High Court of Ireland Decisions

Judgment Title: **Canty** -v- Private Residential Tenancies Board

Neutral Citation: [2007] IEHC 243

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Judgment by: Laffoy J.

Status of Judgment: Approved

Neutral Citation Number: [2007] IEHC 243

THE HIGH COURT

2006 No. 519 SP

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT, 2004

BETWEEN/

JACK CANTY

APPLICANT

AND

PRIVATE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

DAVID CONNOLLY

Judgment of Miss Justice Laffoy delivered on 8th August, 2007

The proceedings

These proceedings were initiated by special summons which issued on 27th October, 2006. In the special endorsement of claim the applicant claimed to be exercising a right of appeal under s. 123(3) of the Residential Tenancies Act, 2004 (the Act of 2004) against the determination order made by the respondent (the Board) on 6th October, 2006, seeking to vary or cancel the determination order on the basis of "manifest error(s) of law committed in the purported adjudication thereof".

The applicant has been a tenant of the notice party (the landlord) since 22nd September, 2004. Since April, 2005 the tenancy has been the subject of a series of dispute resolution processes under the Act of 2004. In addition to these proceedings, the following matters are pending in the Superior Courts arising out of those processes:

(a) An appeal to the High Court from Cork Circuit Court in proceedings under s. 124 of the Act of 1924 to enforce an interim determination order made by the Board. That appeal was heard by de Valera J., who reserved judgment.

(b) An appeal to the Supreme Court against a decision of this Court (McKechnie J.) refusing the applicant's application for judicial review of an earlier determination order made by the Board.

The applicant appeared in person in these proceedings. The Board and the landlord were represented by solicitor and counsel. The documentation put before the court by the applicant and his submissions suggest that he has some legal background or training. However, it is noted that he refused to answer questions put to him by the Tenancy Tribunal which determined the matters which led to the determination order appealed against in these proceedings as to legal training or qualification. The applicant would appear not to have been at any disadvantage in representing himself. That notwithstanding, I propose dealing with the issues raised in these proceedings comprehensively, not least because by virtue of s. 123(4) of the Act of 2004 the determination of this Court on this appeal in relation to the points of law concerned is final and conclusive.

Factual and procedural background

I propose setting out first the terms of the tenancy agreement between the landlord and the applicant and then outlining the disputes which have been referred to the Board in relation to the tenancy and the Board's determinations in relation thereto.

Tenancy Agreement

By a tenancy agreement dated 24th September, 2004 (the tenancy agreement) the landlord agreed to let and the applicant agreed to take a property described as the dwelling house known as 14 The Orchard, Crosshaven, Co. Cork (the Property) and contents for the term of six months commencing on 22nd September, 2004 to 31st March, 2005 at a rent of €700 per calendar month, excluding part of September, 2004. It was provided that the rent would be payable on the first day of each month, the first payment to be made on 1st October, 2004.

The other provisions of the tenancy agreement which are relevant for present purposes are:

§ Clause 7.1 which provided:

> "Notice is hereby given that possession might be recovered by the [landlord] if applicable. That is that the [landlord] intends to occupy the Property as his … only or main home. This provision shall not be exercised by the [landlord] prior to 1st November, 2005."

§ Clause 8 which provided:

> "This agreement may be extended by the [applicant] on 1st April, 2005 for a further period of 6 months without changes in terms, including maintenance of the agreed rent of €700 per calendar month. The agreement may be further extended by the [applicant] from 1st October, 2005 for a period of 12 months thereafter without changes in terms, excepting the right of the [landlord] to increase the rental charge to a maximum of €750 per calendar month. In all circumstances, this agreement shall expire on 30th September, 2006 and the leasehold will be subject of renewed terms at that date."

2005 Disputes

In 2005 two matters in relation to the applicant's tenancy came before a Tenancy Tribunal (the Tribunal) comprising

three members of the Board: Aideen Hayden, Anne Colley and Conn Murray. One matter, referred by the applicant, related to the alleged breach by the landlord of his obligations under the tenancy agreement, namely, a defect in the heating system of the Property resulting in a loss of amenity to the applicant. The other, referred by the landlord, related to overholding by the applicant following the expiry of a notice of termination given by the landlord and non-payment of rent. The two matters were heard together by the Tribunal on 27th January, 2006 in Cork. At the hearing the Tribunal found in favour of the applicant that his tenancy was for a period of greater than six months certain, holding that the applicant had a right to a "Part 4 tenancy", meaning a tenancy protected by Part 4 of the Act of the 2004. The Tribunal also made an interim direction, in accordance with s. 117 of the Act of 2004, in relation to payment by the applicant to the landlord of outstanding rent directing that there be paid to the landlord the following sums: €3,300 forthwith; €2,200 less a sum of €475, which it was agreed the applicant was entitled to deduct in respect of electricity consumption incurred by him, within 30 days; and €2,400 within 60 days. The foregoing direction was formalised in a determination order made by the Board on 15th February, 2006.
The Tribunal reconvened in Cork on 22nd February, 2006. On that occasion the Tribunal ruled in favour of the applicant that a purported notice of termination served by the landlord's agent on the applicant on 18th March, 2005 did not comply with the relevant statutory requirement and, accordingly, was not valid.
Following the reconvened hearing, the final determination of the Tribunal was notified to the Board on 13th April, 2006. In that determination, the Tribunal found in favour of the applicant that he had suffered loss of amenity as a result of the defective heating system in the Property and awarded him €1,000 in respect thereof, against which there was to be set off the sum of €475 awarded by the interim direction referred to earlier. The Tribunal also ordered the applicant to pay all arrears of rent, amounting to the sum of €8,400 at the date of the resumed hearing (22nd February, 2006), all of the arrears to be paid within seven days of the making of the determination order. It also ordered that sums due and owing in respect of rent under the tenancy agreement should be payable as they fell due. Those determinations were formalised in a determination order of the Board dated 19th April, 2006. In relation to the determination of the Tribunal in relation to the payment of further sums due and owing in respect of rent as they fell due, para. 4 of the determination order embodied a provision that the applicant should pay to the landlord –

> "… rent at the rate of €700 per month or part thereof from March, 2006 to the date of giving up possession of the dwelling."

