APPROVED **[2020] IEHC 635**

THE HIGH COURT

2019 No. 299 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 123 OF THE RESIDENTIAL TENANCIES ACT 2004 (AS AMENDED)

BETWEEN

BRENDAN GUNN
ERIKA GUNN

APPELLANTS

AND

RESIDENTIAL TENANCIES BORD

RESPONDENT

DAVID WARRICK

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 December 2020

INTRODUCTION

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

2. The tenants now seek to appeal that determination to the High Court on a point of law. Two principal grounds of appeal are advanced as follows. First, it is said that the Tenancy Tribunal erred in law in finding that the notice of termination had been served by an individual with the requisite legal interest. More specifically, it is submitted that there was not sufficient evidence before the Tenancy Tribunal to allow it to identify the "landlord" as defined under the legislation, i.e. the person entitled to receive the rent paid in respect of the dwelling.

3. Secondly, it is said that the Tenancy Tribunal erred in law in finding that the landlord was entitled to rely on an intention to sell the dwelling as the basis for serving the notice of termination. More specifically, it is submitted that the prescribed threshold under the legislation, i.e. an intention to enter into an enforceable agreement *within three months* for the transfer of the whole of the landlord's interest in the dwelling, has not been met.

4. 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 appellants as "***the tenants***"; the decision-maker as "***the Tenancy Tribunal***"; and the Residential Tenancies Board as "***the RTB***".

PROCEDURAL HISTORY

5. The tenants are husband and wife and have been occupying a dwelling in Wicklow town since September 2012 ("***the dwelling***"). It is common case that the tenants have the benefit of a statutory tenancy of a type known as a Part 4 tenancy. (Such tenancies are named for Part 4 of the Residential Tenancies Act

2004). A tenant under a Part 4 tenancy enjoys some security of tenure: generally, such tenancies will have a duration of six years. The tenancy can, however, be terminated during this period in certain specified circumstances. Insofar as relevant to this appeal, one of the circumstances in which a landlord can terminate a Part 4 tenancy early is where he or she intends to sell the tenanted property. It will be necessary to consider the precise wording of this ground for termination presently, as its application has proved problematic in practice.

6. The ownership of the dwelling is registered with the Land Registry, and it is common case between the parties that the registered owner of the dwelling is Mr. David Warrick. For reasons which have not been fully explained, however, certain documentation in respect of the tenancy had named Mr. Warrick's wife, Ms. Laura Harding, as the landlord. In particular, Ms. Harding is named as landlord in the initial tenancy agreement between the parties dated 6 September 2012. The rent was to be paid to an account in the name of the landlord's agent, Forkin Estates Management.

7. Clause 4.6 of the initial tenancy agreement had provided that the landlord shall register the tenancy agreement with the Residential Tenancies Board (then known as the Private Residential Tenancies Board). As explained below, Ms. Harding was ultimately registered as landlord with the Residential Tenancies Board in 2018.

8. The initial tenancy agreement was to be for a fixed term of twelve months. However, the tenancy subsequently became a Part 4 tenancy, by operation of law, in circumstances where the landlord did not serve a notice of termination within the first six months.

9. It appears that a further tenancy agreement may have been drafted in September 2015. Again, Ms. Harding is identified as the landlord. It seems that this further tenancy agreement may not have been executed.

10. A number of years later, in 2018, Ms. Harding purported to serve two notices of termination in respect of the tenancy. The first notice was withdrawn following a referral to the Residential Tenancies Board. Ms. Harding arranged to have the tenancy registered with the RTB thereafter, and this registration appears to have been applied retrospectively to the beginning of the tenancy in September 2012.

11. The second notice of termination was also the subject of a referral by the tenants to the RTB. This time the matter proceeded as far as a formal adjudication. One of the grounds of objection to the notice had been to the effect that Ms. Harding was not the registered owner of the freehold interest in the dwelling. Rather, it was Mr. Warrick who is identified as the legal owner of the dwelling on the Land Registry folio.

