Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 40 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules")

Chamber Ref: FTS/HPC/PR/18/1506

Re: Property at 5/3 West Montgomery Place, Edinburgh, EH7 5HA ("the Property")

Parties:

Reference number: FTS/HPC/PR/18/1506

Re: Property at 5/3 West Montgomery Place, Edinburgh, EH7 5HA ("the Property")

The Parties:

Miss Ariel Ramirez-Stich, 27/3 Trinity Crescent, Edinburgh, EH5 3EE ("the Applicant")

Free Legal Services Unit, Faculty of Advocates, Parliament House, Edinburgh, EH1 1RF

instructed by

Community Help and Advice Initiative, 1st Floor, ELS House, 555 Gorgie Road, Edinburgh, EH11 3LE ("the Applicant's Representatives")

Mr Leslie Strachan and Ms Ann Strachan, 4 Mount Alvernia, Edinburgh, EH16 6AW ("the Respondents")

Anderson Strathern, 1 Rutland Court, Edinburgh, EH3 8EY ("the Respondents' Representative")

Tribunal Members:

Susanne L. M. Tanner Q.C. (Legal Member)
Frances R. Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal"):

(1) awards expenses as taxed by the Auditor of the Court of Session against the Applicant, on the basis that the Applicant through unreasonable behaviour in the conduct of the case has put the Respondent to unnecessary or unreasonable expense, in terms of Rule 40 of the 2017 Rules; and

(2) the amount of the expenses awarded under Rule 40 are those required to cover the unnecessary or unreasonable expense incurred by the Respondents, namely: (i) Negotiating a Joint Minute of Agreed Evidence with the Applicant's Representative; (ii) Lodging Lists of Witnesses and Documents for the Hearing; (iii) Preparation for the hearing on 14 January 2019 (discharged on the day); (iv) Preparation for and attendance at the hearing on 15 March 2019, at which the parties were required to appear or be represented in order to make submissions in relation to the application for expenses.

1. Procedural background

1.1. On 19 June 2018 an Application was made to the tribunal by Mr Shaun McPhee, a housing volunteer with the Applicant's Representative, on behalf of the Applicant. The Application was made under Rule 69 of the 2017 Rules and Section 37 of the Housing (Scotland) Act 1988, seeking damages for unlawful eviction as measured by Section 37 of the 1988 Act and seeking a determination that the Applicant was unlawfully evicted in terms of the Rent (Scotland) Act 1984, s22.

1.2. On 26 June 2018 the Applicant's Representative submitted an authorisation to act on the Applicant's behalf.

1.3. On 29 June 2018 the tribunal wrote to the Applicant's Representative stating that the Applicant was seeking damages in terms of Section 37 of the Housing (Scotland) Act 1988 but had not stated in the Application what sum she was seeking. The Applicant's representative was asked to confirm the amount of damages the Applicant was seeking.

1.4. On 4 July 2018 the Applicant's Representative sent an email in reply stating, *"I can confirm that we would like to insert the value of £12,000".*

1.5. On 19 July 2018, the tribunal wrote the Applicant's Representative and referred to the tribunal's letter of 29 June 2018 and Mr McPhee's reply of 4 July 2018, stating that the terms of Rule 69(a)(iv) provide that the Applicant must provide *"the details of the amount of damages sought based on section 37 of the 1988 Act in respect of the loss of the right to occupy the premises"*. The tribunal stated that the Applicant's Representative may also wish to have regard to the terms of Section 37 of the Housing (Scotland) Act 1988. The tribunal requested that the Applicant's Representative respond with details of how the sum sought of £12,000 was calculated, based on Rule 69 and Section 37, by 2 August 2018, and that if the tribunal did not hear from him by that time the tribunal President may decide to reject the application.

