

Housing and Property Chamber
First-tier Tribunal for Scotland



Statement of Decision under Rule 38 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule Part 1 of the Chamber Procedure Regulations 2017 (SSI No 328), as amended) (“the Rules”) in relation to an Application for Permission to Appeal by the Respondents.

Chamber Ref: FTS/HPC/PR/24/3313

Re: Property at 19/2 Rose Lane, South Queensferry, EH30 9XW (“the Property”)

Parties:

Mr Stuart Pearson and Ms Sarah L Marshall, 1F2 105 Henderson Row, Edinburgh, EH3 5BB (“the Applicants”)

Mr Andrew O'Connor, Mrs Lea O'Connor, 45 Mill Road, Linlithgow, EH49 7QJ (“the Respondents”)

Tribunal Member:

Andrew McLaughlin (Legal Member)

Decision

[1] The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) refuses the Application for Permission to Appeal.

Background

[2] After a Case Management Discussion (“CMD”) conducted on 15 July 2025 and thereafter considering submissions subsequently submitted by both parties, the Tribunal issued Case Management Notes dated 23 September 2025 which had the effect of continuing the Application to a Hearing for evidence to be heard for a final decision to be made. In so doing, the Tribunal refused the Respondents’ motion to dismiss the Application.

[3] The Tribunal's Case Management Notes dated 23 September 2025 ("The CMD Notes") fully set out its reasons for proceeding in the manner outlined.

[4] By email dated 16 October 2025, the Respondents now apply for permission to appeal under Rule 37 of the Rules ("The Appeal") the outcome narrated in the CMD Notes.

The Rules

[5] Rule 37 regulates applications for permission to appeal. It is in the following terms:

Application for permission to appeal a decision of the First-tier Tribunal

37.—(1) A person must make a written application to the First-tier Tribunal for permission to appeal.

(2) An application under paragraph (1) must—

(a) identify the decision of the First-tier Tribunal to which it relates;

(b) identify the alleged point or points of law on which the person making the application wishes to appeal; and

(c) state the result the person making the application is seeking.

(3) No application to appeal may be made in relation to—

(a) a decision arising from a review by the First-tier Tribunal under rule 39(1);

(b) rule 58(f);

(c) section 7 (apportionment of the rateable value by the sheriff where the dwelling-house forms part of lands and heritages) of the 1984 Act;

(d) section 97 (change of circumstances affecting a tenant who shares accommodation with persons other than landlord which are deemed to be rent increases) of the 1984 Act;

(e) section 85B(6) (application by a local authority for an extension of the time limit for determining an application for landlord registration) of the 2004 Act;

(f) section 28A (landlord application to exercise right of entry) of the 2006 Act;

(g) section 66A (appeals in relation to the right to adapt rented houses for a disabled person or for energy efficiency under section 52) of the 2006 Act;

(h) paragraph 3 of schedule 5 (warrants for ejection to enforce house in multiple occupation amenity notices) of the 2006 Act;

(i) section 33 (time limit for determining application for registration as a letting agent) of the 2014 Act; or

(j) section 29 (First-tier Tribunal's power to set rent) of the 2016 Act.

Application of the Law

[6] An application for permission to appeal must therefore identify an alleged point of law on which the Appeal is premised.

[7] The Inner House of the Court of Session in the case of *Advocate General for Scotland v Murray Group Holdings Limited (2015) CSIH 77* identified four different categories of case covered by the concept of an appeal upon a point of law: these are (i) an error of general law, the content of its rules; (ii) an error in the application of the law to the facts; (iii) making findings in fact without a basis in the evidence; and (iv) taking a wrong approach to the case by, for example, asking the wrong questions or taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal can properly reach.

Basis of the Appeal

[8] The first question which arises is whether the decision made in the CMD Notes is one that can be appealed. The Appeal writes that:

“In paragraph 16 of the Note, the Tribunal states: “The motion to refuse the Application is therefore refused.” This is a “decision” of the Tribunal in terms of Section 46 of the Tribunals (Scotland) Act 2014 and Rule 37. It is not an excluded decision. It is accordingly capable of being appealed under Rule 37.”

Analysis

[9] Section 46 of the said Act is in the following terms:

S 46 Appeal from the Tribunal

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made—

(a) by a party in the case,

(b) on a point of law only.

(3) An appeal under this section requires the permission of—

(a) the First-tier Tribunal, or

(b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

(5) This section—

(a) is subject to sections 43(4) and 55(2),

(b) does not apply in relation to an excluded decision.

[10] The matter of what can be appealed to the Upper Tribunal has been considered to a limited extent by the Upper Tribunal in the case of *Abdul and Adele Gaffney and Andrew Robert Britton* [2019] UT 59. Here the Upper Tribunal set out certain propositions about what can be appealed to the Upper Tribunal which is consistent with the following:

1. Any decision that is not an excluded decision in terms of the Tribunals (Scotland) Act 2014 (see Section 46(5)), or in terms of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (see Rule 37(3)).