12. The notice of termination was found to be invalid by a formal adjudication. The determination does not, however, directly address the ownership issue (above).

13. Thereafter, a third notice of termination was served. This notice was in the name of Mr. Warrick and is dated 18 December 2018. The operative part of the notice reads as follows.

> "The tenancy of the dwelling at [address of dwelling set out] will terminate on
>
> Monday, 10th June 2019
>
> You must vacate and give up possession of the dwelling on or before the termination date.
>
> The reason for the termination of the tenancy is due to the fact that the landlord intends, within three months of the termination date, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of

> his or her (*sic*) interest in the dwelling or the property containing the dwelling.
>
> You have the whole of the 24 hours of the termination date to vacate and give up possession of the above dwelling.
>
> Any issue as to the validity of this notice or the right of the landlord to serve it, must be referred to the Residential Tenancies Board under Part 6 of the Residential Tenancies Act 2004 to 2016 within 28 days from the date of receipt."

14. The notice of termination had been accompanied by a statutory declaration executed by Mr. Warrick.

15. Mr. Warrick was subsequently registered as landlord with the Residential Tenancies Board in January 2019.

16. The question of the validity of the notice of termination of December 2018 was referred by the tenants for adjudication. The adjudication found that the notice was valid. This adjudication was then appealed to the Tenancy Tribunal by the tenants.

17. The Tenancy Tribunal convened an oral hearing into the appeal on 16 July 2019. A transcript of the hearing has since been prepared and exhibited before the High Court. All of the witnesses gave evidence following the administration of an oath or affirmation.

18. The Tenancy Tribunal issued its formal determination on 22 July 2019. Insofar as relevant to the two issues arising on this appeal, the operative part of the determination reads as follows.

> "7.1 Finding:
>
> The Tribunal finds that Mr. David Warrick is the Landlord of the dwelling.
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> Reason:
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> 1. The Tribunal finds that Mr. Warrick, as the sole owner of the dwelling, is "the person for the time being entitled to receive

(otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant thereof" (section 5(1) of the Residential Tenancies Act, 2004 (as amended).

2. The Tribunal considers that de facto Ms. Harding was acting as the agent of the Landlord at various stages during the tenancy. The Tribunal finds that the issue of any potential breach of the Respondent Landlord's obligations under section 12(1)(e) regarding whether he should have notified the Appellant Tenants of the identity of his agent/agents is not material to the issue before the Tribunal, that is, the validity of the Notice of Termination dated 18 December 2018.

[…]

7.3 Finding:

The Notice of Termination served on 18 December 2018 is valid.

Reasons:

1. The Tribunal finds that the Appellant Tenants had the benefit of a Further Part 4 tenancy, as they had been more than six years in occupation of the dwelling.

2. Section 34 of the Residential Tenancies Act 2004 (as amended) sets out the reasons for which a landlord may terminate such a tenancy.

3. Ground number 3 of the Table to section 34 provides that a landlord may terminate a tenancy where there is an intention within three months of the termination of the tenancy to enter into a enforceable agreement for the transfer to another for full consideration of the whole of his or her interest in the dwelling or the property containing the dwelling, and the Notice of Termination is accompanied by a statutory declaration referred to in section 35.

4. The Tribunal finds that the steps taken by the Respondent Landlord, which include retaining a professional agent to sell the dwelling, erecting a 'For Sale' sign, attempting to arrange to have photographs taken of the dwelling, and instructing a solicitor to take up Title Deeds are sufficient steps to evince more than a mere intention to sell, and are evidence of an intention to bind the Respondent Landlord to a sale within three months of termination, in accordance with the criteria set out in Hennessy v. RTB [2016] IEHC 174.

5. Regarding the absence of the date of service on the face of the Notice of Termination, the Tribunal considers that this is an appropriate case in which the provisions of section 64A should apply. The Tribunal finds that the omission of the date of service on the face of the Notice of Termination does not render the Notice of Termination invalid, as the Tribunal finds that the omission of the date of service on the face of the Notice of Termination does not prejudice, in a material respect, the Notice of Termination.

