APPROVED **[2023] IEHC 285**

THE HIGH COURT

2022 No. 206 MCA

BETWEEN

REGINA FITZPATRICK

APPELLANT

AND

RESIDENTIAL TENANCIES BOARD

RESPONDENT

SINÉAD BRETT

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 25 May 2023

1. This is my ruling in respect of legal costs. This matter came before the High Court by way of a statutory appeal pursuant to Section 123 of the Residential Tenancies Act 2004. The procedure governing such an appeal requires that the Residential Tenancies Board be the respondent to the appeal. Other interested parties, such as in this case, the landlord, are joined as notice parties to the appeal proceedings. As such they have a right to participate in the appeal proceedings

but as explained presently their claim to recover legal costs will be less than that of the respondent.

2. This appeal was dealt with in a written judgment delivered on 12 May 2023, *Fitzpatrick v. Residential Tenancies Board* [2023] IEHC 229. The appeal was dismissed on all grounds. The case was an unusual one in that the appellant did not appear before the court to prosecute the appeal. She had made an application through a friend for an adjournment, but that adjournment was refused and the reasons for refusing the adjournment are set out in the written judgment of the court.

3. The appeal was heard in any event *de bene esse* in circumstances where the appellant is a litigant in person and the court was anxious to ensure that anything that could be said in favour of her appeal would be considered by the court. Ultimately, however, the appeal was unsuccessful on all grounds and the appeal was dismissed.

4. The Residential Tenancies Board has made an application for its costs and in so doing has cited the provisions of Section 169 of the Legal Services Regulation Act 2015. That section provides, in brief, that the default position is that a party who has been "*entirely successful*" in proceedings is ordinarily entitled to their costs against the other party. That is the default position only. The court has an overriding discretion and the factors to be taken into account in the exercise of the discretion are set out at Section 169 of the Legal Services Regulation Act 2015. These factors have been considered in a number of judgments including, in particular, the judgment of the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114. The relevant passage from *Lee* has been set

out in the written submissions submitted on behalf of the Residential Tenancies Board.

5. It seems to me that the Residential Tenancies Board has made out an entitlement to its costs. The appellant has not, as I say, participated in the appeal at all and has chosen not to participate in this costs hearing. Therefore, there has been no engagement by the appellant with any of the factors which might justify the court in departing from the default position and making either no order for costs or perhaps even an order for costs in favour of the appellant.

6. There is nothing in the procedural history of the appeal which indicates that the court should depart from the default position. This case does not, for example, raise a point of law of general public importance. Nor was there any conduct on the part of the Residential Tenancies Board which would call for criticism by the court and which might be condemned by way of an adverse costs order. Rather, the Residential Tenancies Board's position was upheld in full, and the conduct of the proceedings was entirely reasonable on its part. Therefore I make an order for costs in favour of the Residential Tenancies Board, such costs to be adjudicated in default of agreement under Part 10 of the Legal Services Regulation Act 2015.

7. I turn next to consider the position of the notice party, i.e. the landlord. For the reasons which follow, I am satisfied that no order for costs should be made in favour of the notice party. The normal position in respect of proceedings of this type is that the Residential Tenancies Board is the *legitimus contradictor* to an appeal and that was certainly the position in this case. The submissions made by the notice party were short and to the point; and the notice party did not, in fact, file any written submissions in relation to the substance of the appeal.

8. It seems to me, therefore, that the approach that I should adopt is similar to that adopted by the High Court (Bolger J.) in *Carroll v. Residential Tenancies Board* [2022] IEHC 326, citing the earlier judgment of the High Court (Baker J.) in *Doyle v. Residential Tenancies Board* [2016] IEHC 36. In the latter case, Baker J. stated as follows (at paragraphs 13 to 15):

> "[…] the costs of a notice party are not necessarily always to be treated as costs which "follow the event", and the matter of costs will depend on the degree of participation of the notice party and whether that was justified. This is because a statutory appeal is not an *inter partes* action and the court is constrained in the approach that it may take to the appeal process in that it is confined to questions of legal construction, whether the approach of the statutory body was correct, whether it had sufficient evidence before it to come to the conclusion that it did, and the High Court may not on a statutory appeal on a point of law against a decision of the PRTB make any primary findings of fact.
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> This means, in practice, that the primary defender of the decision of the Tribunal is the PRTB, and a notice party does not have any central role in such an appeal. He or she might in that context have limited scope to make submissions, and while a notice party may be entitled to urge the court to take a particular approach, the argument of the notice party must, to a large extent, be constrained by the reasons and reasoning of the Tribunal in its primary decision and the basis for that decision.
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> As such, it seems to me, that a notice party will often at the hearing of a statutory appeal make arguments which were open to the PRTB to make, but which were either not canvassed at all by it, or were canvassed with a different emphasis. The question of the emphasis, or of approach is, in my view, a key to considering the role that a notice party takes in a statutory appeal."

9. Baker J. concluded that it was not appropriate to make a costs order in favour of the notice party (on the facts, a receiver) in circumstances where the interests which the notice party sought to protect coincided with those of the Residential Tenancies Board and therefore the Residential Tenancies Board was the

legitimus contradictor. (The receiver was allowed limited costs in respect of a discrete procedural issue).

10. It seems to me that that is also the position in the present proceedings. The principal point raised on the appeal turned on the statutory jurisdiction of the Residential Tenancies Board, and, in particular, whether it had any function under the Equal Status Act 2000. That was a matter which was appropriately addressed by the Residential Tenancies Board in its submissions, and it was not a matter in respect of which the notice party could usefully add submissions. The position is to be contrasted, for example, with an appeal where the dispute may centre on the conduct of a landlord or tenant. The landlord or tenant *qua* notice party may be in a position to assist the court in relation to factual matters which might not necessarily be within the purview of the Residential Tenancies Board. In this case, by contrast, the Residential Tenancies Board was the *legitimus contradictor* to deal with what was, in effect, a jurisdictional point.

11. In summary, therefore, I make an order for costs in favour of the Residential Tenancies Board against the appellant, such costs to be adjudicated in default of agreement under Part 10 of the Legal Services Regulation Act 2015. The costs are to be measured on the basis of a half day hearing. A potential costs liability for a half day hearing would already have been incurred prior to the adjournment application: that application was made less than a week before the hearing date and the briefs would have been out. However, any additional costs incurred as a result of the case being adjourned overnight on 2 May 2023, to allow the appellant a final opportunity to participate at the hearing, are not recoverable.

12. The costs are to include the costs of the written legal submissions on the substantive hearing; the written legal submissions in relation to the costs hearing; and the costs of the costs hearing.

13. I make no order for costs in relation to the notice party landlord. In terms of the substantive order, I simply make an order dismissing the appeal in accordance with Section 123 of the Residential Tenancies Act 2004.

Appearances

The Appellant failed to attend
Úna Cassidy for the Residential Tenancies Board instructed by Byrne Wallace
Eoin O'Donnell for the Notice Party instructed by Sheehan & Co

Approved Gerard Simms