Upper Tribunal for Scotland

2026UT85
Refs: UTS/AP/26/0076

DECISION OF

Sheriff Jillian Martin-Brown

ON AN APPLICATION FOR PERMISSION TO APPEAL

(DECISION OF UPPER TRIBUNAL FOR SCOTLAND)

IN THE CASE OF

Amy Capes and Richard Carr

Appellants

- and -

Maria Del Cristo Hernandez Diaz

Respondent

FTS Case Reference: FTS/HPC/RP/25/3146

Forfar, 6 November 2026

Decision

Permission to appeal is REFUSED.

Reasons For Decision

Background

1. The tenant and respondent (Ms Diaz) applied for a determination of whether the landlords and appellants (Ms Capes and Mr Carr) had failed to comply with the duties imposed by section 14(1)(b) of the Housing (Scotland) Act 2006 to ensure that the house met the repairing standard at all times during the tenancy.

2. The FTS inspected the house on the morning of 5 February 2026 and photographs were taken. A hearing took place later that day. The FTS determined that the appellants had failed to comply with the duty imposed by section 14(1)(b) of the 2006 Act and made a Repairing Standard Enforcement Order ("RSEO") requiring the landlords to:

> "1. Carry out such repairs as are necessary to ensure that the roof to the house is wind and watertight, in a reasonable state of repair and in proper working order."

3. The FTS ordered that the works must be completed within a period of 13 weeks.

4. The appellants applied to the FTS for permission to appeal its decision to the Upper Tribunal. The FTS determined that the proposed appeal did not raise any arguable points of law and refused permission to appeal on 14 May 2026.

5. The appellants submitted an application to appeal to the Upper Tribunal on 12 June 2026, together with written submissions. A permission to appeal hearing took place on 28 October 2026, attended by the appellants only. The respondent's solicitor, Mr Marshall of Dundee Law Centre, wrote to the Upper Tribunal to confirm his client would not attend but believed the decision of the FTS was correct.

6. The appellants had replaced the roof in July 2026 but maintained that did not make the appeal academic because the RSEO could affect their inclusion on the Scottish Landlord Register.

Grounds of Appeal

7. The appellants were candid that they had used AI to help draft their grounds of appeal but unfortunately, as is frequently the case, that resulted in vague, lengthy written submissions which did not make much sense. After discussion during the hearing on 28 October 2026, the appellants clarified that their grounds of appeal were as follows:

   (i) the FTS erred by finding that the inspection was carried out in unexceptional weather conditions;

   (ii) the FTS erred by considering whether any water had reached the roof space, rather than whether the roof failed to resist ordinary attacks of the elements;

   (iii) the FTS provided inadequate reasons for their decision, in particular the rejection of the traditional open roof argument; and

   (iv) the FTS failed to take account of material considerations, including the weather in the weeks leading up to the inspection.

Submissions

8. Beginning with ground (i), the appellants submitted that the FTS gave no evidential basis for its finding in fact that the inspection was carried out during unexceptional weather conditions. The FTS stated that there had been wet weather since the start of January but that was unexceptional given the Scottish climate and the time of year. They did not explain what evidence or reasoning supported that conclusion. The condition of the open slate roof had to be assessed in the context of cumulative weather conditions, including Storm Chandra on 27 and 27 January 2026; prolonged rainfall before and after the storm; driving rain, wind and high humidity; and limited opportunity for the sarking to dry.

9. Turning to ground (ii), the appellants submitted that the FTS misapplied the test in *Wolfson v Forrester* 1910 S.C. 345. The issue was not whether any water had reached the roof space. The issue was whether the roof failed to resist ordinary attacks of the elements, as distinct from exceptional encroachments of water. The FTS did not explain how it distinguished water penetration caused by disrepair or failure to resist ordinary weather from temporary wetting of sarking caused by exceptional or prolonged weather conditions in a traditional open slate roof.

10. In relation to ground (iii), the appellants submitted that inadequate reasons were given by the FTS for rejecting their submission that some dampness to sarking was to be expected because of the construction of the roof. Water ingress occurred during severe wet weather but there was no active water ingress into the living areas at the date of inspection. It was not enough to simply state that the roof space was wet and that the FTS had observed widespread water ingress. Specialist expertise did not remove the requirement to give adequate reasons, nor permit a material finding on weather conditions to be made without evidential foundation.

11. Finally, in relation to ground (iv), the appellants submitted that the FTS failed to take account of: (i) the traditional open slate construction of the roof; (ii) the role of sarking and ventilation in that roof type; (iii) evidence that wet sarking may be consistent with the roof design in prolonged severe weather; (iv) cumulative weather conditions in the weeks before inspection; (v) the absence of observed ongoing damage or mould growth in the living areas at the date of inspection; and (vi) evidence that previous discrete leaks had been repaired.

