Upper Tribunal for Scotland

[2022] UT02

Ref: UTS/AP/21/0015

DECISION OF

Sheriff Iain Fleming

ON AN APPLICATION FOR PERMISSION TO APPEAL RECONSIDERATION (DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND) IN THE CASE OF

Mr Graham Devine, 4 Gailes Park, Bothwell, G71 8TS

Appellant

- and -

Mr Juan Martine Bailo and Ms Tamara Garcia Fernandez, 0/2, 159 Wellshot Road, Glasgow, G32 7AU

Respondents

FtT Case reference FTS/HPC/CV/20/2084

16 December 2021

Decision

[1] The Upper Tribunal refuses the appellant permission to appeal the decision of the First Tier Tribunal Housing and Property Chamber, dated 23 March 2021.

Introduction

[2] An application was made to the First Tier Tribunal (hereafter "the FtT") for an order for payment in respect of excessive heating costs attributable to a faulty boiler in respect of the property at 12 Caley Brae, Uddingston, G71 7TA. Following sundry procedure two substantive hearings took place. The first was on 12th February 2021 by teleconference. The appellant did not attend, having informed the FtT administration in advance that he would not attend. The respondents were in attendance together with a Spanish interpreter. At that hearing the FtT heard evidence and found that the first respondent was a joint tenant from 19th September 2019 (finding in fact 7(iii)). There is an error in paragraph 4 of the decision of the FtT inasmuch as it indicates that the first respondent was a joint tenant from September 2021. The second hearing was on 23 March 2021 and took place by video conference. All parties were in attendance and an interpreter was present to assist the respondents. A written decision was issued by the FtT (in terms of Rule 38 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure Regulations 2017) whereby it set out findings in fact and identified its reasons for its decision. Findings in fact were made which are identified within paragraph 7 of the said written decision of the FtT. It formed the conclusion that the appellant had breached the contractual repairing obligations implied at common law and an order for payment was granted in favour of the respondents in the sum of £1,344.45.

[3] The appellant has lodged an appeal against that decision. While he initially sought a review he withdrew his application and instead sought permission to appeal the FtT decision. By its decision dated 30 April 2021 the FtT refused permission to appeal. The appellant appealed to the Upper Tribunal. By its decision dated 11 June 2021 Sheriff Kelly,

sitting as an Upper Tribunal Judge, refused permission to appeal. The appellant now invokes the terms of Rule 7(b) of the Upper Tribunal for Scotland (Procedure) Regulations 2016 (hereafter "the Rules") whereby he has made an application to the Upper Tribunal for the decision of the Upper Tribunal of 11 June 2021 to be reconsidered at a hearing. As that application was considered on the papers alone when the appellant sought a reconsideration of Sheriff Kelly's decision, that application must be determined at a hearing (Rule 3(7)) and before a member of the Upper Tribunal, different from the member who refused permission without a hearing. (Rule 3(8)).

[4] The hearing took place by Cisco WebEx video conference on 11 November 2021. The appellant was personally present as were the respondents. A Spanish interpreter assisted the respondents.

[5] Parties are involved in a separate application for permission to appeal - 20/2199- which was considered immediately prior to hearing of this application. A decision has been issued in that case and parties will be aware of the legal position which applies in cases of this nature. The cases relate to the same property but are entirely distinct. For the avoidance of doubt and in order that this document may be read in isolation, I set out the legal tests which apply.

<u>The Law</u>

[6] The FtT is created by statute and has the function of deciding legal rights by reference to the facts it finds established. The decision-making process is limited to the powers and jurisdiction conferred on the FtT, the underlying law which it must apply, and the facts as it has found them. In terms of rule 3(6) of the Rules, where the FtT has refused leave to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds for the appeal", in terms of section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined. Case law in other situations is of limited assistance. For example, in *Czerwinski v HM Advocate* 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. After reviewing several potential schemes or tests, it settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal", in terms of section 107 of the Criminal Procedure (Scotland) Act 1995. On that ground of appeal it said this:

> "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel"

[7] In *Wightman v Advocate General for Scotland* 2018 SC 388 Lord President Carloway (at paragraph [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].