1.6. On 20 July 2018 the Applicant's Representative replied the tribunal stating that damages of £12,000 were sought in terms of Section 37 of the 1988 Act and the formula in that section was stated, namely *"the difference between (i) the value of the landlord's interest determined on the assumption that the residential occupier continues to have the same right to occupy the premises as before that time; and (ii) the value of the landlord's interest determined on the assumption that the residential occupier has ceased to have that right"*. Mr McPhee then stated *"I am advised that this difference is usually around 7%. The property in question has an approximate market value of £172,000 – seven per cent of which is £12,040. I accept that this appears somewhat higher than be expected. However, it is broadly comparable to the sum awarded by Sheriff Poole in Mackay v Leask 1996 Hous LR 94."* There was no further analysis of the case cited. Mr McPhee also stated that *"the level of damages is a matter for the tribunal to decide. If further evidence is required to be led in relation to measure of damages that is a decision which ought to be taken by a judge at either a case management discussion or a hearing. …"*

1.7. On 31 July 2018, Mr Stephen Moffat of the Respondents' Representative wrote to the tribunal stating that he understood from being advised by the Applicant's Representative that the Application had been made to the tribunal and Mr Moffat advised the tribunal that his client, Ann Strachan, was the Respondent. This was acknowledged by the tribunal.

1.8. On 8 August 2018, the tribunal wrote to the Applicant's Representative requesting further information in relation to the factual basis of the Application.

1.9. On 10 August 2018, the Applicant's Representative submitted further information and documents to the tribunal. The information included a copy of the Short Assured Tenancy agreement for the Property; confirmation that the tenancy was due to end by agreement on 15 June 2018; the fact that the Applicant had secured alternative accommodation on or about 23 May 2018 but that it was not "move in ready" as at that date; and the fact that the locks to the Property were changed on 30 May 2018.

1.10. On 20 August 2018 the Application was accepted for determination on the basis that the Application was held to have been made in terms of Rule 5 of the 2017 Rules and that Rule 8 of the 2017 rules did not apply. On 21 August 2018 the Applicant's Representative was notified that the application had been accepted and would proceed to a tribunal for determination.

1.11. On 26 September 2018, both parties were notified that a Case Management Discussion would take place on 11 October 2018 at 1000h in George House, Edinburgh. The now Second Respondent, Ann Strachan, was invited to submit written representations as soon as possible prior to the Case Management Discussion and advised that all correspondence would be sent to the other party.

1.12. On 27 September 2018, Mr Moffat of the Respondents' Representative requested postponement of the CMD on 11 October 2018 on the basis that although he could lodge written representations on behalf of the now Second Respondent and attend the CMD, he submitted that having regard to the overriding objective of the tribunal and as there were only 14 days until the CMD, the Respondent's written representations were not due to be lodged until the day of the CMD. The postponement was requested in order to allow the Respondent and her representative the full 14 days to produce written representations and to allow the Applicant to have time to consider and respond to the representations. The Applicant's Representative concurred with the request for postponement of the CMD on the basis that the Applicant's Representative would require time to consider the written representations and consult with the Applicant.

1.13. On 9 October 2018, the tribunal agreed to the parties' request to postpone the CMD to allow the Respondent's Representative the full period of 14 days to produce written representations and to allow the Applicant's Representative ample time to consider the written representations and to consult with the Applicant.

1.14. On 11 October 2018, the Respondent's Representative submitted written representations in response to the Application in which it was stated at paragraph 27 that the Applicant's Representative had failed to provide a professional valuation in support of the statutory claim of £12,000, any comparable evidence and the basis of the differential of 7%, stating that the Applicant had failed to properly quantify the level of damages of £12,000. The Respondent's Representative stated that the valuation appeared to be no more than an estimate without any proper foundation and that the claim for damages should be dismissed. The Respondents' Representative also submitted a List of Documents for the Respondents with a numbered bundle of documents. The Respondents' Representative's written representations and documents were sent to the Applicant's Representative.

1.15. On 15 November 2018 the Respondents' Representative requested a postponement of the CMD on 21 November due to court commitments. This was followed by a further request for a postponement on 16 November on the basis that the Respondent's Representative had just received written representations on behalf of the Applicant (these written submissions had not been received by the tribunal). The Respondent's Representative then made changes to his court diary and the request for postponement was withdrawn.

1.16. A Case Management Discussion ("CMD") took place on 21 November 2018. Reference is made to the terms of the Notes on the Case Management Discussion of the same date.

