



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber)**

Chamber Ref: FTS/HPC/CV/19/0742

**Re: Property at Elmbank House, South Maddrox Farm, Glenboig, ML5 2QH
("the Property")**

Parties:

**Mr Harry Morgan, 2 Gain Road, Glenboig, Coatbridge, ML5 2QG ("the
Applicant")**

**Mr Stuart Kerr, Ms Ashley Blair, Braeside Cottage, Gartliston Road,
Coatbridge, ML5 2FG; Braeside Cottage, Gartliston Road, Coatbridge, ML5
2FG ("the Respondent")**

Tribunal Members:

Virgil Crawford (Legal Member) and Tony Cain (Ordinary Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the
Tribunal") determined that**

BACKGROUND

1. There are three ongoing cases between the parties, those being case reference FTS/HPC/CV/19/0742 in which Harry Morgan and Linda Morgan are the Applicants and Ashley Blair and Stuart Kerr are the Respondents, and cases referenced FTS/HPC/PR/2758 AND FTS/HPC/CV/19/2759 in both of which Ashley Blair and Stuart Kerr are the Applicants and Harry Morgan and Linda Morgan are the Respondents;
2. Each case now has a very long history before the Tribunal. The case under reference FTS/HPC/CV/19/0742 was previously assigned a Hearing and evidence was led on two consecutive days on 5th and 6th September 2019. A further date was assigned for evidence to be heard on 4th October 2019 but,

prior to that, the Solicitors previously acting on behalf of Mr and Mrs Morgan were no longer instructed, Mr and Mrs Morgan did not attend and, subsequently, different Solicitors were instructed by Mr and Mrs Morgan.

3. On the first day on which evidence was heard in that particular case, Miss Blair and Mr Kerr lodged their two separate applications with the Tribunal, each of them seeking an order for payment against Mr and Mrs Morgan, each of them relating to the same tenancy and property and, as it thereafter became apparent, each of them having a significant overlap of evidence with the case originally lodged by Mr and Mrs Morgan;
4. The evidence led on 5th and 6th September 2019 related only to the case under Tribunal reference FTS/HPC/CV/19/0742. On the dates on which evidence was led the other two cases which had been presented by Miss Blair and Mr Kerr were not before the Tribunal. They had not been through the Tribunal sifting process nor had they been accepted by a legal member of the Tribunal to enable them to proceed. That being so, and for the avoidance of any doubt, no evidence has been heard by the Tribunal in relation to the applications under Tribunal references FTS/HPC/PR/2758 and FTS/HPC/CV/19/2759;

PROCEDURAL HISTORY

5. Each of the cases now has a somewhat unfortunate history. The case under reference ending 19/0742 was first presented to the Tribunal on 6th March 2019. Almost 3 years later, it is still not at a conclusion. The cases under references ending 19/2758 and 19/2759 were first presented to the Tribunal on 5th September 2019. Again, more than 2 years later, they remain unconcluded. The Tribunal acknowledges that a lengthy period of delay was caused by the Coronavirus Lockdown. The Tribunal did, however, previously correspond with all Parties seeking views in relation to the best way to progress the cases and no response was received. Ultimately, the Tribunal assigned Case Management Discussions requiring Parties to participate in order that the cases could be progressed. The Case Management Discussion in each of the applications was assigned for 10th September 2021 and was conducted by teleconference.

Case Management Discussion 10th September 2021

6. At the Case Management Discussions on 10th September 2021 all parties agreed that a Hearing would be required and that the Hearing would require to be an “in person” Hearing requiring the physical attendance of parties and witnesses. The Tribunal, however, prior to assigning dates for any such Hearing, wished to ensure that all parties had provided a full list of witnesses, a list of productions and copies of all productions, in order and paginated, to enable the Tribunal to properly consider the likely length of time required for any Hearing and to ensure that any Hearing would be able to be conducted

efficiently by the Tribunal. Accordingly, the Tribunal assigned further Case Management Discussions and issued a Direction to the Parties requiring them to lodge a list of witnesses, a list of productions and copies of all productions which should be paginated;

7. It is noted that, at the Case Management Discussions on 10th September 2021, Miss Blair and Mr Kerr made enquiry as to the use to which the Tribunal would put evidence which had already been heard on 5th and 6th September 2019. At that time the Tribunal advised that it could not comment on such questions at that stage. A consideration of the evidence in the case could only be started once all of the evidence was concluded. The Tribunal also, on that occasion, indicated that, having regard to the previous transfer of agency on the part of Mr and Mrs Morgan and the fact that the currently instructed solicitors had been unsuccessful in recovering any notes of evidence from the previous agents, the evidence in the case under reference ending 19/0742 may require to be re-led with, effectively, the Hearing under that case starting again. Those comments were included within the Case Management Discussion note which was issued to parties after 10th September 2021;

