Upper Tribunal for Scotland

[2022] UT06
Ref: UTS/AP/21/0024

DECISION OF

SHERIFF TONY KELLY

ON AN APPLICATION TO APPEAL
DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
(HOUSING AND PROPERTY CHAMBER)

IN THE CASE OF

Ms Alana McGeouch, Flat 1/1, 2 Katrine Court, Glasgow, G61 3FE
per Latta & Co Solicitors, Floor 2, 137 Sauchiehall Street, Glasgow, G2 3EW;

Appellant

against

Ms Lorraine Paterson, 27 Buchlyive Gardens, Bishopbriggs, G64 2DT
per Friends Legal, 38 Queen Street, Glasgow G1 3DX

Respondent

FtT case reference FTS/HPC/PR/21/0536

Act Chaudry, Latta & Co. Solicitors
Alt Bell, Friends Legal, Solicitors

3 March 2022

Decision

The Upper Tribunal upholds the appeal, quashes the decision of the First Tier Tribunal dated 15 June 2021 and remits the case back to the First Tier Tribunal to proceed as accords.

Background

[1] The respondents applied to the First Tier Tribunal ("FtT") for an order for payment on the basis of rent arrears and sums representing damage said to have been caused by the appellant to items within the property let to her. A case management discussion was assigned for 30 April 2021 at which the FtT issued directions to parties. Prior to the next case management discussion, both parties complied with those directions and lodged documentation – summarised by the FtT at paras. 12 – 20 of its decision. At the next case management discussion on 15 June 2021, the legal chair made a number of observations on the submissions made by parties. The FtT heard from the parties' representatives and then proceeded to determine upon the application on the basis that Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 rules") permitted it do anything at the case management discussion which could be done at a hearing – para.30.

[2] An application for permission to appeal on four separate bases was considered by the FtT, and on 28 July 2021 this was refused in its entirety. By decision dated 23 September 2021 the Upper Tribunal ("UT") granted the appellant permission to appeal three of her grounds of appeal.

Hearing: 21 January 2022

[3] At the outset of the hearing of the appeal Mr Chaudry on behalf of the appellant sought a postponement of the hearing. Prior to the hearing, a similar application had been made on the basis of the non-availability of legal aid for the appellant. Mr Chaudry advised that his client's circumstances had changed since that previous application had been dealt with. She was now financially eligible for legal aid and an application for legal aid had been

submitted. That would be decided in the course of the next 4-6 weeks. Meantime Mr Chaudry had secured special urgency cover under the provisions of Regulation 18 of the Civil Legal Aid (Scotland) Regulations 1996 for his client. In proceeding without the benefit of a full civil legal aid certificate, Mr Chaudry was concerned that his client was not entitled to the full protection of a legal aid certificate and, in particular, would be unable to seek modification of any expenses awarded against her in terms of section 18 of the Legal Aid (Scotland) Act 1986. On behalf of the respondents, Mrs Bell acknowledged a lack of experience in relation to the workings of the Legal Aid (Scotland) Act 1986. She opposed the motion on the basis that the hearing ought to proceed without delay.

[4] I decided to refuse the motion to postpone proceedings. It was necessary to progress matters in light of the relative age of the application and its subject matter. It was in the interests of parties that the hearing proceed rather than be delayed. The appellant's representative had secured legal aid cover to enable him to appear and to represent his client's interests at the hearing. The UT has limited powers on the issue of expenses.

[5] Mr Chaudry then referred to the availability of further evidence and referred to rule 18(4) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 206 regulations"). The respondent objected to this application on the basis that she had not sight of the material referred to and had not been able to obtain instructions. In light of the grounds of appeal on which permission to appeal had been granted it was unlikely that the UT would have to embark upon a fact finding role.

[6] I decided to refuse the application for the UT to consider this further evidence *in hoc statu*. Rule 18(4) of the 2016 regulations provides that:

> "(4) Fresh evidence may only be led in an appeal if the Upper Tribunal is satisfied—

(a) that the evidence—
(i) could not have been obtained with reasonable diligence at the First-tier Tribunal stage;
(ii) is relevant and will probably have an important influence on the hearing; and
(iii) is apparently credible; or
(b) that the interests of justice justify the evidence being led."