1.17. The Applicant's Representative produced written submissions at the CMD. These had been submitted with the wrong case reference number so had not been sent to the tribunal in advance of the CMD. The Application was amended by the Respondent's Representative at the CMD to add a second Respondent. Paragraphs 17-19 of the Notes deal with statutory damages. The Applicant's position was that any requirement to submit a professional valuation report would be contrary to the overriding objective of the tribunal to deal with the proceedings justly. The submission proceeded on the basis of the Applicant's limited financial means. In paragraph 19 the Applicant's Representative submitted that the Respondent's concerns might be adequately addressed by ensuring that the panel listed to hear the application included a chartered surveyor member (as is usual in repairing standard applications). Para 6.15 of the CMD Notes summarises Mr McPhee's position on the question of damages. He submitted that it would be contrary to the overriding objective of the tribunal to order that the Applicant produce a valuation

report in support of the statutory claim for damages, due to her limited resources. The tribunal chair asked Mr McPhee what evidence, if any, he was proposing to lodge in support of the statutory claim for damages, stating that it was for the Applicant to prove her case and that the tribunal, however, constituted, could not reach a decision on statutory damages in terms of the formula provided in the Act, in the absence of evidence. Mr McPhee repeated his position (recorded at paragraph 9) that it would be contrary to justice to order the Applicant to obtain a valuation report. No order was made requiring the Applicant to instruct a valuation report but the tribunal chair informed Mr McPhee that it was for the Applicant to prove her statutory claim for damages and no undertaking was given by the tribunal chair that the Applicant could do so without evidence of the valuation, having regard to the terms of Section 37.

1.18. Paragraph 7.9 of the Notes on the CMD summarises the Respondents' Representative's position regarding the statutory claim for damages and repeated the submissions that some form of evidence and justification would be required for the loss. He was of the view that a specialist member could not take the place of the Applicant proving the financial element of her Application.

1.19. The tribunal Chair advised parties that there were no surveyor members sitting in the private rented sector jurisdiction in the tribunal and that any oral hearing would be fixed in the normal way with a legal member and an ordinary member with a housing background.

1.20. At the CMD, both parties indicated that they were ready for a hearing to be fixed and agreed a date of 14 January 2019 at 1400. The parties discussed adjustment of written submissions, lists of witnesses and lists of productions for the hearing.

1.21. Mr McPhee did not state to the tribunal at the CMD that he had sought legal assistance from the Faculty of Advocates Free Legal Representation Unit ("FLRU") and was awaiting a response as to whether advice and/or representation would be provided to the Applicant.

1.22. Parties were directed to adjust their written submissions and produce a joint Minute of Agreement by 14 December 2018; and to submit lists of witnesses and productions no later than 7 days before the hearing date.

1.23. On 14 December 2018 the Respondent's Representative contacted the tribunal to state that the Joint Minute of Agreed Facts was still in

discussion between the representatives and requested an extension to the time allowed to do lodge it.

1.24. On 4 January 2019 the parties' representatives lodged a Joint Minute of Agreed Facts.

1.25. On 4 January 2019 the Applicant's Representative provided a One Drive web link to documents for the hearing. He was told by the tribunal's administration that tribunal staff were not permitted to download documents submitted via such means and he was asked to submit the documents in another format.

1.26. On 7 January 2019 the Respondents' Representative lodged a Second List of Documents and List of Witnesses for the Respondents.

1.27. The Applicant's Representative's submissions were re-submitted on 11 January 2019 at 14.38h.

1.28. At 1605h on 11 January 2019 the Respondents' Representative sent an email to the tribunal's administration stating that they had only received the Applicant's productions at 1438h that afternoon, with the hearing due to take place on Monday 14 January 2019. The Respondents' Representative sought a postponement of the hearing in order to allow them time to consider the documents and to take instructions from the Respondent.

1.29. The Respondents' postponement request was not sent by the tribunal's administration to the tribunal chair until the morning of 14 January 2019. The tribunal agreed to the Respondents' Representative's postponement request on the basis that the Applicant's Representative had sent submissions on the afternoon of Friday 11 January and the Respondents and their Representative required time to consider, take statements and take instructions. Both parties were advised that a further hearing date would be notified to them.