[8] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different categories that an appeal on a point of law covers:

(i) General law, being the content of rules and the interpretation of statutory and other provisions;

(ii) The application of law to the facts as found by the First Tier Tribunal;

(iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv)An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43])

[9] The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be ascertained a ground of appeal capable of being argued at a full hearing. This is an important qualification or condition on appealing which serves a useful purpose. If no proper ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in

the matter proceeding. The respondent in a hopeless appeal ought not to have to meet any further procedure in a challenge with no merit. It is in the interests of justice that an appeal which is misconceived and is incapable of being articulated such that it cannot be characterised as arguable is not allowed to proceed.

[10] In essence, therefore, the task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified an error of law that is capable of being stated or argued before the Upper Tribunal at a hearing. That is a low bar. As with applications to the supervisory jurisdiction of the Court of Session at permission stage, the basis of a prima facie appeal ought to be capable of identification. There are a number of authorities relating to what constitutes an error of law, and in particular: *CF v MF* [2017] CSIH 44, Lord Drummond Young, paragraph 9. Rule 48 of the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017, (SSI 2017/366) required the tribunal to provide a full statement of the facts found by it and the reasons for its decision. A failure to provide adequate reasons is an error of law. A decision must leave the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it: *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345, at pages 347-348. A statement of reasons must identify what the decision maker decided to be the material considerations; must clearly and concisely set out his or her evaluation of them; and must set out the essence of the reasoning that has led him or her to his decision: *Ritchie v Aberdeen City Council* 2011 SC 579, Lord President (Gill) at paragraph

12; *JC v Midlothian Council* [2012] CSIH 77, Lord Menzies, paragraph 30, citing *Uprichard* v *Scottish Ministers 2012 SC* 172, Lord President (Gill) at paragraph 26. It is necessary to read the reasons as a whole: *City of Edinburgh Council v MDN* 2011 SC 513, paragraph 28.

[11] It is no part of my function either to review the decision of the FtT to refuse permission to appeal or indeed to review the decision of Sheriff Kelly. It is my function to determine whether to give permission to appeal to the appellant in respect of the grounds which he has placed before the Upper Tribunal. Before granting permission to the appellant I require to be satisfied that there are arguable grounds for the appeal.

[12] The FtT is an expert tribunal and its decision requires to be respected save where it had clearly misdirected itself in law: *AH (Sudan) v Secretary of State Department for the* Home 2008 1 AC 678 wherein at paragraph 30 Lady Hale said the following:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection's simply because they might have

reached a different conclusion on the facts or expressed themselves differently."

The appellant's position

[13] The appellant has submitted with his form UTS-1, a paper apart accompanied by a number of documents. The appellant also made oral representations at the hearing which I categorise as follows:

(a) Miss Fernandes is not included in the lease agreement. The appellant submitted that she was not part of the procedure.

(b) In its written decision the FtT suggested that the case was complicated. In the view of the appellant it is not complicated.

(c) The FtT appeared to place on the appellant a far greater burden to disprove the case of the respondent. The burden of proof at the FtT was upon the respondent. This appeared to be reversed by the FtT

(d) The FtT's consideration of the evidence disclosed a lack of scrutiny.

(e) The appellant asked the FtT on many occasions to consider historic energy bills. These were not required by the FtT and they should have required them. The FtT made its decision based on viewing a limited number of bills and managed to extrapolate information from its reading of those few bills. It failed to take into account the projected energy costs contained in the bills and seemed to accept that £65 per month was adequate for energy usage within the property.

(f) The FtT failed to make any effort to consider if there were any arrears within the account payable by the respondent for energy bills.

(g) The FtT accepted, without corroboration, that the applicant took regular meter readings and had no arrears at any time.

(h) The FtT appeared to suggest that there was no increase in electricity usage during the period therefore the gas boiler was faulty. The appellant emphasized that it was a gas boiler not an electrical boiler that was under consideration.

(i) It was the ordinary member of the FtT who asked if the boiler installed was secondhand. The record of the FtT attributed this question to the respondent.

(j) The appellant questioned the delay by the respondent who waited until February 2020 to advise the appellant that he had a high energy bill. That appeared to be strange and that delay was not taken into account by the FtT.

(k) A boiler that was installed was a brand new boiler installed by a guest engineer. The gas engineer could find no fault within the boiler.

(l) The appellant indicated he submitted evidence which showed a neighbouring property had energy bills of £2,000 per annum. It was quite simply incredible that the respondents could expect to pay £65 per month to cover his energy usage.

(m) The gas engineer provided a statement. He said it was not possible for the boiler to use that energy in a short space of time. It was quite simply not feasible it could have happened.