Case Management Discussion 15th November 2021

8. In each of the cases a further Case Management Discussion was assigned for 15th November 2021. It is concerning that little or no progress had been made in the two month period between the Case Management Discussions;
9. The Tribunal noted that neither party had complied with the Direction which had been issued. Neither party had lodged a list of witnesses, a list of productions nor any copy productions in order and paginated, as had been requested by the Tribunal;
10. The Solicitors for Mr and Mrs Morgan forwarded an e-mail to the Tribunal on 15th November 2021 indicating that it was intended that only Mr and Mrs Morgan would be called to give evidence and that a further period of time would be required to enable the list of productions and copy productions to be organised and lodged. The Tribunal was advised that the e-mail had been sent the week before but, for some reason, had not been received by the Tribunal so was sent again on the morning of the Case Management Discussions;
11. Miss Blair had previously communicated with the Tribunal in relation to the Direction which had been issued. The Tribunal pauses to comment that the email forwarded by Miss Blair commenced "Hi Laura" and concluded "Kindest regards, Ashley". Such informality in communication should be avoided by Parties communicating with the Tribunal. While the Tribunal is designed to be less formal than a Court it is still a legal tribunal determining important legal matters between the parties. The Tribunal requires to remain independent and impartial in any dispute between the Parties and such informality of

communication can give rise to an impression that a certain level of camaraderie may exist between Parties and members of the Tribunal;

12. Having made that point, the e-mail forwarded on 7th October 2021 requested an extension of time to comply with the Direction which had been issued by the Tribunal. That extension of time was granted. At the Case Management Discussions on 15th November 2021 Miss Blair advised that she had not received any intimation from the Tribunal that her request had been granted. During the Case Management Discussions the Tribunal did not have the full email exchange between Miss Blair and the Tribunal but subsequently ascertained that, on 15th October 2021, an e-mail was forwarded to both Miss Blair and Mr Kerr confirming that an extension of time was granted until 5pm on 22nd October 2021. It is concerning that Miss Blair suggested that no response had been received to her communication when it had, in fact, been considered by both the Legal Member and the Ordinary (Housing) Member of the Tribunal, the requested extension granted and that fact communicated by the Tribunal. Of further concern is the fact that the Tribunal has now noted that Miss Blair forwarded an e mail to the Tribunal on 21st October 2021 in which she stated

“...I am so sorry as I am aware we were granted the extension...”

13. Miss Blair again asked about the evidence which was previously led and whether that would be taken into account by the Tribunal. The Tribunal again advised that the intention was to commence the leading of evidence again in relation to all three cases as, while evidence was led on 5th and 6th September 2019, that related only to the application by Mr and Mrs Morgan under reference ending 19/0742 and, for the reasons previously stated, the currently instructed Solicitors were unaware of that evidence and would not be able to address the Tribunal in relation to it;
14. Miss Blair did not appear to be content with that position and seemed to be of the view that the Tribunal should still consider the evidence which it had heard previously. The Tribunal pointed out that, in relation to the applications lodged by Ms Blair and Mr Kerr, no evidence had been led at all. Miss Blair queried that also, pointing out that the cases were now being heard together and she seemed to believe that the evidence which had already been led should be able to be used in connection with all three cases. It was pointed out, as stated above, that, at the point in time when evidence was led, the Tribunal did not have before it the applications from Miss Blair and Mr Kerr and, in those circumstances, there can be no question of evidence led being used in connection with cases which were not before the Tribunal at that time;
15. Miss Blair then challenged the information provided by the Tribunal, suggesting that the two applications by herself and Mr Kerr were, indeed, before the Tribunal at that time. The legal member pointed out that applications lodged by Miss Blair and Mr Kerr were dated 1st September 2019

and were received by the Tribunal on 5th September 2019. While they had been received by the administration department of the Tribunal on 5th September, they were not before the Tribunal when it heard evidence on 5th and 6th September 2019. The applications by Miss Blair and Mr Kerr were not accepted by a legal member of the Tribunal until 10th October 2019. Those applications will not have been intimated to Mr and Mrs Morgan until after they had been accepted by the Tribunal and, in the circumstances, there can be no question whatsoever that evidence led more than one month prior to the cases being accepted, and prior to Mr and Mrs Morgan having any knowledge of the applications, can be used in relation to those cases;

