Upper Tribunal for Scotland

2026UT77
Ref: UTS/AP/26/0070

DECISION OF

Sheriff J. Komorowski

ON AN APPEAL
IN THE CASE OF

Mr Stephen Swiffen, Ms Tracie Smith, Ms Gemma Stanway

Original respondents and Appellants

- and -

Mrs Julie Paszkiewicz

Original applicant and Respondent

FTS Case Reference: FTS/HPC/EV/25/2656

9 October 2026

On the original respondents' appeal against a decision dated 16 April 2026 of the First-tier Tribunal for Scotland Housing and Property Chamber granting an order for eviction,

the Upper Tribunal for Scotland:

(i) UPHOLDS the decision of the First-tier Tribunal to entertain the application for an eviction order,

(ii) *Quoad ultra* QUASHES the decision of the First-tier Tribunal;

(iii) Thereafter REMITS the application to the First-tier Tribunal for reconsideration, that tribunal constituted so as not to include George Clark, legal member, or Andrew Macfarlane, ordinary member.

(iv) ORDERS:

Subject to any subsequent direction from the First-tier Tribunal to the contrary:

a. the **applicant (landlord)**, if so advised, **within 14 days** of this decision, to apply in writing to the First-tier Tribunal for permission to include a ground as a stated basis upon which eviction is sought that the respondents (the tenants) have been in arrears of rent for three or more consecutive months (2016 Act, Schedule 3, Ground 12), to include an account of the arrears and when they arose (not to exceed 500 words);

b. the **respondents (tenants)**, if so advised, **within 28 days** of this decision, to lodge with the First-tier Tribunal any written response to any such application, with any response addressing whether the applicant's account of the arrears is disputed and whether it would be reasonable to order eviction by reason of rent arrears (not to exceed 500 words);

c. **each party within 28 days** of this decision, to lodge:

    i. a list of witnesses they wish to call to give oral evidence,

    ii. (for any witness other than the opposing party) to lodge a written statement of evidence for each such witness in such a form as might be adopted by them at a hearing as constituting the main part of their evidence; and,

    iii. any further documents to be relied on that have not already been lodged.

REASONS

[1] On 18 June 2025, a landlord gave notice to leave, specifying that an application would not be made before 22 September 2025. Notwithstanding that, the landlord applied to the First-tier Tribunal for Scotland the next day for an eviction order.

[2] After a case management discussion conducted by telephone conference call, the FTS (George Clark, legal member; Andrew Macfarlane, ordinary member) on 16 April 2026 decided to:

a. Entertain the application, deeming it not to have been lodged too early.

b. Reject the landlord's contention that she was entitled to an eviction order by reason either of *(i)* intending to refurbish the home; or, *(ii)* the tenants' failure to comply with an obligation (other than payment of rent) as tenants (Private Housing (Tenancies) (Scotland) Act 2016, section 51, Schedule 3 (Grounds 3, 11)).

c. Grant the landlord's application on the ground that she intended to sell the home, with the order for eviction to be enforced only once two months had passed (2016 Act, Schedule 3 (Ground 1)).

[3] The tenants applied to the Upper Tribunal for Scotland for permission to appeal against the making of the order for eviction. I granted permission, observing that there was a question whether the FTS had applied the correct test in deciding the merits at a case management discussion. I invited written submissions and advised of my intention to decide this appeal based on those submissions without a hearing.

[4] The tenants have made written submissions on the issue I identified. The tenants question also whether the landlord's application was premature. The landlord has not addressed the

substance of the tenant's complaints about the decision of the FTS. But the landlord states that the tenants are now in over five months' arrears of rent.

[5] I address the appeal first on the question I identified as being of particular concern, as to whether the FTS applied the correct test in deciding the application at a case management discussion.

Substantive decision at a case management discussion – the appropriate test

[6] The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 provide, so far as material:

> **"Case management discussion**
> **17**.— … (3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, including by—
> (a) identifying the issues to be resolved;
> (b) identifying what facts are agreed between the parties;
> (c) raising with parties any issues it requires to be addressed;
> (d) discussing what witnesses, documents and other evidence will be required;
> (e) discussing whether or not a hearing is required; and
> …
> (4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.
>
> **Power to determine the proceedings without a hearing**
> **18.**—(1) Subject to paragraph (2), the First-tier Tribunal—
> (a) may make a decision without a hearing if the First-tier Tribunal considers that—
> (i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and
> (ii) to do so will not be contrary to the interests of the parties;
> (2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties.
> …

Powers of the First-tier Tribunal to require production of evidence

21.—(1) The First-tier Tribunal may require any person—

(a) to attend a hearing of the First-tier Tribunal at such time and place as the First-tier Tribunal may specify for the purposes of giving evidence;

…

Hearings

24.—… (4) Subject to any direction of the First-tier Tribunal, at a hearing—

…

(c) a party may make representations, call witnesses, give evidence on his or her own behalf and cross-examine any witness called by another party.

….