(n) The appellant submitted that at one point one of the respondents had indicated that he had no hot water. Thereafter, the respondent overflowed a bath and

flooded the kitchen and therefore the suggestion by the respondents that there was no hot water is not believable.

(o) The last time the gas engineer checked the boiler was December 2019. The property was sold in August 2020. There are no reports of any fault from the new purchaser.

(p) When the high energy bill was received by the respondent the appellant changed the gas meter. The appellant was asked by the First Tier Tribunal of details. In the appellant's view this shows a lack of assessment of the information provided. The question should have been addressed by the respondent not by the appellant. In the appellant's view there is a distinct possibility that the meter readings were not transposed from one meter to the other.

(q) The appellant indicated that he found it unbelievable that the respondent should receive an energy bill for £1,500 and not query with the energy company how this has occurred.

(r) A careful consideration of the evidence would find that the FtT has gone out of its way to ignore evidence submitted by the appellant and gone out of its way not to query the evidence of the respondent. In the appellant's view this shows a high degree of bias. There were a number of reasons why the gas bill was high rather than a fault with the boiler. In the appellant's view the FtT has taken the decision based on the least credible reason not for the most credible reason. It failed to consider other possibilities as to why the gas bill was as high.

(s) The notes provided by the FtT are not an accurate reflection of what took place. What is clear, in the appellant's view, is that this is evidence of bias. This is not reflected in the notes and the bias is downplayed.

[14] Upon enquiry from the Upper Tribunal the appellant indicated that he wished each of the of the individual points to be considered and advised that a particular point he wished to raise was that in light of all of the matters he had canvassed the FtT was not as a matter of law entitled to make the findings that it did due to the identified shortcomings and inconsistencies in the evidence.

The respondents' position

[15] The Upper Tribunal then heard in response firstly from Miss Fernandes, through the interpreter. It is her position that the problem with the boiler was not fixed. At one point she and Mr Bailo had £200 in credit with the energy company. It is not true to say that there were ever any arrears. The appellant is not telling the truth.

[16] Mr Bailo then testified through the interpreter and indicated that he had mentioned to the appellant that when the water was getting really hot he was ignored. The gas certificate produced by the appellant does not have an address on it. The bill produced in respect of the neighbouring house is a three monthly bill. The evidence admitted by the respondent was evidence that they had. In the view of the witness the boiler that was produced was very cheap. It was a low price low quality boiler.

The appellant's response

[17] Having heard parties and having considered the written application of the appellant and in answer to questions from the Upper Tribunal it was noted that one of the points which the appellant wished to emphasize was that no reasonable tribunal could have made the findings that it did on the basis of the evidence. He wished the Upper Tribunal to consider not only the points he has raised individually but also cumulatively.

The decision

Ms Fernandes is not included in the lease agreement

[18] This point is addressed by the FtT at paragraphs 3, 4 and 7(i) of its written decision. The inclusion of Ms Fernandes was decided by the FtT at a hearing at which evidence was heard. The appellant was not present at the hearing, having informed the FtT that he would not attend. The appellant did not hear the evidence given. The FtT did. A finding in fact was made on the basis of the evidence led. If the appellant elects not to attend a hearing and challenge the evidence or to testify then he cannot expect to have his contrary position upheld by the FtT or an appellate court. No point of law arises. One matter which does need to be raised is that the hearing on 12th February 2021 took place in the absence of the appellant. That which was determined at the hearing was limited to whether Ms Fernandes should be a party to the action. No point is taken by the appellant about the

hearing proceeding in his absence. However, I am mindful that in the other case between the parties (20/2199) permission to appeal has been granted in respect of a point whereby the FtT proceeded in the absence of the appellant. This case is distinct. That which was decided in the absence of the appellant is not determinative of the final outcome and the appellant has not raised the issue as a point of appeal.

Was the case complicated?

[19] The appellant maintains that the FtT observed that the case was complicated and in his view it was not. This is not a ground of appeal. It is an observation by the appellant. The position is perhaps further confused by the appellant maintaining that the case was not complicated but "It has been complicated by the (respondent's) scurrilous accusations which were solely designed to tarnish my reputation." The appellant is simply disagreeing with an observation made by an FtT member about the complication or otherwise of the case. No ground of appeal lies in this observation. No point of law arises.