2006 disputes
After the ruling was made by the Tribunal on 22nd February, 2006 that the purported notice of determination of 18th March, 2005 was invalid but before the final determination of the Tribunal of 13th April, 2006 was made and the determination order of the Board of 19th April, 2006 was handed down, on 23rd February, 2006 the landlord, by solicitor's letters of that date, notified the applicant as follows:
§ Of an increase in the monthly rent to €750 per calendar month, that sum to be payable in respect of the month of March, 2006 and each succeeding month, given the fact that the applicant had remained in possession after 1st October, 2005.
§ That the monthly rent due in respect of February, 2006 (€700) had not been paid, that no rent had been paid since the payment in respect of the month of February, 2005, and that eleven months' rent was then outstanding, totalling €7,700 and requesting immediate payment of the monies due and warning that the correspondence would be relied upon for the purposes of Parts 4 and 5 of the Act of 2004.
By letter dated 7th March, 2006 the solicitors on behalf of the landlord, referring to their letter of 23rd February, 2006 which requested payment of the rent then due to the landlord, at the time €7,700, and the fact that it had not been paid, pointed to the landlord's entitlement to terminate the tenancy for failure to pay rent if the failure was not remedied within a reasonable time. The applicant was notified that unless payment in full, including all arrears, was received on or before 10th March, 2006, which it was stated was a reasonable period in the context of the long outstanding arrears, the landlord would proceed to terminate the tenancy.
Two notices of termination dated 13th March, 2006 were served by the landlord on the tenant on that day. The first gave the reason for termination of the tenancy as the failure by the applicant to pay rent due to the landlord as required by the tenancy agreement and by law. 10th April, 2006 was designated as the termination date. The second gave the reason for termination as that the landlord required the Property for his own occupation. 24th April, 2006 was designated as the termination date. The second notice was expressed to be served without prejudice to the landlord's entitlement to terminate the tenancy on an earlier date on account of non-payment of rent or for other reason.
On 22nd March, 2006 the applicant applied for dispute resolution to the Board in relation to three disputes, which he referred to as the "A" dispute, the "B" dispute and the "C" dispute.
The Tenancy Tribunal which heard the applicant's reference dated 22nd March, 2006 also comprised Aideen Hayden, Anne Colley and Conn Murray. The hearing took place in Cork on 11th July, 2006. The determination of the Tribunal was dated 6th October, 2006. At the hearing, the applicant objected to the Tribunal as constituted. He also made a preliminary application to the effect that, by virtue of the application of s. 86 of the Act of 2004, the Tribunal should not consider any application in relation to either rent or the notices of termination. In relation to that submission, the Tribunal found as follows:
§ Section 86, which is designed to protect the status quo while a dispute is pending, did not apply. The requirements of s. 86(2) were satisfied, as the tenancy agreement provided that a rent increase could occur from 1st October, 2005

under clause 8, the provision being freely negotiated between the parties.
§ Section 86 provides that no termination of tenancy may be effected, and none was in the case. The Act of 2004 does not prohibit the serving of a notice of termination arising from a wholly new cause of action.
§ The provisions of s. 86(3) did not apply as the prior disputes, which were the subject of the determination of 13th April, 2006 and the determination order of 19th April, 2006, referred to a termination based on different grounds and was not, therefore, "a dispute relating to the validity of the [notice of termination] concerned" set out in that sub-section".

Determinations of Tribunal and Board on 2006 disputes

The Tribunal made a finding of fact that the applicant was in breach of the two determination orders dated 15th February, 2006 and 19th April, 2006 in relation to payment of rent.

What the applicant had termed the "A" dispute was his contention that the purported rent increase was invalid. On this contention the Tribunal found that the notice of rent increase dated 23rd February, 2006 was valid and that the landlord had a right to levy such increase under clause 8 of the tenancy agreement. It also found that the determination order of 19th April, 2006 did not operate to place a permanent stay on any further rent increase contemplated by the tenancy agreement, which had been found to constitute a binding agreement in the proceedings on the 2005 disputes. The Tribunal also noted that no argument had been advanced to suggest that the increased rent levied was not a market rent and the increase was valid.

The determination order of the Board, which was also dated 6th October, 2006, embodied those findings. It determined that the applicant should pay rent at the rate of €750 per month from 1st March, 2006 up to the date of giving possession (para. 3).

On what was termed the "B" dispute, in broad terms, the applicant challenged the adequacy of the demand for arrears of rent contained in the letter of 7th March, 2006, which was served on 8th March, 2006, to give rise to an entitlement to serve a notice of termination and the validity of the first notice of termination of 13th March, 2006, contending that, by virtue of s. 67 of the Act of 2004, the giving of fourteen days notice was a condition precedent to the service of a valid notice of termination and that such notice had not been given. In relation to those contentions, the Tribunal pointed to the letter of 23rd February, 2006 and found that it was in compliance with s. 67(3) of the Act of 2004, which requires that fourteen days shall have elapsed from receipt of a notice notifying that an amount of rent due has not been paid prior to issuing a notice of termination based on grounds of arrears of rent. The Tribunal found that the first notice of termination of 13th March, 2006 served on the applicant in respect of arrears of rent was properly served and valid in all respects.

On what was termed the "C" dispute, in broad terms, the applicant challenged the validity of the second notice of termination of 13th March, 2006, in reliance, *inter alia*, on s. 86. Alternatively, he contended that the landlord's personal circumstances rendered it inequitable for the notice of termination to be upheld on the basis that the landlord required the Property for his own occupation. The Tribunal found that clause 7(1) of the tenancy agreement had been freely negotiated between the parties and that the landlord had properly exercised the "break" clause as he intended to re-occupy the Property for his own use. The Tribunal also found that the exercise of the break clause by service of the notice of termination caused the period certain of the applicant's occupancy under the tenancy to fall short of the two-year duration set out in s. 66 of the Act of 2004 as requiring 56 days' notice and that the appropriate notice was 42 days. The Tribunal also found that the second notice of termination of 13th March, 2006 pursuant to s. 34.4 of the Act of 2004 was valid. Finally, on this point, the Tribunal found that the landlord had demonstrated a clear need and intention to occupy the Property for his personal use. Earlier in its determination the Tribunal had recorded that the landlord gave sworn testimony that he wished to live in the Property because he was 28 years of age, living with his parents and he wanted to move into his own home, considering he was paying for it. The arrears of rent position was financially crippling as he had "to pay the mortgage without receiving any income".

As regards the "B" dispute and the "C" dispute, the determination order of the Board dated 6th October, 2006 determined that the two notices of termination were valid (para. 1) and that the applicant and all persons residing in the Property should vacate the Property within 28 days from the date of issue of the determination order (para. 2).

Course of the proceedings

In the special endorsement of claim on the special summons the applicant did not particularise any error of law which was the basis of his appeal. As I understand the position, while the matter was pending in the Master's Court, the Master allowed the applicant to file a grounding affidavit, which was sworn on 5th January, 2007. That affidavit, which contained 61 paragraphs, like all of the documentation submitted by the applicant is unnecessarily abstruse and prolix. In any event, by direction of the court, the applicant particularised the points of law he was pursuing in a statement of particulars dated 9th March, 2007, which itemised 22 points, and in a statement of further and better particulars dated 4th April, 2007.

The hearing of the substantive matter commenced in this Court on 11th June, 2007. On that occasion the court refused an application of the applicant to cross-examine the deponent for the Board, Anne Colley, on her affidavit sworn on 23rd April, 2007 on behalf of the Board. The matter was resumed on 25th June, 2007. On that occasion, the court ruled on which of the points itemised in the statement of particulars and the statement of further particulars were points of law which were justiciable on an appeal under s. 123(3) of the Act of 2004.

