



**DECISION OF**

Sheriff Ian Hay Cruickshank

**ON AN APPEAL  
IN THE CASE OF**

Mr Matthew Carrol

Appellant

- and -

Ms Jacqueline Sutherland

Respondent

FTS Case reference: FTS/HPC/PR/23/4171

4 July 2024

**Decision**

Upholds the appeal; Quashes the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 2 May 2024; Remits the case back to the First-tier Tribunal to be reconsidered by a differently constituted Tribunal and to proceed as accords.

**Introduction**

[1] The appellant lodged an application with the First-tier Tribunal for Scotland Housing and Property Chamber (“the FTS”) seeking an order under sections 58 and 59 of the Private Housing (Tenancies) (Scotland) Act 2016 for wrongful termination without eviction. The FTS assigned a



Case Management Discussion (“CMD”) which proceeded by telephone conference call on 2 May 2024. Both parties attended.

[2] At the CMD the FTS had before it the initial application and productions for the appellant, written submissions lodged by the respondent, additional submissions from the appellant and the further oral representations provided by both parties during the telephone conference. The FTS concluded that the application should be determined without assigning a hearing and proceeded to refuse the application.

[3] The appellant sought permission to appeal but the FTS refused that in its decision of 15 May 2024. The appellant thereafter sought permission to appeal from the Upper Tribunal for Scotland (“the UTS”). The UTS granted permission to appeal on 21 May 2024. Following further procedure an appeal hearing was assigned and proceeded by WebEx on 2 July 2024. Both parties attended.

## Grounds of Appeal

[4] The discrete point for appeal purposes in this case is whether the FTS made a final decision at the CMD in circumstances where it was inappropriate to do so. Given that there was a factually disputed background the appellant submits that the FTS erred in making a decision at the CMD when fairness required a hearing to be assigned. The appellant argues that (1) the FTS made findings in fact without a basis in the evidence and (2) that the FTS took a wrong approach and arrived at a decision that no reasonable tribunal could properly reach.



## *Proceedings before, and reasoning, of the FTS*

[5] The application was lodged because the appellant had been served with notice to leave advising that the respondent would, on expiry of the notice period, apply for an eviction order on the ground that she intended to live in the property. The appellant vacated the property as required by the notice but then had doubts as to whether the respondent had in fact moved in. He sought further evidence via the respondent's letting agent and was told the move was to assist her husband who had health issues. When the appellant collected mail from the property he found it to be occupied by the respondent's nephew and he considered that there was nothing to confirm that either the respondent or her husband were living in the property. He therefore believed he had been misled by his landlord and that a wrongful termination order should be made.

[6] The appellant's written submission to the FTS provided detail on the inquiries he had made. He provided evidence which he believed confirmed that the respondent's nephew was involved in transferring Council Tax liability into his name.

[7] The respondent lodged written submissions in advance of the CMD in which she stated that the claim she and her partner had not moved into the property was "completely false". The respondent further stated that her nephew had split up with his long term girlfriend and she recommended that he should stay at the property with them. In response to this the appellant lodged further written submissions and, for the various reasons he outlined, he questioned the credibility of this position. He stated that he had been accompanied by a friend when he went to the property to collect his mail and asserted that this individual could provide "corroborating testimony regarding the events and conversations that took place" between himself and the



respondent's nephew. At the CMD the respondent confirmed she had never moved into the property due to her personal circumstances changing but her husband had done so. Her nephew had moved in also and the latter had taken on responsibility for Council Tax and other utilities. Both her husband and nephew had now moved out of the property.

[8] In addition to finding in fact the date upon which notice to leave was served, and finding that the appellant vacated the property on 31 October 2023 (being findings in fact i and ii) the extent of the FTS's findings in fact were as follows:

- “iii. The respondent has not lived in the property since then. (i.e. 31 October 2023)
- iv. the respondent's husband lived in the property from 7 November 2023 until recently.
- v. The respondent's nephew lived in the property from 11 November 2023 until recently.
- vi. Council Tax and utilities bills were, until recently, in the name of the respondent's nephew.”

[9] On the matter of the respondent's nephew the FTS stated in its reasons (at paragraph 15) that it made no finding as to whether he was a tenant or a lodger. Instead the FTS explained that it held the nephew had shared occupancy with the respondent's husband.

[10] The final paragraph of the decision of the FTS (paragraph 16) is in the following terms:

“The tribunal found, on the balance of probabilities, that, at the time the Notice to leave was served, the Respondent intended to move in with her husband. Events had, however, overtaken that intention, with the result that she did not join her husband. The view of the Tribunal was that the Respondent had not intended to mislead the applicant and that, but for unforeseen circumstances that occurred after the Notice was served, she would have lived in the property. The Tribunal was unable to hold that the reason for wanting the applicant to vacate the property was to allow the Respondent's nephew to replace him,



rather than to allow the respondent and her husband to live there. It is for applicants to prove their case and the applicant had failed to do so. Accordingly, the Tribunal refused the application.”