Burden of proof

[20] Although the decision of the FtT is silent on the burden of proof it is clear from paragraph 45 of the FtT decision that on the balance of probabilities the FtT found that the excessive gas bill was caused by a faulty central heating system. The standard of proof is the balance of probabilities and the burden of proof before the FtT was on the respondents. The findings in fact made by the FtT justify their conclusion. The FtT accepted the evidence of the respondent and was entitled so to do. There is no evidence that the burden of proof was reversed. It was for the now respondents to establish their case on the

balance of probabilities. Given the findings in fact made by the FtT, it was entitled to hold that the respondents had done so. Burden of proof does not appear to have been a live issue between the parties. (*Lothian Health Board v M* 2007, SCLR, 478.) A consideration of the full decision of the FtT discloses that it considered all of the evidence before it and found the respondents to be credible and reliable. The FtT was legally entitled to make the findings in fact and to reach its legal conclusion. There is no basis to the appellant's suggestion that the burden of proof was reversed. No point of law arises.

Lack of scrutiny

[21] This can be considered under two headings. Firstly, if the appellant is suggesting that there was an obligation on the FtT to adopt an inquisitorial role as evidenced by his assertions as follows; - "*there must be some responsibility on the FtT to check important facts rather than merely take lazy, biased decisions*"- ; - "*if the chairperson is really interested in justice she could have asked pertinent questions herself*" - and- "*Why did the FtT not see fit to investigate this matter further either before or during the hearing?*"-then the appellant misunderstands the role of the FtT. It is no part of its function to carry out independent investigation. The FtT requires to consider the evidence brought before it and decides legal rights with reference to the facts it holds as established. It is for the appellant to place before the FtT such evidence as he considers is appropriate. If he does not do so the FtT cannot consider the evidence. Insofar as the wider point of scrutiny of the whole evidence is concerned I address this later in this decision.

Consideration of other energy bills

[22] The appellant alleges that he asked on "many occasions" that the FtT consider historic energy bills that he had submitted. It needs to be noted that at paragraph 44 of its decision, the FtT indicates that it gave no weight to energy bills lodged by the respondents from other properties. It is for the FtT to determine which evidence it considers. It is clear, within paragraphs 11, 12 and 13 of the written decision, that the bills being incurred in respect of heating costs were considered and indeed there were questions from the FtT about other bills being lodged. If, as he maintains, the appellant asked the respondents to provide previous energy bills, and none were provided, he had an opportunity to question the respondents about this at the hearing. It would appear that he declined to do so. Indeed, in terms of paragraph 26 of the FtT decision, the appellant was given an opportunity to ask questions but elected not to do so. The FtT clearly felt able to make its decision without reference to previous energy bills. The FtT made its decision on the basis of the oral evidence of the respondents and the documentary evidence they lodged. It was entitled to do so. The appellant maintains that they should have looked at other material. There was no obligation on the FtT to do so.

[23] It would appear that in seeking to introduce new energy bills the appellant is seeking to introduce new evidence which was not before the FtT when it heard the case. No application was made by the appellant to lodge additional evidence in terms of Rule 18 which governs the process for such applications. Any documentation he seeks to lodge now can only be considered by the Upper Tribunal if such an application for additional evidence is made. If the appellant had wished the FtT to consider productions in the form of historic energy bills he should have obtained these and lodged them with the FtT. It is

not for the FtT to pursue productions. It needs to be remembered that this is an expert tribunal whose membership consists of both legal members and those with an expertise in the area being considered.

[24] The decision of the FtT was entirely within its discretion. It is part of its function to consider the evidence and make findings in fact thereon. The facts found were within its discretion. The contention outlined in the paper attached to the Form UTS-1 asserts a factual position which the appellant says ought to have been accepted by the FtT. This is not a competent appeal ground: *Nelson v Allan Bros & Co* (UK) 1913 SC 1003. No issue of law arises. Permission to appeal can only be granted if there are arguable grounds of appeal. An appeal is not a re-hearing, and can only succeed if the tribunal can be shown to have erred in some manner. It is not enough that parties disagree with the decision. The Upper Tribunal cannot overturn the FtT's decision without material to legally justify doing so. It cannot simply substitute its own view. No point of law arises.