The hearing of the substantive application was concluded on 27th July, 2007.

For the remainder of this judgment, I propose setting out first what the jurisdiction of the court is under s. 123(3) and

recording the submissions made on behalf of the Board and the applicant on 25th June, 2007 as to which of the 22 items particularised by the applicant were justiciable as points of law on an appeal of this nature and the court's ruling on that issue.
I will then set out my general observations on the validity of the Tribunal's determination and the determination order in issue, bearing in mind the points of law raised by the applicant. I will then deal with any further matters which arise in relation to the particular items which I have found to be justiciable. I have found it necessary to adopt this approach because of the manner in which the applicant presented his case. He has raised technical points in relation to the Act of 2004 which, in my view, is an extremely complex piece of legislation. He has advanced interpretations of some of the provisions of that Act which are contorted in the extreme. He had to be compelled to comply with the Rules of the Superior Courts, 1986 and identify the points of law on which he alleged the Tribunal erred. He failed to adhere to time limits prescribed for the conduct of this type of appeal. Overall, he has failed to adopt a consistent approach in contesting the legality of the landlord's actions in February and March, 2006 before the Tribunal and before the court. In general, it has to be said that, having regard to the issues involved, this appeal has taken up an inordinate and disproportionate amount of court time and has been conducted in a manner which I consider to be unfair both to the Board and the landlord. Having said that, if the Board has erred in law, the applicant is entitled to seek to have that redressed.
By way of general observation, the court is concerned with issues of law which are properly raised concerning the determination order of 6th October, 2006. Any position adopted by the Board or the landlord after 6th October, 2006 has no bearing on the outcome of this appeal.

<u>Court's jurisdiction under section 123(3)</u>

Section 123(3) provides that any of the parties concerned in dispute resolution
under the Act of 2004 may appeal to the High Court from a determination of the Tribunal (as embodied in a determination order) on a point of law. Sub-section (5) provides that the High Court may, as a consequence of the determination it makes on such appeal, direct the Board to cancel the determination order concerned or to vary it in such manner as the court specifies.
In addressing the issue as to which of the 22 items particularised by the applicant are points of law for determination by the court, counsel for the Board prefaced his submissions by making two general observations.
First, he referred to the multiplicity of proceedings which have been initiated by the applicant in relation to his tenancy, to which I have already alluded.
Secondly, it was submitted that, if the applicant had what might be loosely termed a judicial review point, the time to object was before the Tribunal, citing the decision of the Supreme Court in *Corrigan v. Land Commission* [1977] I.R. 317. Therefore a challenge to the make up of the Tribunal should have been made at the time of its appointment. On that point, I note that, while it is clear from the transcript that the applicant did challenge the makeup of the Tribunal appointed to deal with the 2006 dispute at the July, 2006 hearing, he did not pursue that matter by way of judicial review. Counsel referred to the decision of the Supreme Court in *Dublin Wellwoman Centre Limited v. Ireland* [1995] I.L.R.M. 408 and submitted, referring to the judgment of Denham J. at p. 418, that, where a challenge to an adjudicator is based on perceived bias, the standard is very high. Prior exposure to the issue in dispute, without more, is not sufficient. Aside from that argument, counsel submitted that a challenge to a tenancy tribunal on the ground of perceived bias is not a point of law in the sense of s. 123(3). What s. 123(3) is concerned with is an error in the decision, not an error of jurisdiction. In this connection, counsel referred to the decision of the Supreme Court in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 106. In defining the distinction between an issue in respect of which the appropriate procedure and remedy is judicial review, as opposed to a statutory appeal on a point of law, O'Flaherty J. stated at p. 111:

> "It is clear that judicial review is appropriate where the method or manner by which the decision is reached is attacked rather than the actual decision itself."

The issue before the Supreme Court in that case was the failure of the Labour Court to give reasons for its decision. O'Flaherty J. stated that he was inclined to the view that failure to give adequate reasons was not a point of law, although, like the High Court in the matter, he took a pragmatic view and dealt with the issue.
Thirdly, counsel for the Board entered a caveat against this Court taking a pragmatic view, as had happened in the *Faulkner* case. In that case, the challenge to the relevant tribunal, the Labour Court, did not bear on the integrity of the members. What the applicant was attempting to advance in this case was a challenge on the basis that the members of the Tribunal had an *animus* against the applicant. Before being allowed to advance such an argument, it was submitted, the members should have an opportunity to know in advance what was being alleged and to deal with it on affidavit. But, in any event, counsel submitted that the basis on which the Board had come to court on this application was to defend the determination within its four corners, not to answer an attack on jurisdictional grounds.
Fourthly, counsel pointed to the material differences between the special summons procedure under which an appeal on a point of law is litigated (where the proceedings have been commenced before the commencement of Orders 84B and 84C of the Rules of the Superior Courts, 1986 in February of this year) and judicial review procedure. Under judicial review procedure it is necessary to obtain leave to prosecute the complaint, whereas a special summons may

be issued without leave. Further, an application for leave to proceed by way of judicial review must be supported by a statement of grounds and, if the contention is that the adjudicator had *animus* against the applicant, the allegations must be set out with particularity.
Addressing the alleged manifest errors of law identified by the applicant in the original particulars and the further particulars, counsel for the Board accepted that the following items raised points of law in the sense of s. 123(3): items 6, 7, 9, 10 in the original particulars in combination with 11 in the original particulars, but not 10 in the further particulars, 14, and 15. In relation to item 12, counsel's understanding was that the point being made was a matter as between the landlord and the tenant and did not engage the Board. However, counsel accepted that, if the point being raised related to whether it was permissible to serve the two notices of termination, it was a point of law. In his response, the applicant explained that his point was that the services of two notices contravened s. 34 of the Act and that what he described as "the retake" notice must fail under para. 4(b)(ii) of the Table in s. 34. In relation to item 13, counsel acknowledged that, if the issue was whether it was open to the landlord to serve the two notices of termination, that raised a point of law. However, counsel's interpretation of the reference to "*bona fide*" in item 13 was that the applicant was contending that the Board had not acted *bona fide* and submitted that that would be a judicial review point. However, in his response the applicant explained that in item 13 he was referring to the manner in which the Board approached the issue of the *bona fides* of the landlord. In relation to item 22, in which the applicant sought that, should he prevail, the court should "commit the matter to a Jury List for assessment of the [applicant's] damages pursuant to, *inter alia* … s. 14 [of the Act of 2004]", counsel submitted that the question of damages would only arise as a consequence of a finding of *ultra vires*. There was no error on the part of the Board and ex hypothesi there was no point of law. In response, the applicant explained that the reference to damages in item 22 was damages not against the Board but against the landlord and he referred to s. 14 and s. 115(2)(d) of the Act of 2004. Following that explanation, counsel for the Board submitted that, in effect, what the applicant is saying is that the Board did not exercise its jurisdiction properly. Therefore, no point of law arises; it is a judicial review point.
Counsel submitted that all of the other points itemised in the original particulars and the further particulars were not points of law within the meaning of s. 123(3) and that, insofar as they could give rise to a remedy at the suit of the applicant, they should have been pursued by way of judicial review.
The applicant's response was that the distinction which the Board was asserting between proceeding by way of special summons and proceeding by way of judicial review was of "constitutional moment". He submitted that there was nothing in the Act to give an intended litigant notice that in the selection of the form of procedure one was at one's peril. Was s. 123(3) intended to be coded language to the effect that one better go the judicial review route and not by way of special summons, he asked rhetorically, suggesting that it was not intended to be trap for unwary litigants. Where is the boundary between a question of law and a mixed question of fact and law, he queried. He submitted that the determination of the Tribunal includes its processes. Its rules are rooted in statute and an applicant is entitled to rely on them being properly complied with.
Having heard the submissions, I ruled that the following items, all of which are paraphrased later, in the original particulars and as elaborated on in the further particulars constitute points of law which are justiciable under s. 123(3): item 6; item 7; item 9; items 10 and 11 in the original particulars, but not item 10 in the further particulars; item 12; item 13; item 14; and item 15.
I ruled that all of the other items, including item 22 in respect of which I considered that the court had no jurisdiction, did not raise points of law and could not be pursued.