6. The Tribunal also finds that the Notice of Termination is otherwise in compliance with the provisions of the Act and that the provisions of section 62 have been otherwise complied with.

7. The Tribunal also makes this finding that the Notice of Termination is valid in light of the finding above that the Notice of Termination was served on 18 December 2018."

APPEAL ON A POINT OF LAW ONLY

19. 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.

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

> "The applicable principles were helpfully summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, as follows:-
>
> > 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
> >
> > (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

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

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

> "What principles can be drawn from the foregoing as to the court's role in the within appeal? Four key principles can perhaps be drawn from the above-considered case-law:
>
> (1) the court is being asked to consider whether the Tenancy Tribunal erred as a matter of law (a) in its determination, and/or (b) its process of determination;

(2) the court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them;

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

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

22. I turn now to apply these principles to the circumstances of the present appeal. For ease of exposition, I will address each of the two principal grounds of appeal under separate headings.

(1). IDENTITY OF "LANDLORD"

23. Section 63(1)(b) of the Residential Tenancies Act 2004 ("***the RTA 2004***") provides that, in order to be valid, a notice of termination must be signed by the landlord or his or her authorised agent.

24. The term "landlord" is defined under section 5 of the RTA 2004 as follows.

> 'landlord' means the person for the time being entitled to receive (otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant thereof and, where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of the tenancy;

25. The first ground of appeal centres on whether the Tenancy Tribunal erred in finding that Mr. Warrick is the person entitled to receive the rent paid in respect of the dwelling, and thus entitled to sign a notice of termination.

26. It is common case that Mr. Warrick is the registered owner of the dwelling. The tenants, however, submit that no "positive evidence" was tendered on behalf of Mr. Warrick before the Tenancy Tribunal to the effect that he is the landlord. As summarised earlier (under the heading "Procedural History"), Ms. Harding had been named as landlord in at least one of the tenancy agreements and had been registered as landlord with the RTB. Counsel on behalf of the tenants submits to the court that, having regard to the dealings between the tenants and Ms. Warrick, the Tenancy Tribunal was not entitled to rely on the fact that Mr. Warrick was the registered owner of the dwelling as the sole basis for finding that he is the landlord.

27. Notwithstanding the confusion as to the precise role of Ms. Harding, I am satisfied—applying the principles set out in *Fitzgibbon v. Law Society* (cited earlier)—that the finding that Mr. Warrick is the person entitled to receive the rent is one which was certainly open to the Tenancy Tribunal on the basis of the evidence before it. It was common case that Mr. Warrick is the registered owner of the property, and that Mr. Warrick and Ms. Harding are married. There was no evidence to suggest that Ms. Harding is asserting an independent claim to be entitled to be paid the rent. Mr. Warrick was represented at the hearing before the Tenancy Tribunal by an estate agent who had managed the tenancy at various points in time. The estate agent explained the limited involvement of Ms. Harding.

28. The finding of the Tenancy Tribunal is one which is supported by the evidence, and, insofar as the tribunal drew the inference that Ms. Harding had been acting *de facto* as agent, such inference was not unreasonable.

29. In circumstances where the issue had not been pressed in argument, it is not necessary for this court to reach a concluded view on the interaction, if any, between the definition of "landlord" under section 5 of the RTA 2004, and the obligation under section 134 to apply to register a tenancy . A question may arise, however, in a future case as to whether a person who has allowed a different person to be named as landlord on the statutory register has lawful authority to sign a notice of termination. It is at least arguable that a tenant is entitled to assume that the only person who is authorised to sign a notice of termination is the registered landlord or his or her authorised agent. (The landlord is required, under section 12(1)(e) to notify the tenant of the name of the person, if any, who is authorised by the landlord to act on his or her behalf in relation to the tenancy).

30. The scheme of the legislation is that there must be transparency in respect of the identity of the landlord and his or her authorised agent. This makes perfect sense: it is important that a tenant can have confidence that the person to whom they are paying rent is in a position to provide a valid receipt for same. Similarly, a tenant is entitled to know the identity of the person who is authorised to serve a notice of termination.