16. The Tribunal repeatedly asked Miss Blair if she was in a position to lodge a list of witnesses, a list of productions and copies of all productions in order and paginated. Miss Blair repeatedly referred to documents and productions which had previously been lodged by her and made reference to "Hazel" and communications she had with "Hazel". It is assumed by the Tribunal that "Hazel" is one of the administrative members of the Tribunal. Again, the informality of such a reference is not helpful in dealing with the Tribunal. It was made perfectly clear, however that the Tribunal, for the reasons stated on 10th September 2021, and stated again at the Case Management Discussions on 15th November 2021, was wishing the Directions previously issued to be complied with and stated that the Directions will be reissued following these Case Management Discussions;
17. Miss McWilliams, Solicitor, on behalf of Mr and Mrs Morgan sought clarification from the Tribunal as to how evidence was expected to be led, pointing out that there were three separate applications, one of which Mr and Mrs Morgan were the Applicants and the other two Mr and Mrs Morgan being the Respondents. She indicated that, in connection with any lists of productions, she may wish to lodge separate lists and productions for each case. The Tribunal advised that it intended to deal with the three cases together given that it was acknowledged by all parties that there would be a significant overlap of evidence, that while a final decision can be taken at a later stage, it was intended that evidence would be led by and on behalf of Mr and Mrs Morgan first with Miss Blair and Mr Kerr having the opportunity to examine any such witnesses and, thereafter, Miss Blair and Mr Kerr leading any additional evidence they would wish to lead in connection with the various applications before the Tribunal with Mr and Mrs Morgan having the opportunity to examine any witnesses;
18. Miss McWilliams also enquired as to whether any responses had been lodged in relation to the applications under references ending 19/2758 and 19/2759. The Tribunal advised that it was not aware of any submissions or responses having been lodged and intimated that that is something Miss McWilliams may wish to attend to prior to the next calling of the cases;

Case Management Discussion Note Dated 15 November 2021

19. In its note issued following the Case Management Discussions on 15 November 2021 the Tribunal stated:-

“18.....the length of time each of the 3 cases has been before the Tribunal is concerning. The previous failure of parties to communicate with the Tribunal in response to communications issued with a view to progressing the cases is concerning. The failure of the parties to comply with the Directions previously issued is concerning. The need for the Tribunal to have to address issues on 15th November 2021 which had been comprehensively discussed on 10th September 2021 is concerning. Parties should be under no illusions that, while the Tribunal has indulged the parties to a significant extent in relation to the proceedings, the patience of the Tribunal is not endless and subsequent failures to comply with Directions may result in the Tribunal dismissing one or more of the applications before it;

19...The Tribunal draws the attention of the Parties to Rule 27 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the FTT Rules”) which provides as follows:-

Dismissal of a party's case

27.—(1) The First-tier Tribunal must dismiss the whole or a part of the proceedings if the First-tier Tribunal does not have jurisdiction in relation to the proceedings or that part of them.

(2) The First-tier Tribunal may dismiss the whole or part of the proceedings if the applicant has failed to—

(a) comply with an order which stated that failure by the applicant to comply with the order could lead to the dismissal of the proceedings or part of them; or

(b) co-operate with the First-tier Tribunal to such an extent that the First-tier Tribunal cannot deal with the proceedings justly and fairly.

20...The Tribunal

21...A further Case Management Discussion will be assigned by the Tribunal in relation to each case and intimated to the Parties. A further Direction requiring Parties to provide information to the Tribunal in relation to the evidence to be led will be issued in relation to each case also. Having regard to the history of the cases and the overriding objective of the Tribunal as set out within paragraph 2 of the FTT

Rules, failure to comply with the Directions may result in dismissal of one or more of the applications before the Tribunal.”

