide an issue which it was required to decide and proceeded to decide something else.

45. While s.123 of the 2004 Act does not expressly confer a power to remit a matter back to the Tribunal, I am satisfied that the High Court has this power. Otherwise, this type of error of law could only be corrected by judicial review. The Oireachtas cannot have intended that the statutory appeal on a point of law would be confined so as not to permit me to remit and direct that the Tribunal hear and decide an issue which was not determined at first instance. This power is a normal incident of jurisdiction conferred by statute on appellate courts.

46. This judgment is being delivered electronically. I have not come to any provisional view about who should bear the legal costs of this appeal. This matter will be listed for an oral hearing on that issue on a date convenient to the parties. They should each file a short legal submission setting out their position in advance of the hearing date.