(2). INTENTION TO ENTER ENFORCEABLE AGREEMENT

31. Section 34 of the Residential Tenancy Act 2004 identifies a number of circumstances in which a landlord may terminate a Part 4 tenancy early. Relevantly, the following category is identified at paragraph 3.

> 3. The landlord intends, within 3 months after the termination of the tenancy under this section, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling and the notice of termination is accompanied by a statutory declaration referred to in section 35.

32. As appears, the landlord must intend to enter into an enforceable agreement for the transfer of the whole of his or her interest in the dwelling *within three months* after the termination of the tenancy. (This period has since been extended to nine months under the Residential Tenancies (Amendment) Act 2019, but this amendment does not apply retrospectively).

33. The same phrase had appeared in the Residential Tenancies Act 2004 as originally enacted, and is the subject of a detailed discussion in the judgment of the High Court (Baker J.) in *Hennessy v. Private Residential Tenancies Board* [2016] IEHC 174. As explained presently, it is submitted on behalf of the RTB that the precedential value of this judgment is diminished as a result of amendments introduced subsequently by the Residential Tenancies (Amendment) Act 2015.

34. The controversy in *Hennessy* centred on the validity of a notice of termination which had simply stated that the landlord's receiver required vacant possession of the dwelling as he intended to sell the property. The tenant had argued that the notice was defective in that it failed to expressly state that the receiver required vacant possession because he intended to enter into a contract for sale

within three months of the date of termination, as required under the legislation. (In the events that transpired, the dwelling had, in fact, been sold within three months but this did not save the validity of the notice).

35. Baker J. held that in order for a notice of termination to be valid, it must comply with the requirements of both section 34 and section 62 of the Residential Tenancies Act 2004. It was necessary, therefore, that the landlord intended to enter into a binding contract *within three months* of the termination of the tenancy. See paragraphs 37 and 38 of the judgment as follows.

> "The reason [for termination] must therefore be one of the six justifying reasons identified in the Table to s.34. In construing s.34, it cannot be ignored that the time frame of three months within which it is intended to sell is quite short, and in that context a landlord may terminate a tenancy on the grounds of an intended sale only if he has taken some preliminary steps to place a property on the market, as it would not always or perhaps usually be possible for an owner to predict that he or she would make an binding contract for sale within three months of placing the premises on the market. A landlord may not seek to recover possession of premises the subject matter of a Part 4 tenancy merely on account of a general intention on his part to sell the premises, and the intention must be to sell within three months and not merely, for example, to place the property on the market to test the market or to place the property on the market and wait a period of time until the appropriate price is achieved. The intention must be one to enter into a binding contract within three months of the termination of the tenancy, and that intention must exist before a notice of termination can validity be served. That in many cases will involve the requirement that the landlord has identified a potential purchaser, or commenced negotiations towards an eventual sale. Because of the short time frame of three months, it does not seem to me that the Oireachtas intended permitting termination of a Part 4 tenancy merely in anticipation of the commencement of the sale or advertising process. I would not go so far as to say that the intention was that a notice of termination could be served only in the context of an identified sale, but the legislation in my view envisages more that a mere intention to sell, and requires a landlord to have as a matter of fact, and to state, that he intends to bind himself to a sale within three months of termination.

> Thus, I consider that the operative reason for termination on account of ground 3 in the table to s.34 is not that the landlord intends to sell the premises, but that he intends to bind himself to a contract for sale within three months of termination. There is a difference in emphasis and meaning between the two statements of intent, and that difference is relevant and central to the protection afforded by the legislation. An intention to sell simpliciter is not sufficient to terminate."

36. The judgment then goes on to address the implications of this finding for the form of a notice of termination. Baker J. held that the purpose of the legislation is fully served only if the notice makes express reference to the three-month period. This is necessary in order to alert the tenant to the potential of making a claim for damages for abuse of the termination procedure in the event of the dwelling not being sold within the three month period allowed (section 56). See paragraphs 41 and 42 of the judgment as follows.