1.30. A hearing was fixed for 15 March 2019 and parties were notified of the date, time and place of the hearing.

1.31. On 5 February 2019, Mr McPhee advised the tribunal for the first time that he had recently instructed Counsel, having applied to the FLRU. He did not say when he had applied. He stated that Counsel had suggested having an additional CMD without discharging the hearing and made a

request for Directions to be issued for further written representations to be ordered to clarify the issues.

1.32. On 6 February 2019, Mr Moffat of the Respondent's Representative replied opposing the Applicant's Representative's request for a further CMD, stating that a hearing had been fixed. Mr Moffat stated that the Applicant's Representative had stated at the CMD on 21 November 2018 that they were ready to proceed to a hearing on 14 January 2019. This was only discharged because of the Applicant's lengthy list of documents being produced the day before the hearing. He stated that he could not see the merit in fixing another CMD and did not see why a further CMD was required. He stated that the Applicant could have appointed Counsel at any point before then. He stated that the Respondent was being put to expense by the Applicant trying to change the procedure fixed by the tribunal in November. He wanted to reserve his position on expenses. He said that expenses had already been incurred in preparing for a hearing. Reference was made to Rule 40 of the 2017 Rules and he stated that the Applicant's behaviour was unreasonable.

1.33. On 6 February 2019, the tribunal considered the Applicant's Representative's requests, and the Respondents' Representative's opposition thereto. Parties were advised by letter of 7 February 2019 that the tribunal was not prepared to fix a further CMD (which would necessitate discharging the hearing on 15 March 2019) or to change the hearing on 15 March 2019 to a CMD, on the basis of the information provided at that time by the Applicant's Representative. The hearing was still over four weeks away and the Applicant's Representative had not specified what further matters would require to be dealt with at a further CMD that have not already been considered and dealt with. There had already been a lengthy CMD and a detailed Note of the CMD had been produced and provided to parties.

1.34. On 19 February 2019 the Applicant's Representative submitted an email further to his letter of 5 February and the tribunal's response of 7 February 2019. He stated that the FLRU had provided the Applicant with the assistance of Counsel and that he had received certain advice as to the heads of claim in the matter. Mr McPhee sought to introduce an entirely new claim for civil proceedings under Rule 70 of the 2017 Rules, in addition to the statutory claim in terms of Rule 69. Mr McPhee stated that in relation to the statutory claim they had instructed DM Hall Surveyors to provide quantification under Section 37 of the 1988 Act and that a report was awaited. The claims sought to be introduced were a contractual claim under the common law for damages, solatium, harassment under Section

36(2)(b)(ii) of the 1988 Act and recoupment of overpaid rent. Mr McPhee stated that they were ready to proceed on the matter of whether there was an illegal eviction. He stated that it would be expedient for a Rule 70 Application to be heard together with the Rule 69 Application and proposed that a new CMD be fixed to introduce the new Application into proceedings; or to use the hearing on 15 March 2019 to resolve the issue of whether there had been an illegal eviction, with questions of quantification to be resolved at a future hearing. Mr McPhee noted that the Applicant had not until that stage had qualified legal representation and that the respondents were represented by a solicitor of come seniority. Mr McPhee advised that Counsel would appear on behalf of the Applicant at any future hearing.

1.35. On 19 February 2019 the Applicant's Representative sent an email to the Respondents' Representative, copied to the tribunal's administration, stating that they were now in funds to obtain expert evidence and had instructed DM Hall Chartered Surveyors to produce a report. Access to the Property was requested.

1.36. On 21 February 2019 the Respondents' Representative replied stating that they would take instructions regarding access and noting the Applicant's change in position regarding the obtaining of an expert report on valuation. Mr Moffat reserved his position on the question of expenses arising from the valuation and any further work required as a result of the late change in position.

1.37. On 21 February 2019 Mr McPhee replied to Mr Moffat stating that due to the time that had elapsed, the Applicant had entered full-time employment and was able to fund the necessary report. He stated that were the hearing to have gone ahead in January that would not be possible. Mr McPhee stated that any attempt to recover expenses in the matter would be vigorously challenged.