[7] It appeared that the material referred to by Mr Chaudry related to supplementary information that may have been available to the FtT if it had dealt with his application. This is focused in ground of appeal number 1. It was unfortunate that the material was not lodged with the UT and not intimated upon the respondent prior to the hearing of 21 January 2022. For present purposes, it was difficult to envisage circumstances where, in deciding upon the grounds of appeal, the UT would require to consider any further material. In the event I had to consider additional evidence in order to determine the appeal, the matter could be revisited.

Appellant's submissions

[8] In relation to ground of appeal number 1, regarding the FtT's refusal to allow additional evidence to be led, Mr Chaudry referred to paragraph 29 of the FtT decision which states:

> "Mr Chaudry said that there was a possibility that he might be able to obtain from the Respondent some further photographic evidence, but the Tribunal decided that, as the Parties had had ample time, following on the Tribunal's clear Directions of 13 May 2020, to provide any documentation on which they intended to rely, it was not prepared to permit a further continuation."

[9] In Mr Chaudry's submission, an application was made to the FtT to allow documents to be lodged though late. This appears to have been dealt with by the FtT on the basis of refusing a further continuation of the application or hearing. The relevant applicable procedural rules were rules 21 and 22 of the 2017 rules. The FtT did not deal with the application to allow the documents to be lodged though late and did not determine upon whether there was a reasonable excuse tendered – rule 22(2), (if dealt with as a failure to respect the time limit); or good reason for the

omission – rule 21(3), (if dealt with as an application to lodge documents though late). In Mr Chaudry's submission this was a clear error or law which had a material bearing on the FtT's determination.

[10] In relation to ground of appeal number 3, Mr Chaudry submitted that it was trite when there was dispute as to fact the matter should be considered at an evidential hearing. He referred to *Sheriff Court Practice,* Macphail 3rd Ed, paragraph 31.142 which envisaged that when there were disputed issues of fact these would be resolved at a diet of proof. On the basis of the evidence and submissions considered by the FtT in its decision at paragraphs 30 *et seq*, the failure to assign an evidential hearing was a clear and obvious error upon which the appeal should be allowed.

[11] There were a lack of appropriate findings in fact. No opportunity had been afforded to the parties for the FtT to hear their direct evidence. This failure to accord parties the most basic principle of natural justice was especially important where there were significant factual disputes between them. To proceed to decide a case without affording parties an opportunity to give their own account amounted to an error in law. Anticipating the respondent's submission, Mr Chaudry then referred to paragraph 30 of the FtT's decision where it is recorded that it had the "information and documentation it required to enable it to decide the application without a hearing". Mr Chaudry said that there was further material and relevant evidence available that would have been led at an evidential hearing (had one been assigned). The material upon which the FtT proceeded to decide the case was not sufficient.

[12] Mr Chaudry then referred to the overriding objective as provided for by rules 2(1) and (2) of the 2017 regulations. There was a failure in dealing with the proceedings with the flexibility called for – rule 2(2)(b). In relation to rule 2(2)(c), in light of the appellant's mental health there was a failure to ensure that parties were placed on an equal footing procedurally. The appellant's

mental health was raised in the course of the hearing and was referred to by the FtT at paragraph 33 of its decision. Mr Chaudry submitted that the determination fell short of the spirit of the overriding objective. Any delay, for example in assigning a further hearing, was justified on the basis of rule 2(2)(e) of the 2017 rules to allow a proper consideration of the issues.

[13] In relation to ground of appeal 4, Mr Chaudry referred to paragraph 39 of the FtT's decision and criticisms made of the applicants and further efforts that they ought to have made. This had echoes in similar criticisms at paragraph 42 about an inspection that should have been carried out. These were the sort of issues that parties would have expected to have been canvassed at an evidential hearing. Mr Chaudry observed that the respondent had acknowledged that the tenant complained a number of times regarding the state of the property and accepted that no inspection had been carried out at the property. This was the sort of issue that ought to have been canvassed at an evidential hearing.