> "While of course a tenant and a landlord can be presumed to know their respective rights under the tenancy agreement, the legislation is intended to be protective of the rights including the right of security of tenure of the tenant, and accordingly, I consider that the purpose of the legislation is fully served only if the notice of intention sets out that the landlord intends to sell within three months of the termination of the tenancy. An alternative approach could lead to potential abuse, in that a landlord may serve a notice identifying an intention to sell, and the tenant may not have a sufficient indication of the intention to sell within the statutory period to be watchful or mindful of the circumstances that might evolve following the tenant quitting possession on foot of the notice. If the notice does not identify that the intention is an intention to enter a binding contract for sale within three months then the legislative intention of the Act of 2004 taken as a whole, may be defeated. A tenant may not be for example in a position to know that the time frame in which such intention must be manifest is the short period of three months after termination. The purpose of the legislation is to permit a landlord to re-take possession only if he can show an immediate intention to bind himself to a sale within three months. In the absence of an express identification of such circumstances, it seems

> to me that certain risks exist that the tenant will not be alert to the entitlement to seek redress under s.56 of the Act.
>
> Accordingly, for the legislation to be fully operative, and to achieve its stated aim of providing a measure of security of tenure for the tenants of residential premises, it seems to me that the notice is required to set out the ground as identified in the Table to s.34 namely, that the landlord intends within three months after the termination of this tenancy to enter an enforceable agreement for sale. Any other notice would merely express the intention of the landlord to sell, and such an intention is not sufficient to trigger the entitlement of the landlord to terminate. *The reason for the termination is not that the landlord intends to sell, but that he intends to bind himself to a contract for sale within the statutory period of three months*.*
>
> *Emphasis (italics supplied).

37. The importance of the judgment in *Hennessy* has been acknowledged by the leading textbook in the area, namely *Landlord and Tenant Law: The Residential Sector* (Cassidy and Ring, second edition, Round Hall, 2020) at §§8–93 and 8–94 as follows.

> "The court was of the view that given the short time frame involved of three months, it did not seem that the Oireachtas intended to permit termination of a Part 4 tenancy merely in anticipation of the commencement of the sale or advertising process but rather where the landlord as *a matter of fact* intends to sell the property within three months. Accordingly, the 'operative reason for termination' is not that the landlord intends to sell the premises but rather that he or she intends to bind himself or herself in contract to sell the property within three months. In coming to this conclusion, the court noted the civil and criminal sanctions for abuse of the termination process, the latter of which showed 'the extent of the seriousness with which the Oireachtas regarded the importance of providing security of tenure to the tenants whose tenancy was protected by the legislation'. Accordingly, the court held that the purpose of the legislation is to permit a landlord to retake possession only if he or she can show an immediate intention to bind himself or herself to a sale within three months and simply expressing an intention to sell would not be sufficient to 'trigger the entitlement of the landlord to terminate'. For that reason, the court held that the tenancy Tribunal had erred in law in finding the notice of termination served to be valid.

> The High Court judgment was an important one. In coming to the conclusion she did, Baker J. acknowledged that the requirement of the RTA 2004 for a valid notice of termination where a landlord intended to sell, did not lend itself to an obvious answer. However, she gave clear direction as to the intention a landlord must have when terminating a tenancy on this ground. In addition, the judgment demonstrates the strict view taken by the High Court on the law in relation to the termination of tenancies, an approach which has also been taken by the RTB's tenancy tribunals."
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> *Footnotes omitted.

38. Leading counsel on behalf of the Residential Tenancy Board sought to distinguish the judgment in *Hennessy* on two grounds as follows. First, it is said that the rationale of the judgment is confined to the narrow question of whether it had been necessary to include the words "within three months" in the notice of termination in order for it to be valid. Secondly, attention is drawn to the fact that the legislation has since been amended, and there is now a requirement for a landlord to make a statutory declaration confirming their intention to sell the property.

