



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/PR/21/1940

Re: Property at 90 Mellerstain Road, Kirkcaldy, KY2 6UD (“the Property”)

Parties:

Mr Stuart Watt, Miss Kerstin Zinner, 33 Cleish Gardens, Kirkcaldy, KY2 6AA (“the Applicants”)

Mr James Mooney, Mrs Susan Mooney-Grundy, 39 Birch Avenue, Kinghorn, KY3 9YN (“the Respondents”)

Tribunal Members:

Petra Hennig-McFatrige (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be refused.

A Background:

This is an application for a wrongful termination order on the basis of S 58 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) made by the Applicants on 11 August 2021 under rule 110 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the rules).

The following documents were lodged by the parties in the case:

1. Private Residential Tenancy agreement between the parties over the property commencing 20 May 2020.
2. Notice to Leave given to the Applicants on 7 May 2021 stating ground 5 as the ground for the notice.
3. Email exchange between the Applicants and the Respondent's letting agents between 16 February 2021 and 13 April 2021

4. Screenshot advert 29 July 2021 of your move showing the property for sale with a closing date of 3 August 2021
5. Photo dated 29 July 2021 showing for sale sign at the property
6. Text message exchange between the Applicants and Mr Mooney stated to be on 29 November 2020 and 31 May 2021
7. Call log showing calls made by and to "Sue landlord" (being Mrs Mooney) by and to the Applicants.
8. Reply by the Respondent Mr Mooney on behalf of both Respondents in the email of 14.10.2021
9. Timeline document emailed by Mr Mooney on 3 December 2021
10. Letter from Paul Clark dated 24 November 2021 to whom it may concern
11. Email exchange between Mr Mooney and Delmore Estate Agents on 6.5.2021 and 7.5.2021
12. Job description Staff Manager/StageCoach sent to Mr Mooney on 22.6.2021
13. Offer Form from First to Mr Mooney with start date 4.10.2021
14. Home Report form from Your Move dated 25.5.2021
15. Estate Agent Contract from Your Move for the property signed by Your Move 23.7.2021 and by the Respondents on 25.7.2021

A Case Management Discussion (CMD) took place on 1 November 2021. The CMD note and directions issued on 1.11.2021 are referred to for their terms.

On 23.11.2021 both parties received notification of the hearing date, time and joining instructions.

B The Hearing:

The hearing took place on 11 January .2022 at 10 am by teleconference.

The Applicants both attended. Mr Mooney attended on behalf of both Respondents. The Tribunal members were satisfied that the hearing had been intimated correctly to Mrs Mooney- Grundy. Mr Mooney explained that his wife would not participate in the hearing as she had another commitment and he would speak on behalf of both Respondents.

The legal member explained the purpose of the hearing, read to the parties the relevant section of the legislation, set out the structure of the hearing to be followed and confirmed with both parties that the CMD note correctly reflected the content of that previous calling of the case and that all parties had all relevant documentation.

Evidence of Mr Watt:

Mr Watt stated that the Applicants felt misled about the relevant notice period. Mr Mooney put the property up for sale and the Notice to Leave they received showed that for this ground the relevant notice period would be 6 months rather than the 3 months for the ground used for the notice. They only were given 3 months to move and it was quite stressful and difficult to find a new property. They looked on line for 2 weeks and could not find anything. Then there was a call with Mr Mooney who said he was happy for them to stay and they halted the search As no further contact was made by the Letting Agent they contacted the landlord and he stated the

circumstances had changed. The market for let properties was insane and if a property went up it would be gone by 8:30 in the morning and a lot of times they received no reply to expressing interest. Finally a property which was not quite on the market was notified to them by the agent and they took that property, which is 3 bedrooms but no garage and is £695 per month in rent. The property market at the time was also crazy and they had no deposit but saw that the house prices had increased a lot. They thought that the Respondents had tried to make a quick sale. On 15 May 2021 there was a conversation with Mr Mooney when he told them about he intended to move because of the job in Glasgow. He heard Mrs Mooney say in the background "maybe sell it then". There were two calls or rather 1 text that the circumstances had changed and one call. Mr Mooney mentioned maybe sorting something else out regarding the notice period for the job and moving in or selling the property at the end of the year. Mr Watt stated that when there was no response from Delmore he messaged the Respondent who then texted back that he intended to live in the property.