Decisions of the First-tier Tribunal

26.— … (2) Where the decision is made without a hearing, the one member of the First-tier Tribunal making the decision in accordance with rule 18 is deemed to be the chairing member for the purposes of this rule."

[7] In *McGeouch* v. *Paterson* (Upper Tribunal for Scotland, 3 March 2022), Sheriff Tony Kelly observed as follows:-

Rule 17 envisaged the identification at a case management discussion of disputed and undisputed issues, so as to define the scope of an "evidential hearing", with the case then proceeding to such a hearing for the disputed issues to be determined (paras. 34, 35). Whilst rule 17(4) did not set out any guidance as to when the power to make a decision at a case management discussion should be invoked, the terms of that provision fell short of a presumption that there should be a decision on the merits at a case management discussion; rather, the rest of rule 17 pointed the other way (para. 37). Exercise of the power was to be consistent with the "overriding objective" in the rules to deal with proceedings "justly" (paras. 39-41; rules 2(1), 3). It also had to be exercised in accordance with common law

procedural fairness, so that where there were factual disputes or where the "factual matrix" was otherwise material, an "evidential hearing" might be required (paras. 37, 43).

[8] In *Carrol* v. *Sutherland* (Upper Tribunal for Scotland, 4 July 2024), Sheriff I. Cruickshank observed that:

> "Whilst it is accepted that the FTS may do anything at a CMD that it may do at a hearing including making a decision that is not something it would ordinarily be able to do where there is a dispute on the relevant facts." (para. 16).

[9] In my view, rule 17(4) needs to be interpreted in the context of the rules as a whole, not just the overriding objective, but the general power in rule 18 to decide an application without hearing. The crucial feature of a hearing that distinguishes it both from a case management discussion and an entirely written procedure, as rules 21(1)(a) and 24(4)(c) indicate, is the opportunity to obtain and rely upon oral evidence.

[10] Rule 18 is no less demanding than what Sheriffs Kelly and Cruickshank say as to when a hearing is necessary; indeed the rule appears to go further. Those sheriffs speak of a hearing being potentially or ordinarily required, whereas the terms of rule 18 make a hearing indispensable whenever there is a disputed factual issue that might be material to the outcome.

[11] The language of rule 18(2) appears to envisage cases where a decision is made following a purely written procedure, with the matter determined on the basis of documents and written submissions. Rule 26(2) envisages a decision under rule 18 being made by a legal member alone, whereas in this case the decision was made at a case management discussion consisting of a legal member and an ordinary member. It might be that rule 18 does not apply to decisions made at a

case management discussion. But in both cases decided purely in writing and those decided after a case management discussion, there is no opportunity for oral evidence, which could include calling upon an opponent to give evidence. It makes no difference as to what opportunity the parties have had to elicit oral *evidence*, that oral *representations* have been made. It also makes no difference to their opportunity to advance their own case, or test their opponent's case, that a legal member has decided the matter with an ordinary member. It would be arbitrary if some different standard was to apply for making a decision under rule 17(4) rather than a decision under rule 18(1). Even if rule 18 does not apply as such to decisions at case management discussions, the power in rule 17(4) should be exercised consistently with it, so that the rules operate as a coherent whole.

[12] It follows that, whether proceeding under rule 17(4) or 18, the FTS must first assess what facts are not disputed by the parties. It must then decide whether those undisputed facts are sufficient for the case to be determined. If the outcome might be affected by matters of fact that are disputed, the FTS must not determine the matter in advance of a hearing. Unless it is apparent that there is no factual matter disputed that might affect the outcome, then the FTS must not make a decision as to the substance of the application, whether following a case management discussion or on the basis of the papers alone.

The error of the FTS in deciding the case at the case management discussion

[13] In this case, the FTS stated that:

> "The Tribunal was satisfied that it had before it sufficient information and documentation to decide the application without a Hearing" (para. 19).

Nothing else was said as to why the tribunal felt able to determine the grounds upon which an eviction order was sought without parties having had the opportunity to lead oral evidence.

[14] In deciding that the landlord had proven that she intended to sell the home without a hearing, the FTS denied the tenants the opportunity of, at the very least, calling upon the landlord to support her contention by oral testimony and subject herself to cross-examination. Should she have refused to give evidence, this would potentially weaken the credibility of her claimed intention.

[15] The FTS did not ask itself, either in terms or in equivalent language, whether there were sufficient matters of *undisputed fact* (not merely "information and documentation"), to enable it to determine what the outcome ought to be. In these ways the FTS committed an error of like kind as that identified by Sheriff Kelly in *McGeouch* v. *Paterson, supra* and Sheriff Cruickshank in *Carrol* v. *Sutherland, supra.* In both those cases the tribunal consisted of the same legal member who signed the present decision under appeal. In *McGeouch,* the FTS said had "all the information and documentation it required to enable it to decide the application without a Hearing." (FTS decision of 15 June 2021, para. 30). In *Carrol,* the FTS used exactly the same formula as in this case, of having "sufficient information and documentation to decide the application without a Hearing" (FTS decision of 2 May 2024, para. 12). Nothing more was said in either case as to why the FTS considered it appropriate to decide the merits at that stage. In both those cases the Upper Tribunal for Scotland held that the FTS had not justified deciding the merits without a hearing. In each case, the Upper Tribunal remitted the case to the FTS for it to be redetermined. As the tenants are entitled to their challenge as to the landlord's intention to be assessed at a hearing, I will take the same

course here. This is accordingly the third time that this legal member has taken an apparent short cut leading to a dead end.