39. The first of these two grounds can be disposed of shortly. Whereas it might be correct to say that, strictly speaking, the *ratio decidendi* of the judgment is confined to the formal requirements for a notice of termination, the importance of the judgment in *Hennessy* goes much further than this. This is because, in order to resolve the question of whether there was an obligation to make express reference to the three-month period in the notice of termination, it had been necessary for the High Court to identify the legislative intent underlying the provisions governing that requirement. See paragraph 23 of the judgment as follows.

> "The Act establishes the entire rights and obligations of the landlord and tenant of residential premises, and the common law requirements regarding the contents and form of a notice to quit have no application. The scheme is intended to make compliance a wholly statutory measure. This has the effect that from the point of view of statutory interpretation one must look first to the language in the relevant provisions, and then, if necessary for the purposes of interpretation, to the scheme or purpose of the Act and/or the relevant section or part."

40. Baker J. then identified the purpose of the legislation as being to permit a landlord to re-take possession only if he or she can show an immediate intention to bind themselves to a sale within three months. The court held that this purpose is fully served only if the notice of intention sets out that the landlord intends to sell within three months of the termination of the tenancy. Were it otherwise, then the tenant might not be alert to their entitlement to seek redress in the event that their landlord did not enter into an enforceable agreement within three months. (Section 56 provides for a claim for damages for abuse of the termination procedure).

41. The High Court's finding that a landlord is only entitled to rely on a proposed sale of the property where he or she can show an immediate intention to bind themselves to a sale within three months represents an indispensable part of the reasoning of the judgment. This finding has an obvious resonance with, and relevance for, the legal issues to be decided by me in the present case.

42. I will return to address the second ground advanced for distinguishing *Hennessy* at paragraph 50 below.

FINDINGS OF THE COURT ON GROUND OF APPEAL NO. 2

43. The Tenancy Tribunal erred in its interpretation of sections 34 and 35 of the Residential Tenancies Act 2004. In particular, the Tenancy Tribunal failed to

address the question of whether the evidence demonstrated an intention on the part of the owner of the property to bind himself to an enforceable agreement for transfer within the statutory period of three months. The determination does not properly engage with the question of the *timing* of the enforceable agreement. Rather, having purportedly found that the owner of the property had taken sufficient steps to evince more than "a mere intention to sell", the Tenancy Tribunal treats this as equivalent to an intention to be bound by an enforceable agreement within three months. With respect, this is a *non sequitur*. As explained by the High Court (Baker J.) in *Hennessy v. Private Residential Tenancies Board* [2016] IEHC 174, an intention to sell *simpliciter* is not sufficient. An owner must intend to bind himself to an enforceable agreement *within three months* of the termination of the tenancy. There is a difference in emphasis and meaning between the forms of intention, and that difference is relevant and central to the protection afforded to tenants by the legislation.

44. There was simply no evidence before the Tenancy Tribunal which would have allowed it to reach a lawful finding that, as of 18 December 2018, the owner had intended to commit to a contract for sale within three months of the termination of the tenancy. Rather, the evidence of the estate agent to the Tenancy Tribunal was to the effect that the owner had been advised to market the property with vacant possession. Thus, notwithstanding that the notice period was six months, the intention as of 18 December 2018 had been to defer marketing the premises until vacant possession had been achieved. The practical effect of this is that a potential purchaser would have to be identified, and an enforceable agreement entered into, all within three months.

45. Pointedly, the exclusive agency agreement entered into between the owner and the estate agent was to have a duration of eighteen months. There is nothing in the agreement that suggests that the sale had to proceed as a matter of urgency or that the owner intended to discount the sale price in order to ensure an early sale. Indeed, the estate agent confirmed in evidence that he had not yet carried out a full valuation of the property. The figure of €595,000 referenced in the agreement represented no more than a "desk top" valuation. The evidence also establishes that a decision to take the steps to progress the sale of the property (relied upon by the Tenancy Tribunal in its determination) had only been made *subsequent* to the hearing before the adjudicator on 13 February 2019. The estate agent indicated, at a number of points in his oral evidence, that the instructions had changed from the original mandate to defer marketing the premises until vacant possession had been achieved.