[14] Mr Chaudry referred to section 47 of the Tribunals (Scotland) Act 2014 in relation to the powers of the UT upon disposal of an appeal. He moved the UT to quash the determination and to remit the cause back to the FtT. He reminded the UT of the procedural rules applying in relation to expenses – rule 12 of the 2016 regulations and rule 40 of the 2017 regulations. He contended that the unreasonableness of the respondent's conduct was in failing to recognise, especially when permission to appeal was granted, that there were obvious grounds of appeal.

Respondent's submission

[15] Mrs Bell was not the solicitor who conducted the FtT proceedings. She was unable to comment upon Mr Chaudry's submission, made in the course of his presentation of ground of appeal 1, that he had sought leave of the FtT to lodge documents though late. She concentrated

her submissions upon whether there was good reason such as would justify the FtT allowing this application. She pointed to the detailed directions made at the conclusion the first case management discussion, see paragraphs 9 and 10 of the FtT decision. A fair reading of paragraph 29 was that there had been ample time for the appellant to comply with those directions and that no further time was being granted. She fairly conceded that there was no express recognition in the decision of either of the procedural rules which may have governed Mr Chaudry's application.

[16] As regards the possibility of a reasonable excuse (rule 22(2)) or good reason (rule 21(3)), the appellant's representative had mentioned that the appellant's mental health and the potential debilitating effect upon her ability to handle her affairs. It was not explained to the FtT before either case management discussions what it was about the appellant's mental health that had hampered her in instructing her solicitor to lodge documentary productions on time. This, it was said, could not amount to an error of law because the material was not presented to the FtT. If her mental health difficulties were significant enough to impact upon her ability to instruct her solicitors properly that would be expected to be vouched in a medical report, and the position fully explained to the FtT. Any failing in this regard was not of the FtT's making but rather of the appellant and her representatives.

[17] In connection with ground of appeal 3 parties were afforded an opportunity to make submissions. There was sufficient material to enable the FtT to proceed to make the determination that it did. The possibility of further information was not sufficient to vitiate the decision. The duty was upon the solicitor to properly prepare and present the case. Reference was made to *Wilson v Fife Properties* [2021] UT 28 and the decision of Sheriff Ross at paragraph 9.

[18] Turning to ground of appeal 4, Mrs Bell said that although reliance was placed by the appellant upon the respondent's acknowledgement that complaints were made about the state of the property, that did not equate to an acceptance that there were defects within the property. Mrs Bell contended that there was no evidence before the FtT to support the issue raised by the appellant's representative. The onus was on the appellant to provide evidence to substantiate the position in relation to the state of the property. The emails lodged did not sufficiently meet that requirement. There were photographs produced but the further photographs referred to were not produced.

[19] The overriding objective in rule 2 of the 2017 rules was complied with. There was no obligation upon the FtT to intrude upon the presentation of the appellant's case. An opportunity was afforded to the appellant to produce further evidence. She did not avail herself of that opportunity. That did not lead to any breach in the application of the overriding objective.

[20] In relation to rule 2(2)(c) of the 2017 rules, the appellant was represented throughout the proceedings at both case management discussions. The requirement to ensure that the parties are on an equal footing is of some moment when a party is unrepresented. It cannot be said in the particular circumstances of this case that parties were on an unequal footing. The respondent moved the UT to refuse the appeal.

Decision

[21] At the case management discussion convened on 13 May 2021, the FtT identified the areas of dispute between parties and invited submissions about documentary productions to be lodged with the FtT. It concluded by assigning a further case management discussion and making certain directions. This case management discussion appears to have proceeded in

accordance with the procedural rule governing case management discussions, namely rule 17 of the 2017 rules. At paragraphs 12-20, the FtT notes the documentary and other production lodged by parties and summarises these.

[22] The second case management discussion of 15 June 2021 proceeded somewhat differently. This is dealt with at paragraph 21 *et seq* of the FtT decision. At the outset, the legal chair appears to have made a number of rulings – the FtT would not consider (i) the issue of whether the respondent charged an illegal holding deposit, and (ii) the question of wrongful eviction.

[23] From paragraph 23 onwards, the FtT deals with the material before it. It made a ruling that there would be no determination on whether the repairing standard was met. The appellant's motion for the FtT to inspect the property was refused and reasons are provided in this regard. This was the subject of a separate ground of appeal which was refused permission to progress further.