2. A refusal of permission to appeal is not reviewable OR appealable (Section 55(2) of the Tribunals (Scotland) Act 2014).

3. A decision in a review (being the decision to set aside, take no action, or correct a minor or accidental error) is not reviewable OR appealable (Section 52 of the Tribunals (Scotland) Act 2014)

[11] The Tribunal proceeds on the basis that the Tribunal did make a decision to refuse a motion to dismiss and so will entertain the Appeal in terms of Rule 37. The situation is broadly analogous to a decision of a Sheriff or Judge to refuse to allow a preliminary plea to the relevancy of pleadings that might result in an action being dismissed. The Tribunal considers there is no obvious rational to seek to limit the rights of such appeals and no reason not to in this case. The Tribunal however is mindful that there ought to be some limit to the nature of any case management orders that can be appealed after a CMD. That however is not a matter for this Tribunal to comment on in this Application.

The Basis of the Appeal

[12] The Tribunal considers each of the grounds of appeal in turn.

Improper Identification of Admitted facts

[13] The Appeal states:

“The first point of law is that the Note does not advise of any findings of fact which it relied

upon when making its decision... The Tribunal did not state in the Note which admitted facts, if any, were taken into account by the Tribunal when it made its decision. It is therefore not possible to properly determine the reasons for the Tribunal's decision."

[14] The Tribunal rejects this argument. The Tribunal did not hear evidence in the case and no findings in fact were or have been made as the Tribunal would be required to do in an evidential hearing with disputed evidence that had to be resolved. The Tribunal did however clearly note the legal arguments advanced by the Respondents and it's implicit in the CMD Notes and in both sets of representations submitted that the salient facts were not disputed. The net effect of the point advanced by the Respondents is simple enough to understand: because they incorrectly emailed the Notice to Leave instead of sending it hard copy, then they are effectively immune from an Application for a Wrongful Termination Order because the tenants should have known that that Respondents' had bungled the serving of the Notice to Leave and could have remained in place comfortable in the knowledge that no Tribunal would have granted an Application for their eviction. It is implicit in this argument that all tenants are supposed to have a thorough understanding of the legislative framework but the Tribunal does not wish to rehearse the wider difficulties with this argument set out in the Decision.

[15] Paragraphs 14 and 15 of the CMD Notes make it clear that "*There is no doubt that the Applicant's received the notice*", "*Received*" being used with the everyday meaning of the word. These paragraphs also record the Applicants' helpful submissions on the matter with reference to the case law they considered relevant to the issue.

[16] It is clear that the Tribunal made its decision in the full knowledge of the only real issue that mattered- did the fact that the Notice to Leave was emailed instead of hard copy delivered mean the Application for a Wrongful Termination Order was doomed to failure? In that regard this ground of Appeal is academic and even if it does identify an error, it falls short of identifying a relevant "*error of law*", as the error set out would in any event be immaterial to the outcome.

[17] The Tribunal also notes that the argument put forward by the Respondents does not require specific findings in fact to be made. The argument is that because the Respondents say they incorrectly emailed the Notice to Leave instead of sending it hard copy, then they are effectively immune from an Application for a Wrongful Termination Order because the tenants should have known that that Respondent's bungled the serving of the Notice and remained in place. That is a legal question which the Tribunal addressed fully with reference to the relevant case law. Detailing findings in fact would not have assisted in addressing the matter at hand and would have been inappropriate. Nobody was arguing about the facts.

[18] Permission to Appeal on this ground of Appeal is refused.

[19] The Second and third grounds of appeal are headed “*Service of a Notice to Leave*” and “*Meaning of “received” in Section 50*” respectively. They do little more than restate the arguments made by the Respondents at the CMD. These were rejected for the reasons set out in the Decision.

[20] The CMD Notes record that there is clear appellate authority to the effect that a Notice to Leave may not be required at all for there to be an Application for a Wrongful Termination Order. In that regard, the Appeal’s further references to the law regarding service of a Notice to Leave miss the point. The Appeal remains premised on their having to be a legally sound Notice to Leave before an Application for a Wrongful Termination Order can be entertained. The Tribunal interpreted the Upper Tribunal as having rendered that argument untenable.

[21] The Tribunal maintains its decision that the relevant authorities do not support the Respondents’ argument and the CMD Notes set out its reasons for so doing. The Tribunal does not accept that the Appeal has identified any relevant “*error of law*”.

Decision

[22] In these circumstances, the Tribunal does not accept that it erred in law. Accordingly, the Tribunal refuses the application for permission to appeal.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Andrew McLaughlin

Legal Member/Chair

12 November 2025.

Date