General observations on validity of Tribunal's determination and Board's determination order of 6th October, 2006.

Although this may be an unusual approach to adopt, for the reasons set out earlier, I propose first setting out in general terms my views on the validity of the Tribunal's determination of 6th October, 2006 and the Board's determination order of that day. I will do so by reference to the provisions of the Act of 2004 invoked by the applicant and deal in broad terms with the arguments he advanced in respect of them. Later, I will address further the specific points of law raised by the applicant which I consider to be justiciable in these proceedings.

Section 86

Section 86 of the Act of 2004 provides as follows:

> "(1) Subject to sub-section (2), pending the determination of a dispute that has been referred to the Board (but subject to that determination when it is made) –

(a) the rent payable under the tenancy concerned and the rent payable under any sub-tenancy arising out of it shall continue to be payable,
(b) if the dispute relates to the amount of rent payable, no increase in the amount of the rent may be made, and
(c) a termination of the tenancy concerned may not be effected.
(2) Sub-section (1) does not apply if –
(a) in the case of paragraph (a) of that sub-section, the parties concerned agree to payment of the rent being suspended,
(b) in the case of paragraph (b) of that sub-section, the parties concerned agree to an increase in the amount of the rent being made,
(c) in the case of paragraph (c) of that sub-section (unless the dispute is a dispute specified in sub-section (3)), the

notice of termination concerned was served –
(i) before the dispute was referred to the Board for resolution, or
(ii) after the dispute was so referred and the required period of notice to be given by the notice of termination is 28 days or less and that period of notice has been given, or
(d) in any of the cases, the dispute is not dealt with, or ceases to be dealt with, under this Part pursuant to section 82, 83, 84 or 85.
(3) The dispute mentioned in sub-section (2)(c) is a dispute relating to the validity of the notice of termination concerned or the right of the landlord or tenant, as appropriate, to serve it."
The purpose of s. 86 is to maintain the status quo between a landlord and a tenant pending the determination of a dispute referred to the Board for resolution.
Although the 2005 disputes were still pending in February and March, 2006 and were not finally determined until the determination order of 19th April, 2006 was made, in my view, s. 86 did not act as a bar to the landlord taking the initiatives which became the subject of the 2006 disputes for the following reasons:
(a) In relation to the "A" dispute, para. (b) of sub-s. (1) of s. 86 had no application because the 2005 disputes did not involve any dispute relating to "the amount of rent payable".
(b) In relation to the "B" dispute, the notice of termination in issue, the first notice served on 13th March, 2006, fell within the ambit of para. (c) of sub-s. (2), so as to disapply sub-s. (1), in that –
(i) it did not fall within the ambit of sub-s. (3), because there was no dispute pending in relation to the validity of that notice or the right of the landlord to serve it, and
(ii) while served after the 2005 disputes were referred, the required period of notice to be given was 28 days and that period of notice was given.

> As I have recorded, on 27th January, 2006, the Tribunal had ruled that a purported notice of termination served by the landlord on the applicant on 18th March, 2005 was invalid. Clearly, the landlord accepted that ruling. Nothing in s. 86 prevented the landlord from mending his hand and serving a 28-day notice of termination on the ground of failure to pay rent due.

(c) In relation to the "C" dispute, sub-s. (1) of s. 86 precluded the termination of the tenancy being effected on foot of the second notice of termination dated 13th March, 2006 prior to the Board making its determination on the 2005 disputes, but it did not preclude the service of the notice.

The "A" dispute

Turning to the substance of the "A" dispute, in the applicant's reference dated 22nd March, 2006, the alleged invalidity of the rent increase was premised on failure to comply with s. 22, which is in Part 3 of the Act of 2004. That Part deals with rent and rent reviews.
Section 19 prohibits the setting of rent at any time above the market rent for the tenancy at the relevant time, whether the initial setting of the rent under the tenancy or any subsequent setting of the rent by way of review. Sections 20 and 21 regulate the frequency with which rent reviews may occur and the right to review where none is provided for.
Section 22, in so far as it is pertinent for present purposes, provides as follows:

> "(1) The setting of a rent (the 'new rent') pursuant to a review of the rent under a tenancy of a dwelling and which is otherwise lawful under this Part shall not have effect unless and until the condition specified in sub-section (2) is satisfied.
> (2) That condition is that, at least 28 days before the date from which the new rent is to have effect, a notice in writing is served by the landlord on the tenant stating the amount of he new rent and the date from which it is to have effect."

Sub-section (3) deals with the time limited for referring a dispute in relation to a rent review to the Board and is not material.
Sub-section (2) of s. 24 provides that references in Part 3 to "a review of rent" include references to –

> "(b) the effect of the operation of a provision of a … tenancy agreement providing that, by reference to any formula, happening of any event or other matter whatsoever (and whether any act, decision or exercise of discretion on the part of any person is involved or not), such … increase [in the amount of rent for the time being payable under the tenancy] shall have effect,"

Sub-section (3) of s. 24 provides that references in Part 3 to the setting of a rent are references, in the context of a review of rent, in the case of a provision of the kind referred to in sub-s. (2)(b), to the rent being set by the operation of that provision.
The rent increase provided for in clause 8 of the tenancy agreement to which the landlord was to be entitled if the applicant extended the tenancy from 1st October, 2005, while agreed at the outset, was not to come into effect until the happening of an event, the extension by the applicant of the tenancy beyond 1st October, 2005. The effect of the operation of that element of clause 8 fell within the ambit of s. 24(2)(b), so that such effect is deemed a review of the

rent under Part 3. Therefore s. 22 applied when the landlord sought to increase the rent in February, 2006 and 28 days' notice was required under s. 22. As the required notice was not given, the rent increase did not have effect. Accordingly, the reasoning of the Tribunal on the "A" dispute was not correct in law. The Board erred in law in determining that a valid notice of increase of rent was served by the landlord on 23rd February, 2006.