[24] The issue of a check out inspection, described by the FtT at para. 23 as "empirical evidence", was raised with the appellant's representative. The appellant's representative appears to have made submissions about the checkout report not being independent evidence. A discrepancy in the appellant's accounts was raised at paragraph 24, together with an observation that a formal inspection had not been carried out. A written report was not available. The respondent's representative put forward her clients' position regarding dampness in the property. At paragraph 26, FtT records that no further submissions were made in relation to dampness.

[25] At paragraph 27 the FtT records the competing positions of parties in relation to the landlord's application to recover the cost of a new cooker. At paragraph 28, the FtT notes the

competing position of the parties in relation to floor covering referring to the representatives' submissions of their respective clients' positions. The respondent's representative framing of the issue for the Tribunal, at paragraph 28, is: "to determine whether the [appellant's] explanation [for the state of the floor covering] was reasonable".

Ground of Appeal 1: Refusal to allow the appellant additional time to lodge additional evidence.

[26] At paragraph 29 of its decision, the FtT concludes its narration of what occurred before it at the case management discussion. Mr Chaudry, at the hearing before the UT, indicated that he had sought leave to lodge additional evidence. He contended that either rule 21 or 22 of the 2017 rules had application. Mrs Bell for the respondent was not in a position to assist on what motion was made before the FtT.

[27] The basis upon which the FtT proceeded to deal with the appellant's motion is not made explicit. Its decision is noted as a refusal "to permit a further continuation". But this was not what was sought. If it was an application to allow a document to be lodged late, in terms of rule 22(2) the FtT "must be satisfied that the party has a reasonable excuse". All the FtT recorded in relation to refusing the request is that ample time had already been allowed to parties to comply with the direction of 13 May 2020.

[28] It is doubtful that rule 21 governs what was done at this stage of the proceedings. This rule relates to the powers of the FtT to require production of evidence and the procedure to be employed in this regard. It is not clear that rule 22 has application either. This relates to the lodging of documents for a hearing notified under rule 24(1).

[29] The case management discussion convened on 14 June 2021 was not a hearing in terms of rule 24. Whatever rule was relevant for dealing with the application by Mr Chaudry no consideration was given to it. Instead the FtT stated that ample time had already been afforded

to the appellant. There was no assessment by the FtT of any explanation for the document not being available.

[30] The matter is further complicated in that parties at the case management discussion were of the view that the hearing was governed by rule 17. That was not an unreasonable assumption for them to make. At the conclusion of the case management discussion, the FtT advised parties, without prior notice and without inviting any submissions on its proposed course of action, that it was intending to make a decision without further procedure.

Ground of Appeal 3: Evidential hearing

[31] The FtT did not assign a hearing to take place in terms of rule 24. At paragraph 30, the only assistance provided by the FtT to explain or justify that course of action was that it had power to make a decision and that it was satisfied that it had the necessary information "to enable it to decide the application without a hearing".

[32] Rule 17 of the 2017 rules, dealing with case management discussions, provides as follows:

> "Case management discussion
> 17.—(1) The First-tier Tribunal may order a case management discussion to be held—
> (a)in any place where a hearing may be held;
> (b)by videoconference; or
> (c)by conference call.
> (2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.
> (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
> (f)discussing an application to recall a decision.

(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision."

[33] Rule 17(3) describes the purpose of the case management discussion as being "to enable the First Tier Tribunal to explore how the party's dispute may be efficiently resolved". It lists a number of steps which are not intended to be exhaustive. In considering those various steps, it is clear that one aspect of that discussion is to ascertain preparedness for the hearing in terms of rule 24. The FtT ought to be able to identify the disputed and undisputed issues - thereby cutting down the scope of any evidential hearing. It may look to the number of witnesses and documents and ascertain how that material may be dealt with at the hearing. It can be discuss and then decide whether or not a hearing is required – rule 17(3)(e).

[34] One can envisage situations where, at the conclusion of the case management discussion, a number of disputed issues are identified. The rule envisages the case proceeding to a hearing with a view to resolving those disputed issues. The case management discussion may then ascertain how the FtT will deal with the documents and other material at that hearing. At the conclusion of a case management discussion it should be made clear to parties the reason for the case proceeding to a hearing and how that will be conducted.