1.38. On 3 March 2019 the tribunal issued Directions to parties ordering the Applicant or her Representative to provide written representations in relation to the proposed amendment, having regard to Rule 13(2)(b) of the 2017 Rules, views on further procedure and any other matters they wished to be considered at that stage. The Respondents/their Representative were required to confirm whether they wished to make oral representations on the proposed amendments and if so, whether that could take place at the hearing or any CMD fixed in its place, or whether further time was required. Parties were ordered to comply with the

Directions by 11 March 2019. The Directions were sent to parties with a covering email from the tribunal.

1.39. On 11 March 2019 the Respondents' Representative submitted written representations opposing the proposed new application in terms of Rule 70 or amendment of the application in terms of Rule 69 to additionally proceed in terms of Rule 70. The Respondents' Representative outlined the procedural history of the Application made on 18 June 2018 and tribunal procedure following thereon. Mr Moffat submitted that the Applicant had not adequately explained why they were only raising a common law action at that stage or addressed why Counsel was only instructed in February 2019. Mr Moffat submitted that the Applicant had to choose between a statutory and a common law claim and could not pursue both simultaneously. Mr Moffat sought to proceed with the hearing on 15 March in relation to the Rule 69 Application (with any amendment to that application opposed) stating that if the hearing on 15 March was discharged he would be seeking expenses on behalf of the Respondents in terms of Rule 40, in that the Applicant had been unreasonable and caused the Respondents additional expense. Further written submissions were made in relation to the application for expenses in terms of Rule 40.

1.40. The Applicant's Representative submitted written representations in response to the tribunal's Directions. In relation to the Application in terms of Rule 69 and s36(3) of the 1988 Act, Mr McPhee stated that the surveyor's report had been obtained and it was now accepted that the statutory claim had no value and must be abandoned. Further submissions were made in respect of the amendment of the application to introduce a new application in terms of Rule 70, submitting that the proposed amendment complied with any enactment which would have applied if the amendment had been included in the Application as first lodged. The Applicant's Representative's principal position was that the hearing on 15 March 2019 be converted into a CMD, stating that it was a legally complex matter and that Counsel had been instructed to appear at any procedural or substantive hearings. Alternatively, it was proposed that the hearing be limited to the question of whether there was an unlawful eviction.

1.41. On 12 March 2019, the Respondents' Representative wrote to the tribunal noting that the Applicant has abandoned the Rule 69 Application and stating that the Rule 70 Application is not yet a matter before the tribunal and could not proceed to a CMD or hearing. Mr Moffat proposed that the hearing be discharged with expenses in favour of the Respondents or to proceed in relation to the issue of expenses only. Mr Moffat made further

submissions in support of his Application for expenses, stating that the Applicant should have had a valuation report from the outset of the action, the Rule 69 Application was predicated on the figure of £12,000 a figure which the Applicant now accepted was without any basis or foundation and that the Applicant had changed her position from that at the outset of the Application and the CMD. Mr Moffat stated that the Applicant had caused the Respondents to incur stress, inconvenience and expense over the previous nine months, including attendance at a CMD, preparing a Joint Minute of Agreed Facts and preparation for a full hearing on the matter. The Respondents therefore sought their expenses due to the Applicant's unreasonable behaviour.

1.42. On 12 March 2019 the Applicant's Representative submitted further representations in response to those of the Respondents' Representative. Mr McPhee stated that the Applicant had only recently been in a position to fund an expert report, stating that she had previously been a student in part-time employment, unemployed and was then in full employment. He stated that the issue of expert evidence was discussed in some details at the Case Management Discussion. Mr McPhee stated that the Chair had stated at the CMD that the Applicant should produce what she could to substantiate the valuation. Mr McPhee submitted that the valuation was reasonable, in good faith and consistent with authority in both Scotland and England and Wales. He stated that the nil valuation was unexpected but accepted by the Applicant and disclosed to the tribunal as quickly as possible. He submitted that the Applicant had acted entirely reasonably and sought to assist the tribunal and the Respondents in a manner proportionate to her means. An oral hearing was requested on the matter of expenses in order that submissions could be advanced in relation to reasonableness. Further the Applicant's Representative stated that the Rule 69 Application has no value and stated that she could continue the application and accepting a nil award while simultaneously lodging a Rule 70 Application. However he proposed that the amendment of the Application should be allowed and that the hearing should proceed on 15 March 2019; and in the alternative he requested that the hearing be used for submissions on the proposed amendment. In relation to the question of legal representation, Mr McPhee stated that the Applicant had applied to the FLRU on 22 July 2018 seeking pro bono assistance. He stated that the Applicant had relied for the majority of the case on the assistance of lay representation, stating that there was a considerable inequality of arms throughout. He stated his opinion that the instruction of Counsel would be of considerable benefit to the Applicant, the Respondent and the tribunal. He stated that if the amendment were refused the Applicant would require to submit a further application to the Free Legal Representation Unit.