Evidence of Ms Zinner

Ms Zinner stated that they received the notice to leave on 7 May 2021 and managed to move out on 15 July 2021. On 29 July 2021 they visited their former neighbours and found the for sale sign on the property, which is lodged in evidence and then went on the website of Your Move and saw the property for sale with a closing date of 3 August 2021, which again is evidenced in the screenshot lodged. They felt misled into leaving by the former landlords. They are not happy with the location of the new property and it is not as convenient. The call with Mr Mooney was on 15 May 2021 when he mentioned possibly selling or moving in December 2021 and the text to confirm the notice was being kept in place on 31 May 2021.

Evidence of Mr Mooney

He stated his old boss had offered him a job and he didn't think that the process would take so long. He was living down South and was going to move back to Scotland at the start of August but the time scales dragged on. Once he got confirmation he put in his notice but did not realise his old job had such a long notice period. The new job started 4 October and he moved up to Scotland on 28 September 2021 although he had accepted the verbal offer for the job in May. He stated there was no intention to mislead and things transpired, such as the financial burden. He intended to move into the property. He can only remember that there was a phone call on 15 May 2021 but not what the content was. It would have been about the new job. They did not decide to sell the property until late July. There were the additional costs and he had not finished his old job until 30 September 2021. He knew that the notice period for the old job would be about 3-4 months but he was able to negotiate that down to 2 months. He did not put in his notice until July with the old job because there was still due process to be followed. The reference to them "moving for a couple of weeks to take a look" at the CMD hearing was to his wife moving up before him to see in what state the property was after the tenants had left and to find out what, if anything, would have to be done and whether or not that could be done by him once he was up in Scotland. Things like decorating. At that time the plan was for his wife to move and for him to follow for the start date in August 2021. The house is a nice house and there is nothing wrong with it. The reason the email on 6 May 2021 said Sue was going to move up asap was because

she was to move first with him following. He stated they had never lived in the property and one factor for not moving in ultimately was that the toilet was on the ground floor and his wife needed to use several times over night due to a medical condition and the location in relation to his new job. When asked why he had changed his mind although he had known these factors all along he stated it was not until July when he and his wife gave it further thought. She had had an operation in June 2021 and thus they were thinking a lot about things after that in July. They did not realise that there would be a 6 months notice period for a sale, all that was done by the letting agent because he and his wife were still in Exeter. If he had known that he would have moved in. Near the end of July he received the offer about the job, but he knew the job was his much earlier. Around the middle of July he and his wife were then toying with the idea of selling the property and your move did everything. They were a countryside agency and seemed a good choice to approach. They emailed him the documents he lodged and he signed and returned them. He stated he cannot remember when the Home Report referred to in the document was instructed but it would have been around the same time. It all went very fast. He cannot remember about the details of the home report but if it said so on the form he must have had one and it must have been done in that week. They had only spoken about the option of selling the property mid-end of July and after that it all happened very quickly and they did not decide on this until the week they signed the documents with Your Move. The intention was firmly for his wife to move first and for him to follow and for both of them to live in the property. Initially the commute of 1 hour 15 minutes seemed ok. Then it looked like he would not finish his old job until November although he ultimately managed to negotiate an earlier end date with his old job. He got a call from Delmore that the tenants had moved out and the rent for the Scottish property had stopped. They would have had to pay over £1000 rent in Exeter and the mortgage on the property in question until the start of the new job and that was now not until October 2021. The notice to leave was in no way motivated by the housing market picking up and he stated he had a high pressured job in Exeter and knew nothing about the housing market and had not kept himself informed about the Scottish housing market. His wife had had the operation in June and did not recover until around the end of July 2021 and she ultimately moved in with her mother as a temporary solution in September 2021 a week or so before he moved up after he finished with his old job. Living with the mother in law was only ever going to be a temporary arrangement and they had since moved. Once they had instructed the sale everything moved very quickly and he had no idea that would happen. It all moved within a matter of days. Mr Mooney again confirmed that up until the middle of July he and his wife had a clear intention to live in the property. They were then mulling things over and discussing them and they were discussing a lot of things at that time. He firmly disputed that a sale was mentioned in May 2021 on the telephone when this was put to him and queried why reason he would have had to mention a specific date at that time. The advert for the job was finally issued on 22 June 2021, he had his interview by video on 20 July 2021 and received the verbal but formal offer on that day. Only then was he able to quit his old job on 25 July 2021. The home report would have been instructed at that time.