[35] The rule envisages that the matter may well be resolved at the case management discussion. Parties could renounce probation, that is, agree that there is sufficient agreement of the factual background or for some other reason a hearing on the evidence is not required. Rule 17(4) puts the matter beyond doubt in empowering the FtT to make a decision at a case management discussion.

[36] In deciding whether a hearing is required in terms of rule 24, the FtT would be expected to canvass that issue with the parties, see rule 17(3)(e). As it was, in this case the parties were

not afforded an opportunity to make submissions as to whether that was appropriate or necessary. The FtT provides no basis or explanation as to why it considered that an appropriate course of action, aside from an assertion that it had available to it the information it needed to make a decision.

[37] Rule 17(4), which provides a power to make a decision at the case management discussion, requires to be read along with the overriding objective and in accordance with the requirements of common law procedural fairness. Before considering each of these factors, it is important to note that rule 17(4) does not provide any guidance as to when it should be invoked. For example, it falls short of introducing a presumption that a decision on the merits of the application is the conclusion the FtT should to move to at the end of the case management discussion. The remainder of rule 17 points the other way. It clearly envisages that preparations have commenced and ought to be allowed to be completed with a view to fixing a hearing in terms of rule 24.

[38] One purpose of having a case management discussion in advance of a hearing in terms of rule 24 is in order that parties do not come upon that hearing without any guidance and structure as to the content of the hearing and the manner in which it has to be conducted.

The overriding objective

[39] Rule 2 of the 2017 regulations provides:

> 2.—(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.
> (2) Dealing with the proceedings justly includes—
> (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;
> (b) seeking informality and flexibility in proceedings;
> (c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and
(e) avoiding delay, so far as compatible with the proper consideration of the issues.

[40] In determining whether or not to invoke the power in rule 17(4) to issue a determination without a hearing in terms of rule 24, the FtT must be guided by the overriding objective. In terms of rule 3 the FtT:

> "must seek to give effect to the overriding objective when—
> (a) exercising any power under these Rules; and
> (b) interpreting any rule. "

[41] It must manage proceedings in accordance with the overriding objective: rule 3(2). In applying rule 17(4), it ought to ask itself whether the hearing is required in order to deal justly with the application. The failure of the FtT in this case to ask to address itself as to whether it was just to proceed without a hearing under rule 24 amounts to an error of law.

Procedural fairness

[42] What the requirements of common law procedural fairness call for in the particular circumstances of any case are fact specific. The statements of principle on common law procedural fairness were gathered together recently by Fordham J in *Joint Council for the Welfare of Immigrants* v *The President of the Upper Tribunal (Immigration and Asylum Chamber)* 2020 EWHC 3103 (Admin):

> *"Basic Requirements of Common Law Procedural Fairness*
> 2.2 As Lord Steyn explained in *R v SSHD, ex p Pierson* [1998] AC 539 at 591F: "the rule of law enforces minimum standards of fairness, both substantive and procedural". As Lord Dyson explained in *Al Rawi v Security Service* [2011] UKSC 34 [2012] 1 AC 531 at paragraph 22, the "parties" to proceedings have a "fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice". The basic requirements of common law procedural fairness engage the principle of legality….They inform the overriding objective …..
>
> *Contextual Application of Common Law Procedural Fairness*

2.3 The basic requirements of common law procedural fairness are flexible and contextual in their application. In *Lloyd v McMahon* [1987] AC 625, Lord Bridge expressed that point in the following way (at 702H): "the so-called rules of natural justice are not engraved on tablets of stone… What the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates". As Lord Mustill put it in *R v SSHD, ex p Doody* [1994] 1 AC 531 at 560D-G: "The standards of fairness are not immutable. They may change with the passage of time, both in … general and in their application to decisions of a particular type… The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects… An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken". This passage was cited most recently in *R (Pathan) v SSHD* [2020] UKSC 41 at paragraph 55."