Arrears of energy bills

[25] The appellant criticizes the FtT for limiting its consideration of the energy bills to those which pertained at the time of the fault in the boiler. He is of the view that in concluding that £65.00 per month was an adequate for energy usage within the property the FtT was in error. The FtT is an expert tribunal. It was not required to consider projected costs. It was not required to pursue costings. The FtT can decide which evidence to accept and which to reject. It can decide on the weight or importance to apply to the evidence b which it accepts. It is for the FtT to determine which evidence it finds credible and reliable

and to make findings in fact thereon. The FtT further addresses this issue in paragraph 42 of its decision. The submission of the appellant is predicated upon his interpretation of a communication, which interpretation the FtT did not share. The FtT noted that the appellant did not question the respondents on this issue. No point of law arises.

Consideration of costs related to electricity

[26] The appellant makes reference to a comparison of the electricity costs and the gas costs. The FtT addresses this in paragraph 43 of its written decision. The FtT rejected a submission by the appellant and decided to compare gas and electricity costs over a fixed time period. The appellant argues that the FtT made its decisions based on the viewing of "1 or 2 bills" and managed to "extrapolate information from reading those few bills". He maintains that the FtT failed to take into account the projected energy costs contained within the bills. The FtT was entitled to make that comparison to assist it in its determination. It needs to be remembered that the FtT is an expert tribunal and its decision requires to be respected save where it had clearly misdirected itself in law: *AH (Sudan) v Secretary of State for the Home Department* 2008 1 AC 678 wherein at paragraph 30. No point of law arises. The FtT as an expert tribunal was entitled to make the comparison that it did to reach its decision. It is for the FtT to determine which evidence to accept and reject and to apply such weight or importance to that evidence as it deems appropriate.

Second hand boiler question

[27] The Upper Tribunal requires to rely on the account of proceedings as given by the FtT. If there is a conflict there is an argument that it is open to the Upper Tribunal to request the tribunal judge's notes. (*McKee v Secretary of State for Work and Pensions;* {2004] EWCA Civ 334). I express no concluded view upon the application of the power in this case but given that the issue is limited to whether the ordinary member or the respondent asked a question it is unnecessary for the issue to be pursued. The important aspect is the answer, not the question, and in the circumstances of this matter the author of the question irrelevant. No question of law arises.

Corroboration

[28] The FtT accepted the evidence of the respondent as it was entitled to do in proceedings of this nature. Corroboration is not required in proceedings of this nature. (Civil Evidence (Scotland) Act 1988 section 1) No point of law arises.

Delay

[29] The FtT made a finding in fact that on 9th November 2019 one of the respondents contacted the appellant to advise of an issue with the boiler. The FtT also comments that the appellant acted promptly in instructing a gas engineer in "early November 2019." The submission of the appellant is that it seemed strange that the respondents waited until February 2020 to contact him to advise of the receipt of high energy bills. This issue was not put to the respondents by the appellant in the course of the hearing before the FtT. He had an opportunity to ask the respondents questions about this issue and it would appear that he did not avail himself of same. The particular issue of the timing of the provision

of information about the high energy bill is a matter to be placed before the FtT for its consideration, if thought appropriate. If it is not done it is not a matter for the Upper Tribunal to investigate. No point of law is raised. In any event, given the findings in fact there is no doubt that the appellant was aware of the malfunctioning of the boiler on 9th November 2019 and he was aware of the way in which the malfunction was manifesting itself.

Gas engineer

[30] This is an issue referred to on more than one occasion by the appellant (see paragraphs 12kk and 12m) . Since the appellant did not lead evidence directly from a gas engineer he cannot now seek to introduce a statement from the engineer having declined an earlier opportunity to do so. No point of law is raised. It would have been open to the FtT to accept the hearsay evidence of the gas engineer as given by the appellant in that regard but consideration of the findings in fact discloses the the FtT did not do so. Indeed, the FtT enquired of the appellant as to why he had not led evidence from a gas engineer and the appellant advised that he did not do so "as it was not required of him by the Tribunal" (paragraph 29).

[31] A point was made by the appellant that the boiler in question was a brand new boiler installed by a gas engineer. The appellant did not call the gas engineer to testify. The FtT can only determine the issues before it on the basis of evidence led. If the appellant does not call the gas engineer to testify he requires to accept the consequences of that

decision. Insofar as the question of whether the boiler was new or second hand this issue was addressed by the FtT (paragraph27). No point of law arises.

Bills from neighbouring properties

[32] The point of submission of bills from neighbouring properties was to highlight the appellant's submission that it was not credible for the respondents to think that the bills which they were paying for their energy were reasonable. The FtT has given reasons for its decision. The FtT elected not to consider energy bills for other properties, irrespective of which party lodged the documentation. It was entitled so to do. No point of law arises. This is a comment from the appellant after the FtT has decided the matter. The evidence was not before the FtT. No point of law arises.