[16] Similarly, just as the FTS was not entitled to make a finding at that stage that there was intention to sell, I am not satisfied that the FTS has set out a proper basis to reject, at that same stage, the landlord's application based on other grounds.

[17] One reason given by the FTS for rejecting the landlord's contention that an eviction order should be made on the basis that the home was to be refurbished was that, at the case management discussion, the landlord stated it was "her intention … merely to carry out a standard refresh, not significantly disruptive works which would make it impracticable" for the tenants to remain residing there (FTS decision, para. 25). Another reason given concerned inadequacies in the evidence. The occasion to make a decision based on a lack of evidence was at a hearing, not following a case management discussion. If the scale of the landlord's stated intended refurbishment was clearly not of such a scale as might arguably be impractical whilst the tenants occupied the home, then that would be a proper matter to determine at a case management discussion. But I am not sufficiently confident that, had the FTS applied the correct test, it would have proceeded to decide this ground at this stage.

[18] The FTS further rejected the landlord's contention that an eviction order should be granted due to the tenants' failures to comply with an obligation by making unauthorised alterations to the home electrics (FTS decision, para. 26). Again, one reason given by the FTS was based on a lack of evidence. That is not an appropriate basis to decide the matter at that stage. The FTS also said that the landlord had not provided any specification of the alleged alterations. Where a party has



been given an adequate opportunity to specify the facts it contends for, but the specification offered is not such as to allow the opponent to fairly participate in an enquiry at an evidential hearing as to the truth of that contention, there cannot be said truly to be a factual dispute. It would be open to the FTS to reject this ground if the landlord had been given sufficient opportunity to specify the alterations and had failed to do so. I am in some doubt whether the FTS would be entitled to base any decision on a lack of specification given that, on the landlord's account, she had been able to inspect the home only once (para. 26). Again, I am not confident that, had the FTS applied the correct test, it would have proceeded to determine this ground at this stage.

[19] That being so, the proper course is for the decision of the FTS to be set aside and for the case to be remitted to the FTS for all of the landlord's grounds to be reconsidered. The original tribunal members having prematurely expressed conclusions where there might be oral evidence forthcoming, neither member should form part of the FTS on remittal.

Prematurity of application

[20] The tenants also object that the landlord's application was premature. The FTS said that the application should be deemed to have been made only once certain documentation had been provided to the FTS by the landlord that was a prerequisite for a valid application (FTS decision, para. 15). Even assuming that is correct, the documentation was supplied on 4 September 2025, whereas the notice of leave said an application would not be made before 22 September 2025 (paras. 2, 15).

[21] I assume the notice of leave set out the earliest date of application in accordance with the notice period required by the Private Housing (Tenancies) (Scotland) Act 2016, section 54(2). The

landlord is not permitted to make an application to the FTS before that period has expired (section 54(1)). The FTS is not permitted to entertain a premature application (section 52(2)(b)), unless it considers it reasonable to do so (section 52(4)).

[22] In the present case, the tenants were not required to take any action on the landlord's application till 25 February 2026, five months after the notice period expired, when they were invited to make written representations by 18 March 2026. In those circumstances, no reasonable tribunal could conclude that the tenants had been prejudiced by the application being made on 19 June rather than 22 September 2025. No reasonable tribunal, at the point of the case management discussion, could have done other than decide it was reasonable to entertain the application. There is no material error of law by the FTS regarding the prematurity of the landlord's application. The decision of the FTS on this point, despite the flaws in its articulated reasoning, should stand.

Next steps

[23] The FTS can order eviction where rent has been in arrears for more than three months if it is reasonable to order eviction by reason of those arrears (2016 Act, Ground 12). The arrears are said to have arisen since the notice of leave. The FTS cannot consider an eviction ground not included in the notice of leave, unless the FTS grants permission for this (section 52(5)(b)). Whether to grant permission, and if permission is granted, whether to uphold that ground is a matter for the FTS.

[24] I have set out a timetable for the landlord to seek permission to apply for eviction based on rent arrears, and for the tenants to put in a written response, as well as for each party to provide a list of witnesses, witness statements and to lodge any further documents. This is intended to prompt and facilitate parties' preparation before the FTS decides what course to take. The FTS may



vary that timetable or make different or additional provision for case management, whether following a further case management discussion or otherwise. It would be open to the FTS simply to fix a hearing at which oral evidence can be received and the application finally determined.

Sheriff Komorowski
Member of the Upper Tribunal for Scotland

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within ***30 days*** *of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*