[43] The factual matrix of a dispute – not restricted to disputed questions of fact - may amount to a reason why fairness compels an evidential hearing. Fordham J said this at para. 6.4:

"The factual content of a case can be a basis why fairness requires a hearing. An oral hearing "is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome" (*West* [*v Parole Board* [2005] UKHL 1 [2005] 1 WLR 350) at paragraph 31: Lord Bingham). In cases "where credibility and veracity are at issue … written submissions are a wholly unsatisfactory basis for decision" (*Goldberg v Kelly* (1970) 397 US 254, 269 (Brennan J), cited in *West* at paragraph 31 by Lord Bingham). "[A]n oral hearing will … often" be necessary "[w]here facts which appear … to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility"(*Osborn* [*v Parole Board* [2013] UKSC 61 [2014] AC 1115] at paragraph 2(ii)(a): Lord Reed). Even where there is "no dispute on the primary facts" so that "important facts are not in dispute", a court or tribunal "may well be greatly assisted" by an oral hearing because facts may be "open to explanation" or "may lose some of their significance in the light of other … facts" (*West* at §§34-35 (Lord Bingham). It is an unduly "constricted" approach to "the common law duty of procedural fairness" to apply, as a "test" of whether an oral hearing is required, the question whether "the primary facts" are in "dispute" (*West* at paragraphs 34-35: Lord Bingham). It is necessary to "guard against any tendency to underestimate the importance of issues of fact which may be … open to explanation" (*Osborn* at paragraph 2(ii)(a): Lord Reed)."

[44] In *R (Ewing) v Department of Constitution of Affairs* 2006 EWHC 504 (Admin); 2006 2 All ER 993 the court looked at a practice direction created to deal with applications by vexatious litigants for leave to commence proceedings. The issue in that case was whether a hearing was required in order to determine upon such applications or if instead the matter could be dealt with on papers alone. The court held in that case that the decision was fact specific; there may be some circumstances where a hearing is called for. The court discussed the fact sensitive nature of the requirements of common law fairness. Fairness does not preclude the consideration of an issue on papers alone, even to resolve disputed questions of fact. The court in that case left matters to the good sense of decision makers, see paragraph 24.

[45] When one looks at its decision making here, it is clear that the FtT here was hampered by its failure to fix a hearing and to have available further material to enable it to complete its fact finding task. It did not address the exclusion of parties from the decision making process. The appellant's case was decided without reference to her account of the dampness, and its effects over the period of the tenancy. She was unable to give an account at a hearing about what she suffered, for example about the physical effects of the dampness, whether and to what extent the dampness was present at the commencement of the tenancy and whether the property deteriorated as a result of dampness. She also claimed she had suffered financial loss. It may be that had she been permitted to speak directly to the detail of her loss, the absence of vouching by way of receipts and the like, would have been unnecessary. The FtT could, of course, have proceeded on the appellant's account alone.

[46] Similarly, the respondent's account regarding the state of the cooker and floor covering was never heard. Its importance to the decision making process of the FtT is writ large, see,

for example, paragraphs 44 and 45 where the FtT said that evidence presented at that point in time was not sufficient.

[47] The fixing of a hearing, with further evidence inevitably being made available, would have assisted the FtT in relation to the problems it encountered with the state of the evidence at the conclusion of the case management discussion.

[48] The FtT considered that it had the power to decide the case at the conclusion of the case management discussion. It arrived at that decision without inviting submissions upon that suggested course. It intimated that decision (that it would make a decision and fix no further hearing) at the close of the case management discussion. There was no consideration of the overriding objective or what common law fairness demanded in the circumstances of the case. In proceeding in this summary fashion without giving any consideration to those factors, the FtT fell into error.

Ground of Appeal 4: Reasons

FtT Decision

[49] At paragraph 32 the FtT embarked upon its analysis of the evidence then available to it, including those documentary productions which had been lodged. It notes certain inconsistencies within and between the parties' respective positions.

[50] The summary of a chain of communication between parties is included at paragraph 38. At paragraph 39, which was the subject of submissions before the UT hearing, the FtT made a number of observations relative to the dispute about non-payment of rent. These are not findings in fact. The FtT opined that the landlords ought to have been more pro-active in light of the tenant's ill-health. The FtT goes on –

> "The [respondents] should have arranged to inspect the property whenever the easing of lockdown restrictions permitted."

[51] At paragraph 40, the FtT states that it was unable to determine what caused the mould within the property. It seems therefore to accept that there was mould present within the property. There is, however, no positive finding to this effect. The FtT observes that there is no written report (presumably from a surveyor). The landlords' agent advised the appellant of the need for ventilation.