The "B" dispute

As regards the "B" dispute, the provision of the Act of 2004 governing the requisite period of notice for termination where the tenant is in default is s. 67. Section 67, insofar as it is relevant for present purposes, provides as follows:

> "(1) This section applies where the tenancy is being terminated by the landlord by reason of the failure of the tenant to comply with any of the obligations of the tenancy.

(2) Where this section applies the period of notice to be given by the notice of termination is –
(a) 7 days, if the tenancy is being terminated by reason of the behaviour of the tenant that is –
(i) … anti-social …, or
(ii) threatening the fabric of the dwelling …

or

(b) 28 days, if the tenancy is being terminated –
(i) for any other reason (but not a failure to pay an amount of rent due), or
(ii) for failure to pay an amount of rent due and the condition specified in sub-section (3) is satisfied,

regardless of the duration of the tenancy.

> (3) The condition mentioned in sub-section (2)(b)(ii) is that the tenant has been notified in writing by the landlord that an amount of rent due has not been paid and fourteen days elapse after the receipt of that notice without the amount concerned having been paid to the landlord."

The position, accordingly, is that, where a landlord is terminating a tenancy for failure to pay rent, two steps have to be taken to give the requisite period of notice: first, the landlord must notify the tenant that an amount of rent has not been paid and allow fourteen days to elapse from the receipt of that notice; and, secondly, if the amount concerned has not been paid within the period of fourteen days, the landlord must give the tenant 28 days notice of termination. In my view, the landlord properly implemented both steps. First, by the letter of 23rd February, 2006 the landlord notified the applicant in writing that €700 rent was due in respect of February, 2006, as well as arrears totalling €7,700 in respect of the previous eleven months. Secondly, after more than fourteen days had elapsed without the applicant having paid any of the outstanding rent to the landlord, on 13th March, 2006 the landlord served the notice of termination giving the applicant 28 days notice. The finding of the Tribunal that the letter of 23rd February, 2006 complied with s. 67(3) was correct, but that did not necessarily determine the validity of the first notice of termination dated 13th March, 2006.

While compliance with s. 67(2) and (3) was all that would have been required to terminate a tenancy to which Part 4 did not apply, it was not all that was required to terminate a Part 4 tenancy, because s. 57(b) provides that the requirements set out in Part 5 for valid termination of a tenancy are "in addition to the requirements" of Part 4 with regard to the termination of a Part 4 tenancy.

It was held by the Tribunal on 27th January, 2006 that the applicant held under a Part 4 tenancy. Such tenancy could only have been terminated in accordance with s. 34. Where a landlord is terminating in reliance on failure of the tenant to comply with any of his obligations, other than failure which in general terms amounts to anti-social behaviour, to come within ground 1 of the Table in s. 34, the following conditions stipulated in that ground must be complied with:

> "(a) the tenant has been notified of the failure by the landlord and that notification states that the landlord is entitled to terminate the tenancy if the failure is not remedied within a reasonable time specified in that notification, and
> (b) the tenant does not remedy the failure within that specified time."

Additionally, having established the existence of ground 1, the landlord must serve notice of termination giving the required notice by reference to s. 67(2) and (3).

The Tribunal did not expressly address the issue of compliance with the conditions stipulated in ground 1 of s. 34 in its findings. However, the landlord was alive to them and the explanation given to the court for the service of the letter of 7th March, 2006 was that it was served for the purpose of complying with those conditions stipulated in s. 34.1.

In my view, the provisions of the Act of 2004 for the valid termination of a Part 4 tenancy for non-payment of rent are very technical and confusing. It is difficult to understand why, in relation to non-payment of rent, the notification required by para. (a) of ground 1 in s. 34 could not have been made co-terminous with the notification under s. 67(3). As it has not been, it seems to me that prudence dictates that a landlord invoking ground 1 should serve notice in the

form required by para. (a) on the tenant allowing at least fourteen days for remedying the breach, that is to say, discharging the outstanding rent, although, on the facts of a particular case, that period might not constitute a "reasonable time" within the meaning of para. (a).
The Tribunal did not adjudicate on whether the letter of 7th March, 2006, which post-dated the notification for the purpose of s. 67(3) and only allowed three days for remedying the failure, complied with the requirements of ground 1 of s. 34. I am not satisfied that the existence of ground 1 was established by the landlord. In the circumstances, notwithstanding the egregious breach by the applicant of the terms of his tenancy and of the interim determination order made on 15th February, 2006, and notwithstanding that the applicant did not pinpoint the precise infirmity in the landlord's invocation of ground 1 in s. 34, it is not possible to hold that the first notice of termination of 13th March, 2006 was validly given. The only courses open to the court under s. 123(5) are to let the determination order of 6th October, 2006 stand or to vary it. Despite having considerable sympathy for the landlord, I have come to the conclusion that the determination as to the validity of the first notice of 13th March, 2006 cannot stand.

The "C" dispute

In relation to the "C" dispute, and, indeed, the "B" dispute, the starting point is the finding by the Tribunal that the applicant's tenancy was a Part 4 tenancy. Section 33 of the Act of 2004 provides that a Part 4 tenancy may not be terminated save in accordance with s. 34. Section 34 sets out six grounds on which a tenancy may be terminated. The ground invoked by the landlord to which the "C" dispute relates (the "B" dispute having related to ground 1) was ground 4 which provides as follows:

> "The landlord requires the dwelling … for his or her own occupation or for occupation by a member of his or her family and the notice of termination (the 'notice') contains or is accompanied, in writing, by a statement –
>
> (a) specifying –
>
> (i) the intended occupant's identity and (if not the landlord) his or her relationship to the landlord, and
> (ii) the expected duration of that occupation,
>
> and
>
> (b) that the landlord, by virtue of the notice is required to offer to the tenant a tenancy of the dwelling if the contact details requirement is complied with and the following conditions are satisfied –
>
> (i) the dwelling is vacated by the person referred to in sub-paragraph (a) within the period of six months from the expiry of the period of notice required to be given by the notice or, if a dispute in relation to the validity of the notice was referred to the Board under Part 6 for resolution, the final determination of the dispute, and
> (ii) the tenancy to which the notice related had not otherwise been validly terminated by virtue of the citation in the notice of the grounds specified in paragraph 1, 2, 3 or 6 of this Table."

Section 34 expressly provides that a Part 4 tenancy may be terminated "on one or more of the grounds" set out in the Table if notice of termination giving the required period of notice is served and the notice cites as the reason for termination "the ground or grounds concerned" and in the case of ground 4 contains a statement in the terms of paras. (a) and (b) quoted above.
Where a tenancy is being terminated on ground 4 the required notice is governed by s. 66 of the Act of 2004. That section provides that, where the duration of the tenancy is one year or more but less than two years, the notice period is 42 days. For the purposes of Part 5 of the Act of 2004, in which s. 66 is to be found, the expression "duration of tenancy" has a specific meaning which is defined in s. 61(2) as follows:

> "A reference in this Part to the duration of a tenancy is a reference to the period beginning on the date on which the tenancy came into existence or the relevant date, [1st September, 2004 *per* S.I. 505 of 2004] if later, and ending on the date of service of the notice of termination concerned."