46. The Tenancy Tribunal erred in law in having regard to this changed position. In order for a notice of termination to be valid, the requisite intention must exist at the time the notice is served. (See *Hennessy* at paragraph 37). The owner's intentions, as of 18 December 2018, were to defer marketing the dwelling until after the tenants had vacated the property.

47. (For the avoidance of any doubt, this judgment should not be misunderstood as saying that regard can never be had to steps taken *subsequent to* the date of the notice of termination as confirming the existence of the requisite intention on the part of the landlord. There might well be cases where a landlord intends to take advantage of the notice period to market the property, but that intention only takes concrete form, e.g. in the erection of "for sale" signs and the posting of the premises on property websites, after the notice of termination has been served.

The distinguishing feature of the present case is that the subsequent events do not reflect the landlord's intention as of the date of the service of the termination notice, but rather reflect his changed intention).

48. The statutory requirement that a landlord must intend to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property within *three months* after the termination of the tenancy represents a very high threshold. Whereas as observed by Baker J. in *Hennessy*, the legislation does not provide that a notice of termination can only ever be served in the context of an identified sale, it is difficult to understand how a landlord could meet the statutory threshold within three months unless potential purchasers had at least been identified beforehand. This is especially so given the emphasis on pre-contract inquiries in modern conveyancing practice which has led to a longer lead time between the date on which a property goes "sale agreed", i.e. an agreement in principle has been reached, and the actual execution of an enforceable contract for sale.

49. The legislation has since been amended by the Residential Tenancies (Amendment) Act 2019, and a more realistic and achievable time period of nine months has been substituted for the three month statutory period. This amendment cannot, however, avail the landlord in the present case as it does not apply retrospectively.

EVIDENTIAL STATUS OF LANDLORD'S DECLARATION

50. As flagged earlier, the Residential Tenancy Board had sought to distinguish the judgment in *Hennessy* on the grounds that the legislation has since been amended. More specifically, as a result of amendments introduced under the

Residential Tenancies (Amendment) Act 2015, a notice of termination based on an intended sale must now be accompanied by a statutory declaration to the effect that the landlord intends to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling.

51. It has been argued on behalf of the RTB that such a statutory declaration has a particular evidential status. Specifically, it is asserted that the legislature expressly provided that a statutory declaration sworn by a landlord would be evidence to establish intention on his or her part (see paragraph 39 of the written legal submissions). It is further submitted that, in the absence of cross-examination, such a statutory declaration cannot be gone behind (citing *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2019] IEHC 85).

52. Strictly speaking, it is not necessary to decide this issue for the purposes of resolving the within appeal. This is because it is apparent from the terms of its determination that the Tenancy Tribunal did not attach any significance to the statutory declaration in reaching its conclusions. This is consistent with the approach outlined to the parties by the chairperson at the outset of the oral hearing before the Tenancy Tribunal. It was explained to the parties that the hearing was a *de novo* hearing held in public and based on evidence taken on oath or affirmation.

53. The present appeal to the High Court must be decided on the basis of the determination and reasoning of the Tenancy Tribunal. It is not open to the Residential Tenancy Board to attempt to supplement that reasoning *ex post facto* by relying on a consideration, namely the existence of the statutory declaration, which had not been relied upon by the decision-makers.

54. This is no mere formality. It would be unjust to allow the RTB to rely on the existence of the statutory declaration in circumstances where it had never been suggested to the tenants during the course of the hearing before the Tenancy Tribunal that the declaration would be relied upon as proof of intention, and they were thus not afforded an opportunity to consider whether they wished to have Mr. Warrick summonsed to give evidence and to be cross-examined.