Submissions:

Mr Watt and Ms Zinner stated that both feel the landlord had not considered their position as people at all in the decision making process. They were living in the property and had intended to make this their long term home. Ms Zinner's placement

was at the local school and they had made friends and there was a nice community. Ms Zinner in particular stated that Mr Mooney admitted he had not given it much thought when he gave the notice and that made her feel even worse. Both think that they were misled into leaving the property.

Mr Mooney stated there was no misleading. The time scales all changed and he had no control over that.

C The legal test:

Private Housing (Tenancies) (Scotland) Act 2016 Section 58 Wrongful termination without eviction order

(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.

(2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy (“the former tenant”).

(3) The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end.

(4) In a case where two or more persons jointly were the landlord under the tenancy immediately before it ended, the reference to the landlord in subsection (3) is to any one of those persons.

D Findings in fact:

Based on the evidence submitted and given by the parties the Tribunal makes the following findings in fact:

1. The parties entered into a Private Residential Tenancy over the property commencing on 20 May 2020.
2. The Respondents had never lived in the property themselves.
3. A Notice to Leave on the ground that a family member would be moving into the property was served on the Applicants on behalf of the Respondents on 7 May 2021 with the date when proceedings could commence stated as 10 August 2021.
4. The Applicants had a difficult and stressful time finding new accommodation and had planned to remain in the property for much longer.
5. The Applicants moved out on 15 July 2021.
6. The Private Residential Tenancy and the rental payments ended as of that date.
7. A marketing contract with Your Move was signed by the Respondents on 25 July 2021
8. In the week leading up to that date a Home Report had been instructed with DM Hall.
9. The property was advertised thereafter by Your -Move with a closing date set for 3 August 2021 and sold quickly.
10. At no point did the Respondents or any family members of the Respondents move into the property.

11. The intention of the Respondents was to move into the property so that Mr Mooney could start his new position in Scotland.
12. Mr Mooney had received the initial offer of a position from his former boss in early May 2021 and at that time expected the new position in Blantyre to start in August 2021
13. The Respondents had decided for Mrs Mooney to move first and ascertain the state of the property after the tenants would have left and for Mr Mooney to follow.
14. On 6 May 2021 the Respondents instructed Delmore Letting Agents to issue the Notice to Leave to the Applicants on the ground of Mrs Mooney moving into the property.
15. The Notice to Leave was duly issued on that ground on 7 May 2021.
16. On 15 May 2021 there was a telephone conversation between the parties when Mr Mooney advised the Applicants of the changed circumstances.
17. On 31 May 2021 Mr Mooney confirmed his position regarding the new job in a text message.
18. Mrs Mooney had an operation in June 2021 and required a 6 week recovery period.
19. Her medical issues causing her to use the bathroom several times per night continue.
20. The bathroom in the property is located downstairs.
21. The commute is around 1 hour 15 minutes from the property to Blantyre.
22. The new position was advertised on 22 June 2021.
23. Mr Mooney was interviewed formally for the position on 20 July 2021 when he received formal confirmation of him being accepted for the position.
24. His start date was 4 October 2021.
25. He gave notice regarding his former position in Exeter on 25 July 2021.
26. His original notice period was 4 months, which he negotiated down to two months.
27. Both Respondents moved into temporary accommodation with Mrs Mooney's mother in September 2021.
28. The rent in Exeter for the Respondents was £1050, the mortgage for the property £700 per month.
29. After 15 July 2021 the Respondents formed the genuine and settled intention to sell the property and acted on this.
30. The decision was influenced by their financial situation, the changed start date of the new employment, the layout of the property and the location of the property.
31. Prior to that date the Respondent's intention had still been to move into the property.