That provision was not adverted to in the Tribunal's determination.
The applicant's tenancy came into existence on 22nd September, 2004. The notice of termination in reliance on ground 4 was served on 13th March, 2006. Accordingly, the duration of the tenancy for the purposes of the application of s. 66 was one year or more but less than two years, so that the requisite notice period was 42 days. Assuming that on 13th March, 2006 the applicant was not holding under a fixed-term lease for a term extending beyond 24th April, 2006, the second notice of termination dated 13th March, 2006, which provided for 42 days notice, gave the required notice to terminate the tenancy on ground 4 in s. 34. That assumption, that it was not a fixed-term lease, is correct because, although the applicant had an entitlement, by virtue of clause 8 of the tenancy agreement, to extend the term for twelve months from 1st October, 2005 to 30th September, 2006, that entitlement was subject to the provision of clause 7.1 which gave the landlord the right to "break" the tenancy on and from 1st November, 2005

provided the landlord intended to occupy the Property as his only or main home. Provided the contractual right to "break" the tenancy was exercised in a manner compatible with the invocation of ground 4, the contractual right did not constitute "contracting out" of Part 4 of the Act of 2004, which is prohibited in s. 54. The landlord did so exercise his contractual right in serving the second notice of 13th March, 2006. Moreover, s. 58(3) of the Act of 2004, to the extent that it precludes the use of the notice of termination procedure to shorten the duration of a fixed-term lease, had no application.
For the foregoing reasons, I consider that the Board, in determining that the second notice of termination dated 13th March, 2006 was valid, was correct in law.

Justiciable points of law raised by the applicant
I propose specifically addressing now the points raised by the applicant which I consider to be justiciable points of law for the purposes of this appeal, insofar as they have not already been addressed.

Item 6
The applicant contended that what he referred to as the two "purported" notices of termination of tenancy of 13th March, 2006 violated s. 86 of the Act of 2004 and that the Tribunal erred in law in finding them to be valid and that the Board erred in law in adopting and incorporating that finding in the determination order of 6th October, 2006.
As I understand the point being made by the applicant it is that, pending the determination of the 2005 disputes, which the applicant contended occurred on the expiration of 21 days from 19th April, 2006 (the date of the determination order in relation to the 2005 dispute), the landlord could not serve a valid notice of termination.
That argument raises a number of questions in relation to the proper construction of s. 86.
The first is the meaning of "pending the determination of a dispute". The applicant's argument is predicated on the assumption that a dispute is pending until a determination order made by the Board has become binding on the parties. In the case of a determination order embodying the terms of a determination of the Tribunal, by virtue of s. 123(2),that happens on the expiration of the period of 21 days beginning on the date that the determination order is issued to the parties unless, before that expiry, an appeal is made to the High Court on a point of law under s. 123(3). On the basis of that interpretation, as there was no appeal against the determination order of 19th April, 2006, the 2005 disputes would not have been determined until around 10th May, 2006. An alternative interpretation is that the expression "pending the determination of a dispute" in sub-s. (1) of s. 86 means pending the making of a determination order. However, that argument was not advanced by any party and, for present purposes, I am assuming that the applicant's interpretation is correct.
Secondly, what s. 86(1)(c) prohibits is a termination of a tenancy being "effected" and a question arises as to what that means and whether it is distinguishable from the service of a notice of termination. In my view, "effected" must be given its plain meaning, namely, that the termination of the tenancy was brought about, or accomplished, or consummated. That there is a distinction between the termination of a tenancy being effected and the service of a notice of termination is obvious as a matter of common sense: a notice of termination must specify the termination date, that is to say, the day on which the tenancy will terminate (s. 62(1)(f)), which is fixed by reference to the required notice period. The service of the notice does not effect termination; the expiry of the required notice period does. It is also clear from s. 86(2)(c) itself. In the case of service after the referral of a dispute, sub-s. (2)(c) by implication draws a distinction between circumstances in which 28 days or less notice is required and circumstances in which longer notice is required. In the case of the former, sub-s. (1)(c) is disapplied in relation to a notice which is not within the scope of sub-s. (3), which means that the notice can be served and the termination of the tenancy effected notwithstanding the pendency of the dispute resolution process. In the case of the latter, there is no prohibition on the service of the notice of termination but, as sub-s. (1) is not disapplied, it will not operate to effect the termination of the tenancy during the pendency of the dispute resolution process. I assume that the rationale underlying the distinction is that under the Act of 2004 the shorter periods of notice relate to situations of default by either the landlord or the tenant which require to be urgently addressed (for example, anti-social behaviour on the part of the tenant) and situations in which the duration of the tenancy is less than six months, whereas the longer notice periods relate to situations in which the tenant has been in occupation for longer than six months and has the protection of Part 4.
Whatever the rationale, the distinction is there. In this case it means that, if the landlord was entitled to serve the first notice of termination dated 13th March, 2006, as that notice came within the ambit of sub-s. (2)(c), the termination of the tenancy would have been effected at the expiry of the notice notwithstanding that the 2005 disputes were still pending. However, in the case of the second notice of termination dated 13th March, 2006, if the notice was validly served, it could not have effected a termination of the tenancy pending the determination of the 2005 disputes, that is to say, until after 10th May, 2006. However, in my view, after 10th May, 2006 that notice of termination was capable of effecting a termination of the tenancy.
For completeness, I find that the applicant's submission by reference to sub-ss. (1) and (2) of s. 58 that a tenancy is terminated upon the service of notice of termination is also incorrect.
The applicant also raised the question of the propriety of what he referred to as "two reciprocally incorporated by express reference purported" notices of termination being served simultaneously on 13th March, 2006. This refers to the fact that the second notice was expressed to be without prejudice to the landlord's entitlement to terminate the tenancy on an earlier date on account of non-payment of rent, that being a reference to the first notice. It is quite clear from s. 34 that it is open to a landlord to invoke one or more of the grounds set out in the Table to that section.

In summary, a Part 4 tenancy is not terminated until the expiry of the notice period provided for in a notice of termination which complies with Part 5 of the Act of 2004. In the case of a notice of termination served after a referral of a dispute to the Board which does not come within sub-s. (2)(c) of s. 86, as I have already stated, the effect of s. 86(1)(c) is to prevent the tenancy being treated as terminated notwithstanding the expiration of the relevant notice period. That means that termination which, apart from that provision, would have been effected is effectively suspended until the determination is made. When the determination is made, if it contains a provision which is material, that provision takes effect, because s. 86(1) is expressed to be subject to "that determination when it is made". However, in this case, there was never going to be a provision in the determination order made on foot of the 2005 disputes which would be material to any issue as to the termination of the applicant's tenancy, because of the ruling in favour of the applicant made by the Tribunal on 27th January, 2006 in relation to the notice of termination served on 18th March, 2005 and because the invocation by the landlord of ground 4 of s. 34 was not an issue in the 2005 disputes.