[11] In his application for permission to appeal the appellant referred to discrepancies he noted between the respondent’s written and oral representations. He again confirmed that he had a witness who could speak to conversations he had with the respondent’s nephew. In the refusal of permission to appeal decision the FTS stated:

“The view of the Tribunal is that it is satisfied that its reasoning...was robust. It had carefully considered the evidence presented by both parties...The Tribunal considered all the evidence and preferred that of the respondent.”

## Discussion

[12] At the hearing of this appeal the appellant adopted his written submissions. He had been surprised that the FTS reached a decision at the CMD. He reminded the FTS that, if need be, he had a witness who could talk to his discussions with the respondent’s nephew. He did not recall the FTS exploring with the parties the issues to be resolved nor did he recall the FTS identifying facts which were agreed or specifically discussing areas of dispute. All questioning was undertaken by the FTS and neither party was invited to cross-examine the other. He was not asked by the FTS to make any submission on whether a hearing would be required. The FTS did not provide any reasons at the CMD why it considered it had sufficient information and documentation in order to make a decision without assigning a hearing.



[13] At the appeal hearing the respondent considered the FTS had not been at fault in making a decision at the CMD. She had presented her position and the FTS had accepted her version of events. She had also advised the FTS at the CMD that she could call witnesses if necessary to confirm the facts as she stated them to be. The respondent accepted there was a disputed factual background. Similarly she did not recall the FTS exploring with the parties the issues to be resolved nor did it seek to identify facts which were agreed or disputed. The respondent accepted she was not asked by the FTS to make any submission on whether a hearing would be required. The FTS did not provide any reasons at the CMD why it considered it had all the materials it needed in order to make a decision.

## Discussion

[14] In FTS procedure a CMD is an important part of the process. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 is in the following terms:

### **17.— Case management discussion**

- (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.

[15] The purpose of the CMD is very clear. It is to enable the FTS to explore how the dispute is to be efficiently resolved. The FTS may require to address a number of matters in order to establish that. In particular it may identify issues to be resolved and what facts are agreed. The FTS may discuss what witnesses, evidence or documents will be required to aid resolution. The FTS may require to consider whether or not a hearing is required.

[16] There is no indication in the written decision of the FTS that there was any discussion with the parties as to how the dispute may be resolved. 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. There may be situations where parties agree that nothing would be served by assigning a hearing but the FTS would be expected to discuss the necessity of a hearing with the parties. There is nothing contained in the written decision in this case to suggest that the parties either agreed to renounce probation or that the FTS canvassed this matter with them. Ultimately, Rule 17(4) requires to be read along with the overriding objective of the FTS and in accordance with the requirements of common law procedural fairness (*McGeouch v Paterson* [2022] UT06 at paragraph 37).



[17] In its written decision the FTS states that it had sufficient information and documentation before it to decide the application without a Hearing. No reasoning or explanation is provided to inform the reader why the FTS considered that to be the case. Furthermore, the FTS explained that it was unable to hold that the reason for wanting the appellant to vacate the property was to allow the respondent's nephew to replace him. Given that this was the basis of the application the FTS does not provide any explanation as to why it either did not, or was unable to, make a finding in fact that the respondent's nephew was a tenant or a lodger but instead held he shared occupancy with the respondent's husband. In any event what the FTS found in fact was that the respondent's nephew lived at the property from a specified date "until recently". Indeed, having found in fact that the respondent's nephew had assumed responsibility for both Council tax and utility bills no comment or observation is made by the FTS as to the significance of this or how that came to be the case.

[18] Finally, the FTS asserts in the last paragraph of its decision that it is for applicants to prove their case and the appellant had failed to do so. No reasoning or explanation is provided to justify that assertion. In the particular circumstances of this case in which the FTS concluded that it had sufficient materials to make a decision without assigning a hearing, given there was a disputed factual background, given that both the appellant and respondent confirmed they could call witnesses to speak to what might be regarded as a crucial point it would be necessary for the FTS to explain why it was justified to proceed as it did. Otherwise, in the absence of such explanation, fairness would dictate that a hearing should have been assigned to allow parties an opportunity to present evidence, subject to any directions given in that respect by the FTS at the CMD. It must





also be borne in mind that the FTS reached a decision where issues of credibility and reliability must have been considered and yet the FTS, having heard oral representations, was able to carry out that assessment when the parties attended by conference call. All of these factors make the provision of reasons as to why the FTS was justified in reaching a decision without assigning a hearing all the more essential.

## Decision

[19] There is nothing in the written decision of the FTS which contradicts the recollection of either party as to the conduct of the CMD. I have concluded that the purpose of the CMD was not properly addressed by the FTS or if it was then that crucial matter is not recorded in the decision. The written decision lacks any explanation as to why the FTS unilaterally decided to make a final decision rather than assign a hearing. In such circumstances I uphold this appeal on the basis that in making a final decision at the CMD the FTS took a wrong approach and arrived at a decision that no reasonable tribunal could properly reach.

[20] In upholding this appeal I quash the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 2 May 2024. The case will be remitted back to the FTS to be reconsidered by a differently constituted Tribunal.

*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.*

Sheriff Cruickshank  
Member of the Upper Tribunal for Scotland