[52] The FtT considered the check in and check out reports. The reports noted mould patches at the property. Dealing with the challenge to the lack of independence in the checkout report, the FtT stated at paragraph 41 that it:

> "could think of no reason why more widespread dampness issues would not have been mentioned in the [check out] report had these been evident in the property only a few days after the [tenant] vacated it."

This appears to be a comment on the weight to be attributed to the check out report as opposed to dealing with the challenge to it lacking independence in its compilation. The FtT appears to take the view that the contents of the report are unimpeachable.

[53] At paragraph 42, the FtT relied upon the checkout report and attached greater weight to it than the tenant's recorded assertion that the property "was riddled with damp and mould". It rejected that latter contention on the basis that it "had not been substantiated". It placed reliance upon the checkout report, describing it as:

> "the best evidence available…..as to the condition of the property, kitchen floor covering and the cooker, at the end of the tenancy".

[54] The FtT makes criticisms of the landlords' agents for the failing to carry out an inspection and then concludes at paragraph 42:

> "*Accordingly* the Tribunal was not persuaded that the [tenant's] claim for an abatement of rent should be upheld." (Emphasis added)

[55] The respondents' claim for financial loss in relation to personal possessions affected by dampness was not upheld on the basis that the appellant:

> "had provided no evidence to support the claim and no vouching in respect of any costs that she has incurred."

[56] The lack of evidence is relied upon as a basis to reject the appellant's counterclaim. This conclusion was arrived at after the conclusion of a hearing where the appellant was not afforded the opportunity to give evidence, perhaps to provide the very evidence that may well have persuaded a factfinder that she had suffered loss.

Cooker

[57] In relation to the cooker, the respondents' claim was rejected on the basis that, from the photograph produced, the FtT was unable to decide whether the deterioration complained of was attributable to misuse or to fair wear and tear. The FtT appears to have relied solely upon the material that was before it at the case management discussion. The photograph lacked the clarity to enable the FtT to make a definitive decision upon what it contained.

Floor Covering

[58] The deterioration in the condition of the vinyl floor covering appears to have been accepted but a dispute as to its cause arose for determination. The landlords said items had been moved; the tenant said that the matter had been reported and that the floor covering had incorrectly fitted. Rejection of this part of the respondents' claim was on the basis that:

> "the Tribunal was unable to prefer either party's evidence over that or the other party, so it could not make a finding that it was a matter that should be rectified at the respondent's expense".

Why that matter could not be resolved at a hearing convened in terms of rule 24 is not stated.

[59] The FtT appears to move from the premise that it was constrained by the material before it. It was unable to choose between the competing accounts and therefore made no finding.

[60] The FtT's approach to its assessment of the evidence appears to proceed upon making choices and attaching weight to particular parts of the evidence and submissions made at the case management discussion. It provides reasons in relation to this assessment whilst offering criticism in relation to omissions or defects in the evidence available to it. The tenant's contention regarding the state of the property according to the FtT "had not been substantiated"; there was no vouching produced leading to a finding that the counter claim could not be upheld; the photograph was indistinct meaning the FtT was unable to make a decision on the cause of deterioration.

[61] The inability to make certain findings arises due to the fact that the FtT decided it was hamstrung by the state of the evidence before it. However, the constraints on its fact finding function were self-imposed. The FtT fettered its own fact finding function by proceeding to decide the case by reference solely to the material that was available to it at the case management discussion. This misapprehension of its fact finding role led the FtT into error.

Conclusion

[62] The FtT fell into error in arriving at a decision at the conclusion of the case management discussion without considering whether the overriding duty to deal with the case justly and the requirements of common law fairness necessitated a hearing on the facts of the case. It was hampered in its fact finding function by its failure to hear parties on the disputed questions of fact at a hearing in terms of rule 24.

Expenses

[63] There is a limited basis upon which expenses may be awarded by the UT. I do not find the appellant's submission is made out. I therefore refuse to make any award of expenses in connection with the appeal.

Order

[64] The Upper Tribunal upholds the appeal, quashes the decision of the First Tier Tribunal and remits the case back to the First Tier Tribunal to proceed as accords.

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.