1.43. On 12 March 2109 the Respondents' Representative sent an email stating that in the Applicant's Representative's submissions that morning, they stated that they were abandoning the Application; whereas their position in further representations was that the Application should be "paused". The Respondents' Representative was therefore unclear on what the Applicant's position was.

1.44. On 14 March 2019 the tribunal considered the parties' responses to its Directions of 3 March 2019 and their further submissions and the tribunal issued Directions to parties. The tribunal ordered the Applicant's Representative to confirm orally at the hearing on 15 March 2019, or in writing, whether the Application in terms of Rule 69 was to be withdrawn in terms of Rule 15 of the 2017 Rules. Any such withdrawal would be without prejudice to the Respondent's application to seek an award of expenses in terms of Rule 40 of the 2017 Rules. The tribunal did not consent to the Applicant's proposed amendments to the Application of 19 June 2018, in terms of Rule 14(1) of the 2017 Rules, for the reasons stated in the Directions. The hearing fixed for 15 March 2019 at 1000h was restricted to the Respondents' application for expenses in terms of Rule 40 and confirmation of the Applicant's position regarding withdrawal of the Application in terms of Rule 69 and Section 36 of the Housing (Scotland) Act 1988.

2. Hearing for confirmation of the Applicant's position regarding withdrawal of the Application and on the Respondents' application for Expenses - 15 March 2019 at 1000, George House, Edinburgh

2.1.1. The Applicant attended with Shaun McPhee from the Applicant's Representative, who had instructed Joe Bryce, Advocate, FLRU.

2.1.2. Mrs Ann Strachan, the Second Respondent attended with a supporter and Stephen Moffat, from the Respondents' Representative.

2.1.3. The following people attended as observers: Mungo Bovey QC and Andrew Wiseman.

2.2. Documents produced at hearing

2.3. The Applicant's Counsel, Mr Bryce, submitted a copy of a market Valuation Report from Eric Andrew BSc (Hons), MRICS, DM Hall

surveyors dated 26 February 2019 (the same day as inspection of the Property). In his observations, the author stated that *"there is no difference in value between a property subject to a short assured tenancy and a property with no short assured tenancy in place due to there being no difficulty in obtaining vacant possession when the short assured tenancy is in place".* The valuer was not provided by those instructing him with a copy of the lease but proceeded on the information said to have been provided by those instructing him. The valuation as at 29 May 2018 with a short assured tenancy in place and the valuation as at 30 May 2018 without a short assured tenancy in place were both valued at £175,000.

2.4. Authorities produced at hearing

2.5. The Applicant's Counsel, Mr Bryce, produced the English Court of Appeal case of *Dammermann v Lanyon Bowdler LLP [2017] 2 Costs LR 393*. A copy was provided to the tribunal and the other party.

2.6. The tribunal referred both parties' representatives to the English authorities, *Ridehalgh v Horsefield and Anr [1994] 3 WLR 462* and *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290*, and they were given time to consider them.