Decision

12. Beginning with ground (i), the FTS explained in its decision of 14 May 2026 that on the date of the inspection, the weather at the property was overcast with light to moderate rain (para. 12). Unfortunately, such weather was (and remains) self-evidently unexceptional in Scotland.

13. As far as the weather in the weeks prior to the inspection was concerned, the FTS highlighted in its decision of 5 February 2026 that it took into account the appellants' submission that the water ingress had occurred during severe wet weather, the most recent of which was as a result of Storm Bram (para. 13). It also took into account their submission that there had been wet weather almost continuously in January and that there was no active ingress in the living areas below the roof space. The FTS subsequently highlighted in its decision of 14 May 2026 that additional information relating to rain, storms and wind in January and February provided by the appellants in April 2026 was not before it at the hearing in February 2026 (para. 17).

14. The FTS was entitled to make a determination of whether the roof was wind and watertight at the hearing based on the inspection and the information before it at the hearing. It took into account the appellants' submissions about the wet weather since the start of January but ultimately concluded that was not exceptional given the Scottish climate and the time of year. That was a sufficient explanation. It was for the appellants to produce evidence to support their submission that it was exceptional weather and they did not do so at the time of the hearing. I therefore did not consider that the appellants had set out a basis as to how the FTS had erred in law and accordingly, refused this ground of appeal.

15. Turning to ground (ii), in its decision of 5 February 2025 the FTS made reference to the test set out in *Wolfson v Forrester* contained in para. B.2 of Annex B of the Repairing Standard: statutory guidance for private landlords (para. 31) as follows:

"*wind and watertight against what may be called the ordinary attacks of the elements, not against exceptional encroachments of water due to other causes.*"

However, the FTS also made reference to paragraph B.3 as follows:

"*Private landlords should be satisfied that any house they rent to tenants is fit for the tenants to live in. They should be confident that the essential fabric elements of the property (i.e. those parts of the physical structure which ensure the building's stability and resistance to ordinary encroachments of weather) are in good repair. If essential fabric elements are not in good repair, then it is likely that the inside of the property will, in time, be adversely affected. The most common problems arise with rising or penetrating dampness in the property. Private landlords must ensure that the properties they rent are substantially free from rising and penetrating damp, which is also required by the Tolerable Standard.*"

16. Applying that guidance to the facts and circumstances of the appellants' case, the FTS observed that whilst the water ingress was not impacting directly into the living areas, it was impacting on the essential fabric elements of the building, i.e. the roof and attic space (para 32). Consequently, based on their observations at the inspection, the FTS determined that the condition of the roof did not meet the repairing standard.

17. The FTS consisted of a legal member and a surveyor. Their observations at an inspection were a sufficient explanation for their determination. Though it was clear that the

appellants disagreed with the determination of the FTS, I did not consider that they had set out a basis as to how the FTS had erred in law and accordingly, refused this ground of appeal.

18. Similarly, in relation to ground (iii), the observation of water ingress impacting on the essential fabric elements of the building notwithstanding that the water ingress was not impacting directly into the living areas was a sufficient reason for rejecting the argument that some dampness was to be expected. Though it was clear that the appellants disagreed with the determination of the FTS, I did not consider that they had set out a basis as to how the FTS had erred in law and accordingly, refused this ground of appeal

19. Finally, in relation to ground (iv), in its decision of 5 February 2026 the FTS set out its findings in fact (para. 27) and the reasons for its decision (para. 28 – 39) in detail. It had regard to: the bundle of papers which had been available prior to the hearing; the inspection; and the oral representations at the hearing (para. 28). It considered whether a reasonable opportunity had been given to resolve the repairs issues (para. 29). It considered the condition of the roof, which was wet to the touch at inspection with evidence of widespread and active water ingress (para. 30). It had regard to statutory guidance (para. 31). It determined that the condition of the roof did not meet the repairing standard based on their observations at the inspection (para. 31). It then went on to consider whether any of the exceptions in section 16 of the 2006 Act applied in relation to lacking necessary rights of access or otherwise (para. 33 – 37).

20. It also took into account that the tenant accepted that satisfactory repairs had been carried out to the damaged areas of paint in the bedrooms and that there was no evidence of associated mould growth / damage as a result of previous water ingress. It determined there was no breach of the repairing standard in relation to those issues (para. 38). Finally, it took into account that cardboard boxes previously stored in the property had been removed and the buckets which remained were placed in a position that did not retain water (para. 12).

21. The reasons provided by the FTS in its written decision were adequate and comprehensible. It was not necessary to go over the minutiae of each and every point taken. Again, though it was clear that the appellants disagreed with the determination of the FTS, I did not consider that they had set out a basis as to how the FTS had erred in law and accordingly, refused this ground of appeal.

Refusal of Permission

22. Permission can only be granted if there are arguable grounds of appeal on a point of law (section 46 of the Tribunals (Scotland) Act 2014). As that statutory test is not met in relation to any of the four grounds, permission is refused.

Sheriff Jillian Martin-Brown
Member of the Upper Tribunal for Scotland