55. Out of deference to the submissions of counsel, however, I will briefly set out my views on this issue. The legislative intent in prescribing a requirement for a statutory declaration is to ensure that this ground of termination is not invoked lightly. It would, however, be inconsistent with the overall scheme of the legislation to confer some sort of presumptive evidential status upon such a statutory declaration. The RTA 2004 allows a tenant to challenge a notice of termination on the basis *inter alia* that the ground stated by the landlord for the purposes of terminating a tenancy was not valid. (See section 78(1)(g)). A tenant is thus entitled to bring a challenge on the basis that a landlord did not have the requisite intention to enter into an enforceable agreement within three months.

56. The jurisdiction to determine such challenges resides ultimately with the Tenancy Tribunal. The legislation envisages that the Tenancy Tribunal will exercise its appellate jurisdiction by way of oral hearing, with the tribunal having statutory power to administer an oath or affirmation.

57. It would set this elaborate procedure at naught—and undermine the ability of a tenant to pursue an allegation that the ground stated by the landlord for the purposes of terminating a tenancy was not valid—were a statutory declaration to have a presumptive evidential status. It would be perverse were a measure

intended to enhance the protection of tenants to have the practical consequence of making it more difficult for a tenant to test the validity of a landlord's intention. This practical consequence is acknowledged in the written submissions on behalf of the RTB, at paragraph 41, where it is stated that "*it is hard to see how a tenant could endeavour to undermine a landlord's testimony of intention*". With respect, it is precisely for this reason that the RTB's understanding of the legal status of a statutory declaration is incorrect. The introduction of the requirement for a statutory declaration was not intended to diminish the tenant's rights in this way, nor to detract from the importance of an oral hearing before the Tenancy Tribunal.

58. The RTB's reliance on the case law in respect of cross-examination on affidavits in civil proceedings is misplaced. In each of those cases, the default position was that the proceedings at issue were to be determined on affidavit evidence only (rather than on oral evidence). It was in this context that the obligation to apply to challenge the evidence by cross-examination arose. By contrast, the proceedings before the Tenancy Tribunal were by way of oral evidence on oath.

CONCLUSION AND FORM OF ORDER

59. For the reasons set out herein, I have concluded that the second of the two grounds of appeal advanced on behalf of the tenants is well founded. Under the version of the Residential Tenancies Act 2004 applicable as of the date of the service of the notice of termination, a Part 4 tenancy could only be terminated early by reference to an intended sale where a landlord intended to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling within *three months* after the

termination of the tenancy. The determination does not properly engage with the question of the *timing* of the enforceable agreement. The Tenancy Tribunal erred in law in its interpretation of sections 34 and 35 of the Residential Tenancies Act 2004. The tribunal also erred in its application of the principles set out in the judgment in *Hennessy v. Private Residential Tenancies Board* [2016] IEHC 174.

60. Further, there was simply no evidence before the Tenancy Tribunal which would have allowed it to reach a lawful finding that, as of 18 December 2018, the owner had intended to commit to a contract for sale within three months of the termination of the tenancy.

61. These errors are amenable to an appeal on a point of law, in accordance with the principles identified in *Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment).

62. This court will make a formal order, pursuant to section 123 of the Residential Tenancies Act 2004, directing that the determination be cancelled. In circumstances where the legislation has since been amended, and now provides for a more realistic timeframe of *nine months*, no order for remittal will be made. It is in ease of all parties that the landlord, if he so wishes, should serve a fresh notice of termination in accordance with the current version of the legislation.

63. Insofar as costs are concerned, and given that this judgment has been delivered electronically, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of such judgments, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of

> the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

64. The parties are requested to correspond with each other in relation to the appropriate costs order. In default of agreement, the parties are to file short written submissions in relation to costs in the following sequence. The appellants are to file their submissions by 25 January 2021, and the respondent is to file its submissions two weeks later. The court will then issue a written ruling on the question of costs.

Appearances
Allan J. Crann for the appellant tenants instructed by McKenna Murphy Solicitors
Michael McDowell, SC and Úna Cassidy for the Residential Tenancies Board instructed by Eversheds Sutherland

Approved