E Reasons for Decision:

[1] First of all the Tribunal acknowledges that from the information available to them objectively the Applicants had good reason to raise the application. They moved out on 15 July 2021 because they had been issued with a Notice to Quit advising that a family member would move into the property and then, only 14 days later, found a for sale sign at the property and saw it advertised by Your Move. On the face of it there was a case to answer by the Respondents.

[2] The Tribunal also fully accepts that the Applicants had the intention of staying at the property for a much longer time, that there were significant problems of finding another suitable property at the time and the Tribunal further acknowledges that this will have led to a lot of stress and inconvenience for the Applicants at the time. The Applicants clearly felt misled into leaving the property and if the legal test was whether or not the Applicants felt misled, then the application would succeed. However, the legal test is set out in S 58 (3) of the 2016 Act as follows: (3)The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end. It is a question of fact whether or not the Respondents in this case misled the Applicants into leaving the property.

The facts of the case have to be established by the Tribunal from the evidence available.

[3] In this case the question to the Tribunal was whether in fact the Respondents misled the Applicants to move out of the property by giving a ground for eviction, namely the property being required for a family member to move into the property, although the actual reason was that the Respondents intended to sell the property, which would carry a 6 months notice period instead of a 3 months notice period.

The outcome of the case depended on the explanation provided by the Respondents with regard to their intention when the Notice to Leave was given and to the process which ultimately led to a clear change of mind by the time the property was put on the market for sale and on the credibility of this explanation.

The Tribunal considered that the question it had to ask itself was when did the Respondents form a genuine firm and settled intention to sell the property as opposed to moving into the property.

[4] It would have been helpful if Mr Mooney had been somewhat more precise in providing dates to the Tribunal in his evidence and in his written representations but the tribunal acknowledges that some of the problems in accessing previous emails and documents would have arisen out of his previous job email no longer being accessible by him once he had moved to a different company.

[5] The explanation provided by Mr Mooney in oral evidence and set out in the written representations is that his former boss, Mr Paul Clark, changed positions from Stage Coach to First and then headhunted Mr Mooney to move with him to a new position in Blantyre. This is supported by the letter from Mr Clark dated 24 November 2021. In the letter Mr Clark confirms that Mr Mooney was first approached regarding this in early May, which is consistent with the Notice to Leave being instructed on 6 May 2021 by the Respondents.

[6] The evidence from Mr Mooney at the hearing and in the written submissions was clear and consistent that he had expected this job to be starting in August 2021 and that he and his wife had decided she would move up first into the property and he would then follow her when the new job started in August. There is nothing in the

evidence from the Applicants or the documentary evidence that would point to anything else having been the case at that stage

[7] The Tribunal also found it credible and logical that the Respondents, who were resident in Exeter at the time, would intend to use a property they owned as their residence when moving back to Scotland. It seems logical and credible to the Tribunal that Mrs Mooney, who was able to move sooner, would intend to do so and see what may be needed by way of improvements or decorating after the tenants would have vacated the property. The Tribunal is satisfied that the intention of the Respondents at the time the Notice to Leave was issued was genuinely that they would be moving into the property to live there.

[8] After the approach was initially made to Mr Mooney a process clearly started, which the Respondents had misjudged. Rather than being able to simply offer and accept the position in Blantyre to start in August, the documents, in particular the date of the advertisement being sent to Mr Mooney and the start date of the new position on 4 October in the offer document, support his explanation that the process took a lot longer than envisaged and that the change of the start date was out of his control. The Tribunal accepted this on the basis of his testimony and the supporting documents.