Hot water

[33] The appellant argues that there is evidence that although claiming there was no hot water the respondent at one point "overflowed a bath." This issue was not before the FtT. No point of law arises.

Consideration of costs related to electricity

[34] This is a matter entirely within the discretion of the FtT. For reasons explained within paragraph 43, the issue of electricity costs was a factor in its consideration. This is a matter which the expert tribunal is entitled to take into account. No point of law arises. There is

no doubt that the FtT understood the position that the boiler under consideration was a gas boiler.

No reports of fault with the boiler

[35] This information was not before the FtT. The appellant cannot seek to introduce it now and expect it to affect the earlier decision of the FtT. No application has been made to the Upper Tribunal to allow additional evidence. No point of law is raised.

[36] The appellant claims that a gas engineer checked the boiler in December 2019 and he sold the property in August 2020. There were no reports of any faults from the new purchaser. That may be entirely correct but in the absence of any testimony from the gas engineer before the FtT and in the absence of an application for additional evidence to be led before the Upper Tribunal it is not relevant to the application for permission to appeal. No point of law arises.

Lack of assessment of information

[37] The appellant argues that there was a lack of, or deficiency in, the assessment of the information by the FtT and argues that there was a "distinct possibility" that the meter readings were not transposed from one meter to the other. The FtT's written decision sets out why decisions were made. It is clear and comprehensive and explains why it proceeded as it did. Paragraph 41 of the FtT decision discloses the reasoning of the FtT. No point of law arises.

Bias

[38] The law in relation to bias will be familiar to the parties since I referred to it in the other decision referable to the case still outstanding between the parties. The appellant takes issue with the decision of the FtT and contends that it arrived at a decision with which he disagrees and it is biased. The test for an appeal on the basis of the bias of a tribunal is whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" per Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. There have been many descriptions of the traits of the hypothetical observer of court proceedings. Sir Thomas Bingham in *Arab Monetary Fund v Hashim (No. 8)* (1993) 5 Admin LR 348 said that such an attendee "is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried."

[39] There were clearly issues between the appellant and the respondent which go beyond the circumstances of this complaint. Allegations of racism and issues of character surfaced at points. The appellant refused to complete his cross examination of the appellants because "he expected they would not be allowed, so he would not ask them." (paragraph 26). At one stage the appellant asked if proceedings were recorded. He asked for a copy of the notes of the ordinary member of the FtT. He has accused the FtT of amongst other things fabricating evidence. Having considered the whole proceedings the complaint of bias or reasonable perception of bias is not made out. The appellant complains that when there was an issue with the respondents joining the hearing on 12th

March 2021 that the FtTt chair addressed a remark to both parties rather than to the one that caused the problem. That is not indicative of bias. It is indicative of fair and robust case management which recognizes that an issue has arisen and directs how the hearing will continue. Much of the criticism of the FtT appears to be based on the disagreement the appellant has with the eventual outcome of the proceedings. The contentions of the appellant do not meet the legal tests for bias.

The FtT decision

[40] I require to consider in the context of the appellant's complaint of a lack of scrutiny by the FtT whether the FtT was entitled on the basis of the evidence to make the findings in fact. The decision discloses an acceptance by the FtT of the respondent's evidence about the boiler malfunctioning and an acceptance of the respondents' evidence referable to the amount of loss incurred by the respondents as a result. The FtT has noted within paragraphs 41 to 45 its reasons for reaching its conclusions. The submissions of the appellant vis-a–vis causation and quantum were rejected by the FtT. The FtT was entitled to do so on the basis of the evidence before it. The appellant did not lead evidence from a gas engineer. In addition the appellant "*could not say there was no problem with the boiler.*" Relative to quantum the FtT found the respondents credible and reliable and determined to assess the accuracy of the sum claimed by comparison with electricity bills (paragraph 43). There was a sufficiency of evidence before it to allow the findings in fact to be made. It considered and rejected the submissions of the appellant as to the causation of the malfunction and then explained why it had proceeded in that fashion. None of the matters raised by the appellant either severally or cumulatively raise points of law. None are

capable of undermining the findings of the FtT which was entitled to proceed as it did and the conclusions it reached are legally justified.

[41] No points of law are raised. Permission to appeal is refused.