Case Management Discussion 24th January 2022

20. A further Case Management Discussion in each case was held on 24th January 2022. Each Case Management Discussion was, again, heard by teleconference. Mr and Mrs Morgan did not participate in the case management discussion. Their solicitor did not participate either. Miss Blair and Mr Kerr both participated personally;
21. The Tribunal had issued Directions to all Parties following the Case Management Discussions which were held on 15th November 2021, these directions requiring the Parties to lodge lists of witnesses, lists of productions and copies of all productions in order and paginated with the Tribunal within a specified timescale. Yet again, these directions had not been complied with;
22. The Tribunal pointed out that it had made clear that it required the Directions to be complied with and that this was now the second occasion a direction had not been complied with and the Tribunal had previously made it clear that dismissal of one or more of the cases before it could result from such a failing. The Tribunal also pointed out that the failures to comply with the Directions, on two separate occasions, followed upon all Parties failing to engage with the Tribunal previously when it had made enquiry of the Parties in relation to obtaining their views in relation to the best way to progress the cases following the lifting of certain restrictions during the Coronavirus Pandemic;
23. Miss Blair addressed the Tribunal on behalf of herself and Mr Kerr. Mr Kerr confirmed that he was content that Miss Blair take the lead in addressing the Tribunal on their behalf;
24. Miss Blair advised the Tribunal that, in relation to the failure to engage with the Tribunal when it was attempting to progress the cases at an earlier stage she had misread communications from the Tribunal. The communications from the Tribunal were, however, in clear terms. It is difficult to understand how they could have been misread or misunderstood;
25. Following the issue of Directions after the Case Management Discussions on 10th September 2021, Miss Blair apologised for failing to comply with those Directions. She had communicated with the Tribunal prior to the expiry of the initial time limit for compliance asking for an extension of time to comply. In her communications with the Tribunal, however, she pointed out that part of the reason for the delay in lodging the documents was that she and Mr Kerr were intending that Mr Kerr would personally deliver all documents to the Tribunal and, for various reasons, he had been unable to do so within the time limit specified. It was clear from the communication, however, that a significant part of the reason for failing to comply with the first Directions issued was the desire to ensure that papers were delivered personally to the Tribunal;

26. During the Case Management Discussions on 15th November 2021 and 24th January 2022 Miss Blair suggested that she was unaware that an extension of time had been granted for the Directions issued following the Case Management Discussions on 10th September 2021 to be complied with. As noted at paragraph 12 above Miss Blair forwarded an email to the Tribunal on 21st October 2021 in which she said

“I am so sorry as I am aware we were granted the extension”

27. In relation to the failure to comply with the Directions issued following the Case Management Discussions held on 15th November 2021, Miss Blair had, in the days prior to the Case Management Discussions on 24th January 2022, communicated with the Tribunal suggesting that the documents had been posted and had, somewhat belatedly, been returned to her in a damaged state, marked as being undelivered by the post office. Upon further enquiry, it was clear that the documents which were apparently posted in were not sent by any form of recorded or tracked delivery. Miss Blair suggested that the Post Office were not offering any service which guaranteed delivery on any specified date as they could no longer guarantee that. She also, however suggested that she had been advised by Post Office personnel not to use the normal recorded delivery service which would have allowed for tracking of any package posted and allow for confirmation as to if or when any such items had been signed for;

28. No explanation was given why on the previous occasion the reason for the failure to comply with the direction was due to the desire of Miss Blair and Mr Kerr to deliver the items personally to the Tribunal and an inability to do that due to COVID related matters - clearly suggesting that the documents were available and in a format ready to be delivered to the Tribunal – and the subsequent delay in them being forwarded and an explanation being provided that it was due to a failure of the postal service, which they previously did not wish to rely on;

29. Having considered the following

- a) The lengthy history of each case;
- b) The failure of the parties to engage with the Tribunal with a view to the cases being progressed following the easing of Coronavirus Restrictions;
- c) The failure of the parties to comply with the Directions issued following case management discussions held on 10th September 2021;
- d) The clear terms of the case management discussion notes which were issued following the subsequent Case Management Discussion held on 15th November 2022 in which the Tribunal made it clear that a failure to comply with Directions result in one or more of the other applications before the Tribunal being dismissed;
- e) In the Case Management Discussion note following the calling of the cases on 15th November 2021 the Tribunal drew attention to Rule 27 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 which makes clear that the Tribunal may dismiss the whole or part of the proceedings if the Applicant has failed

to comply with certain orders of the Tribunal or to co-operate with the Tribunal to such an extent that it cannot deal with the proceedings justly and fairly;

f) the fact that the parties subsequently failed to comply with directions issued thereafter;

g) the fact that, in relation to case 19/0742 Mr and Mrs Morgan did not participate in the case management discussions on 24th January 2022 either personally or by a representative,

the Tribunal concluded that the parties had failed to comply with Directions issued to them and that as a result of that the Tribunal was unable to deal with the proceedings justly and fairly;

30. The Tribunal has indulged all Parties to a very significant extent since the commencement of each set of proceedings in 2019. The Parties have each singularly failed to co-operate with the Tribunal to allow it to progress the cases. Given the lengthy history of each case the Tribunal concluded that the stage had now been reached where each application fell to be dismissed as a result of the failure of the Parties to co-operate with the Tribunal such that the Tribunal could not deal with the cases justly and fairly;

31. In the circumstances, the Tribunal dismissed each of the applications before it.

DECISION

The Tribunal dismissed the application

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Virgil Crawford

Legal Member/Chair

24 January 2022

Date