Item 7

The applicant contended that the Board, by the determination order dated 6th October, 2006, which was predicated on the Tribunal's determination of the same date, erred as a matter of law in its interpretation of and/or application of s. 67 of the Act of 2004 to the uncontested facts.

The applicant was correct in his submission that compliance with s. 67(3) is a condition precedent to the service of a valid notice to terminate under s. 67(2)(b) for failure to pay an amount of rent due. He was not correct in submitting that the condition precedent was not complied with on any of the bases he advanced.

His contention that no "amount of rent due" was "knowable" prior to 13th March, 2006 does not stand up. This argument is premised on the fact that he had a right of set-off in respect of whatever sum the Tribunal would award him in respect of his claim in the 2005 disputes against rent due and until the final determination of the Tribunal on the 2005 disputes the amount of rent due by him was not "knowable". This argument overlooks the fact that under s. 86, a section relied on by the applicant, the rent payable by him under the tenancy agreement continued to be "payable", not merely to accrue. The position as at 23rd February, 2006 was that, as the letter of that date stated, the rent for the month of February, 2006 was outstanding and the rent for the previous eleven months was outstanding. The letter of 23rd February, 2006 correctly notified the applicant in writing that an amount of rent due had not been paid.

In relation to the other points made by the applicant in relation to the application of s. 67(3), I make the following observations, reiterating, however, that I am not satisfied that ground 1 of s. 34 was established, so that the observations are not in any way determinative:

(a) The simultaneous service of the two letters of 23rd February, 2006 in the same envelope did not in any way impact on the efficacy of the notice informing the tenant that an amount of rent was due. The letter which complied with s. 67(3) dealt with the historic situation in relation to rent which was then due. The second letter the purpose of which was to invoke the landlord's entitlement to the increase in rent from 1st March, 2006 was concerned with future liability for rent. The second letter could not have caused any confusion.

(b) Nor did the letter of 7th March, 2006 affect the efficacy of the letter of 23rd February, 2006 as a notification for the purposes of s. 67(3). The letter of 7th March, 2006 did not contradict in any material manner the earlier notification. However, I am not prepared to hold that it sufficed for the purposes of s. 34.1(a).

(c) Insofar as it is implicit in the applicant's submission that s. 67(3) notification which does not "demand" payment of the rent due does not comply with the section, in my view, that submission is incorrect. What s. 67(3) requires is a notification by the landlord to the tenant in writing of the amount of rent due followed by fourteen days' grace to allow the tenant to remedy his breach before the service of a notice of termination for failure to pay rent. In this case, the landlord, in the letter of 23rd February, 2006, complied with that requirement. However, that letter did not comply with the requirement of para. (a) in ground 1 of s. 34.

Items 10 and 11

To paraphrase the substance of these items, one argument advanced by the applicant was that the Board erred in law in not finding that the duration of the applicant's tenancy as of 13th March, 2006 as being two years or more but less than three years, so as to necessitate a notice period of 56 days to validly terminate it on ground 4 in s. 34.

The applicant's submission is wrong in law because it does not take account of the fact that in the application of the Table contained in s. 66 of the Act of 2004, the expression "duration of tenancy" has the meaning ascribed to it in s. 61(2). As I have already outlined, the applicant's entitlement to an extension of a tenancy for one year from 1st October, 2005 under clause 8 of the tenancy agreement was expressly subject to the right of the landlord to "break" the tenancy if he required the property for his only or main home. That was the bargain between the parties freely entered into. The landlord exercised his right under clause 7(1) on 13th March, 2006 in a manner compatible with the invocation of ground 4 in s. 34 and served notice of termination on that date in accordance with ground 4. At that time the tenancy had been in existence for less than two years. The relevant period of notice, as I have stated earlier, was 42 days.

It may be helpful if I elaborate on why I have concluded that s. 58(3) had no application. Section 58 generally lays down that the methods of termination of a tenancy (whether by a landlord or tenant) which previously existed (notice to quit, forfeiture, surrender and such like) no longer apply to a tenancy of a dwelling. Section 58(3) in effect provides that the Part 5 notice of termination provisions shall be implied into certain tenancies, for example, a tenancy to which

Part 4 does not apply by virtue of s. 25, but goes on to include the following qualification –

> "(but, in case of a tenancy that is for a fixed period, unless it provides otherwise, only where there has been a failure by the party in relation to whom the notice is served to comply with any obligations of the tenancy.)"

The applicant referred the court to the following passage in an article by Ruth Cannon in Conveyancing and Property Law Journal, Vol. 10, No. 4, on "Termination of Tenancies under the Residential Tenancies Act, 2004: the New System"

> "… section 58(3) makes clear that a notice of termination cannot be used to shorten the period of a fixed-term lease unless there has been a prior failure by the party on whom the notice is served to comply with any obligations of the tenancy so as to justify utilising the termination for breach procedure in ss. 67 or 68 of the Act."

The obvious purpose of s. 58(3) is to ensure that contractual rights of a tenant which are more beneficial than the statutory rights conferred by the Act of 2004 are not interfered with, an objective which is also given effect to in s. 26, which provides that nothing in Part 4 shall derogate from rights enjoyed by the tenant which are more beneficial for the tenant than Part 4 rights.
The core issue in determining whether s. 58(3) had any application to the applicant on 13th March, 2006 is whether, as of that date, he held under a contract for "a fixed period". In my view, as a matter of contract, he did not. Even though his tenancy was extended under clause 8 for twelve months from 1st October, 2005, by virtue of clause 7.1 the landlord was entitled to shorten that term after 1st November, 2005. The landlord exercised his entitlement. Therefore, the tenant did not have a tenancy for a fixed period beyond 24th April, 2006.
The applicant's alternative argument, which counsel for the Board submitted was not made before the Tribunal, that a notice to terminate in reliance on ground 4 of s. 34 served on him on 13th March, 2006 required 112 days' notice because his Part 4 tenancy would continue until 21st September, 2004 is also not correct. It is true that by virtue of the operation of s. 28(2) of the Act of 2004 a Part 4 tenancy continues in being for a period of four years from the commencement of the tenancy, but that is subject to s. 34 which allows for earlier determination on one or more of the six grounds stipulated in that section. In this case, the landlord invoked ground 4 and at the time he did so the tenancy was in being for less than two years.