[9] There was nothing before the Tribunal which would lead to doubts about the amounts of rental payable by the Respondents in Exeter and the mortgage payments for the property which were ongoing. There was also no evidence which would have cast doubt on the representations of the Respondents about the operation and recovery time for Mrs Mooney. The date of the operation was stated as 21 June 2021 by Mr Mooney at the CMD and the duration of 6 weeks recovery time was stated in his written representations and further spoken to by him at the hearing.

[10] The Applicants stated that they thought they heard Mrs Mooney saying in the background at a telephone call on 15 May 2021 to maybe sell the property. This is absolutely denied by Mr Mooney. On balance the Tribunal did not find that this comment was made. It was by the Applicant's own description a remark made in the background of a telephone conversation with another person. However, even if this had been the case, it would not indicate an intention to sell the property having been formed by the Respondents at the time of the telephone call.

[11] Mr Mooney described over the course of his oral evidence in some details that the intention to move into the property was held by the Respondents until mid July 2021. He explained that over time he had realised that the job offer would be formalised much later than anticipated, that he would have a lengthy period before he could start the new position due to the notice period for his former job. He stated that following the operation and recovery of his wife and the telephone call of Delmore advising that the rental payments had stopped on 15 July 2021 due to the Applicants having moved out and thus the tenancy having come to an end he and his wife were "speaking about a lot of things". They had been "mulling things over". At that time he had not given notice for his old job as his interview was not until 20 July 2021 and he thought that the notice period of 3-4 months would then mean that he would not be released to start his new position until November 2021, whilst

meantime the Respondents would have to cover both £1050 per month in rent in Exeter and pay £700 mortgage with no rental income.

[12] It was clear from the temporary address of the property the Respondents did eventually move into, the mother in law's address in Kirkcaldy, that the distance of the property to the work location was not the decisive factor in that decision making process, although clearly it may have had an influence on the decision.

[13] Whilst the Tribunal members and the Applicants rightly challenged Mr Mooney's evidence in questions about the time line he provided, ultimately the Tribunal members formed the view that his description of events was genuine, if somewhat unstructured.

[14] The Tribunal members believed his evidence that matters had come to a head once the telephone call from Delmore was received about the tenants having moved out. The Respondents were faced with a move into property which was not ideal to their needs, Mrs Mooney's medical problems necessitating access to a toilet several times a night had not resolved. With an expected period until November 2021 to leave the previous position, the financial situation would have been very unfavourable until Mr Mooney could start his new position and the location of the property was not ideal.

[15] The Tribunal thus accepted that in the week following that telephone call the Respondents reviewed their position and decided to sell the property.

[16] The Applicants in their cross examination queried whether the Respondents were motivated to give Notice to Quit to them and then sell the property because of the flourishing housing market at the time. The Tribunal was content with Mr Mooney's explanation that due to the pressure of his job he had not paid much attention to the development in the housing market at the time and that this was absolutely not the motivation for the Notice to Leave. There is no extraneous evidence to indicate otherwise and his answer seemed genuine.

[17] When the Tribunal considered in detail the documents regarding the house sale the Tribunal also found that these were consistent with the time line given by Mr Mooney. Had the instructions of the sale or the marketing predated the 15 July 2021 then this would have disproved the version of events set out by the Respondents. However, the dates on the Home Report questionnaire and the marketing contract show that these were signed after the tenants had moved out.

[18] Over all thus the Tribunal found the explanation of the Respondents credible that the decision to put the property on the market had been made after the tenancy had ended and that before that point the Respondents had indeed intended for Mrs Mooney to move into the property and for Mr Mooney to follow her once he was able to leave his job in Exeter.

[19] The Tribunal finds that the legal test for a wrongful termination order has not been met in this case and that the application therefore must be refused.

F Decision: The application is refused.

G 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.

P. M

**Petra Hennig McFatridge
Legal Member/Chair**

**12 January 2022
Date**