Item 12

The point made by the applicant was that the Board had manifestly erroneously misapplied and/or misconstrued and/or ignored s. 34.4(b)(ii) of the Act of 2004 which, it was contended, bars an "owner re-taking" notice of termination if the tenancy had otherwise been terminated. As I understand the submission, the applicant contended that the bar should apply in this case because of the attempted termination in 2005, in respect of which the dispute resolution process before the Board remained pending as of March, 2006, and the existence of the first notice of termination of 13th March, 2006 on the ground of rent arrears.
That submission is based on a wilful refusal of the applicant to accept the plain meaning of ground 4 of the Table in s. 34. That ground permits termination where the landlord requires the dwelling for his or her own occupation or for the occupation of a member of his or her family. With a view, obviously, to ensuring that the right is not abused, the notice of termination or an accompanying statement in writing must specify the matters set out in sub-paras. (a) and (b). Sub-paragraph (a) requires that the tenant who is being ousted from possession be told the identity of the intended occupant and his or her relationship to the landlord and the expected duration of that occupation. Sub-paragraph (b) requires the tenant to be put on notice of his right to be offered a tenancy of the dwelling, provided the statutory requirement in relation to the furnishing of contact details (i.e. details of the tenant's whereabouts) is complied with, if two conditions are satisfied. The first condition is that a dwelling is vacated by the new occupant within six months. This condition obviously is designed to deter the landlord from misusing ground 4. The second condition is that the tenancy has not otherwise been validly terminated by virtue of the citation in the notice of termination of another ground specified in the Table to s. 34, being ground 1 (the tenant's failure to comply with an obligation of the tenancy), ground 2 (the dwelling being no longer suitable), ground 3 (sale of the premises) or ground 6 (change of use). What sub-paragraph (b)(ii) of ground 4 does is that it puts an onus on a landlord invoking ground 4 to tell the tenant that an offer of a new tenancy, if the intended occupant vacates within six months, is conditional on the tenancy the subject of the notice of termination not having otherwise been validly terminated. Far from being a bar to a landlord who invokes ground 4 in s. 34 being precluded from invoking any other ground, in fact sub-para. (b)(ii) makes it clear that a landlord may invoke another ground, for example, ground 1, as well as ground 4. The reason for the omission of ground 5 (refurbishment of the dwelling) from sub-para. (b)(ii) is obvious: it embodies a requirement to offer the tenant a new tenancy.

Item 13

The applicant's contention is that the Board manifestly erroneously misapplied and/or misconstrued the *bona fides* requirement of s. 56(6)(b) of the Act of 2004 in relation to the two notices of termination of 13th March, 2006.
Section 56 of the Act of 2004, broadly speaking, gives a tenant who has been unjustly deprived of possession of a

dwelling by reason of an abuse of s. 34 an entitlement to damages. Section 56(6)(b) provides as follows:
"For the avoidance of doubt –
(a) …

> (b) This section is without prejudice to the tenant's right to put in issue, in a dispute in relation to the validity of the notice of termination referred to the Board under Part 6, the bona fides of the intention of the landlord to do or, as appropriate, commit to be done the thing or things mentioned in the notice."

That provision merely clarifies that a tenant who suspects that a landlord is not acting *bona fide* in serving a notice of termination which invokes grounds 3, 4, 5 or 6 in s. 34 does not have to wait and see whether his suspicions are justified and pursue a complaint under s. 56 but can challenge the *bona fides* of the landlord in a dispute in relation to the validity of the notice of termination before the Board.
As is clear from the transcript of the proceedings before the Tribunal, the applicant did challenge the landlord's *bona fides* in serving the second notice of termination of 13th March, 2006. In his submissions to the court the applicant contended that the "twinning" of the ground 4 notice of termination with the ground 1 notice of termination gave rise to a presumption of *mala fides* on the part of the landlord. That is not correct. As I have said previously, a landlord is entitled to invoke one or more of the grounds for termination provided for in the Table to s. 34. In effect, what the applicant is asking the court to do is to review the decision of the Tribunal on the merits. As counsel for the Board point out, that is not permissible on an appeal under s. 123(3). On an appeal under that provision it is not open to the court to set aside a finding of fact made by the Tribunal unless there was no evidence to support it. Counsel for the Board referred the court to the dictum of Finlay C.J. in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 (at p. 72) in which he stated:

> "I am satisfied that in order for an applicant for judicial review to satisfy a Court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the Court that the decision-making authority had before it no relevant material which would support its decision."

That passage, in my view, certainly outlines the appropriate principle in the judicial review context.
Perhaps more apposite for present purposes is a statement of Kenny J., speaking for the Supreme Court, in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 I.L.R.M. 421 in reference to findings of fact in a case stated by an appeals commissioner under the Income Tax Act, 1967. Having pointed out that a case stated consists in part of findings of fact on questions of primary fact, Kenny J. stated that the findings on primary facts should not be set aside by the court unless there was no evidence whatever to support them. That statement was approved of by the Supreme Court in the context of an appeal under s. 300(4) of the Social Welfare (Consolidation) Act, 1981 in *Henry Denny & Sons (Ireland) Limited v. Minister for social Welfare* [1998] 1 IR 34 (at p. 47).
As the summary I have given earlier of the findings of the Tribunal in relation to the "C" dispute makes clear, this is not a case in which there was no evidence to support the finding that the landlord's need and intention to occupy the Property for his personal use was *bona fide*.

Item 14
The applicant contended that the Board has manifestly erroneously misapplied and/or misconstrued s. 86(1)(b), submitting that no rental increase might be effected during the pendency of the 2005 disputes.
I have already dealt with that point earlier. There was no dispute in relation to the amount of rent payable in the 2005 disputes and s. 86(1)(b) did not apply.

Item 15
The applicant contended that the Board has manifestly or erroneously misapplied and/or misconstrued s. 22(2), submitting that no rental increase may be effected without 28 days advance written notice to the tenant. I have already found that this contention is correct.
The only additional matters which it is necessary to advert to are the following:
(a) The suggestion in the applicant's written submission of 27th July, 2007 that the rent increase provision in clause 8 of the tenancy agreement was in breach of the non-contracting out provision contained in s. 54 of the Act of 2004, in that the s. 22(2) requirement for 28 days notice would have been more beneficial to the applicant than clause 8, is not correct because, by virtue of the operation of s. 24, the increase provided for in clause 8 of the tenancy agreement was deemed to be a review, as I have already found, and s. 22 applied.
(b) Both counsel for the Board and counsel for the landlord submitted that the transcript discloses that the s. 22 notice point was not argued by the applicant at the hearing before the Tribunal. Be that as it may, one of the grounds advanced by the applicant in his reference dated 22nd March, 2006 was that the letter of 23rd February, 2006 violated explicitly s. 22. However, it would appear that the applicant's first reference to s. 24 was in his written submission of 27th July, 2007.

Order
The determination order dated 6th October, 2006 will be varied as follows:
(1) Paragraph 1 shall be deleted and there will be substituted therefor the following:

> One valid notice of termination was served by the Respondent Landlord on the Applicant Tenant on 13th March, 2006 in respect of the tenancy of the dwelling 14 The Orchard, Crosshaven, County Cork, that is to say, the notice served because the landlord required the dwelling for his own occupation.

(2) Paragraph 3 shall be deleted.
Otherwise the determination order shall stand.

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