2.7. Submissions on behalf of the Applicant

2.8. Mr Bryce stated that his advice about the statutory damages claim has been that the approach which was outlined by the Applicant's Representative, as summarised at paragraph 6.15 of the 21 November 2018 Notes on the CMD, while stateable, is not one with a reasonable prospects of success. Mr Bryce advised the Applicant to depart from that approach. His advice to the Applicant was to obtain a valuation report from a surveyor. Mr Bryce stated that the Applicant only entered full-time employment on 16 February 2019 and the report was instructed on 19 February 2019. The valuer's opinion is that there is no difference in the value with a tenant and without the tenant on a short assured tenancy. Accordingly the statutory damages claim does not have a value. Mr Bryce stated that the tribunal is not interested in hypothetical questions. Mr Bryce had proposed different categorisations of the claim. Mr Bryce submitted that the tribunal's regulations are somewhat new and he understood that this was the first illegal eviction case to reach the stage of a hearing, further submitting that the procedural rules should have a certain amount of flexibility. Mr Bryce noted that the tribunal has already decided not to allow the proposed amendment. Mr Bryce stated that the Applicant has

decided that if the tribunal draws a line under these proceedings she will make a new application under Regulation 70. Mr Bryce sought a decision from the tribunal about whether there would also be a line drawn under the Respondents' counterclaim (which has never gone through the Rule 5 procedure) if there is a line drawn under these proceedings. Mr Bryce submitted that although the Applicant would be starting again, the current proceedings have not been fruitless, as there has been a factual investigation which would form the basis of any new application.

2.9. Mr Bryce stated that on that basis that neither of the putative bases of the statutory claim, given the evidence from the valuer, have any continuing viability, the statutory damages claim therefore becomes hypothetical. The claim in terms of Rule 69 and Section 36 was withdrawn.

2.10. Submissions on behalf of the Respondents

2.11. Mr Moffat confirmed that he was content to withdraw the Respondents' counterclaim at the same time as the principal rule 69 Application was withdrawn by the Applicant.

2.12. Mr Moffat then advanced submissions in advance of the Respondents' request for an award of expenses in terms of Rule 40. These developed the written submissions already lodged with the tribunal.

2.13. Mr Moffat submitted that the Applicant has put the Respondents to unnecessary and unreasonable expense as a result of her unreasonable behaviour. He submitted that the unreasonable behaviour by the Applicant was two-fold. First, by raising an action for statutory damages at the outset without quantifying the claim. Secondly, Mr Moffat relied on the conduct with regard to allowing a hearing to be fixed, then seeking a further CMD and then seeking to amendment the application at a late stage to add a claim for common law damages.

2.14. Mr Moffat submitted that it was the Applicant's decision to raise a claim for statutory damages in June 2018. He submitted that it was a relatively straightforward option either to seek statutory damages under section 36 or to seek common law damages. The basis of the calculation for statutory damages is clearly set out in Section 37 of the Act. It requires a comparison of the value of property with and without a tenant. Mr Moffat submitted that the Applicant could have chosen to proceed on the basis of common law damages instead of the statutory basis. On 19 June 2018, the Applicant, in response to a request from the tribunal, stated that she

was seeking damages of £12,000. The Applicant advised on 20 July 2018 that the difference in value between the two valuations was 7%. The Applicant provided no basis and no expert report was lodged to substantiate the claim. The Applicant's position at that stage was that it was for the tribunal to decide on the value of the claim in terms of Section 36 and 37.

2.15. Mr Moffat stated that given the value of the claim at £12,000, the Respondents sought to instruct solicitors. The Respondents thereafter incurred expense in instructing the solicitors to carry out the work to prepare for and attend the CMD in November, the negotiation of a Joint Minute and preparation for full hearing in January 2019.

2.16. The Respondents' position in written submissions and at the CMD in November 2018 was that the Applicant required a professional valuation report and that there was no fair notice of how the value of £12,000 had been reached. At the CMD, the Applicant's position remained that it was for the tribunal to value the claim, suggesting that the tribunal might be constituted to include a valuation surveyor. The Applicant said that she could not obtain a report and the Respondent's position was that some form of evidence was required.

2.17. Mr Moffat submitted that in February 2019 the Applicant's position became slightly unclear. Mr McPhee confirmed in an email in February 2019 that a report had been instructed.

2.18. Mr Moffat submitted that the Applicant should not have raised a claim for statutory damages without having quantified the claim at the outset. It is not a complicated legal test and it is clearly set down in statute. The Applicant had the option to proceed under common law damages. She could have paused or held off making a statutory claim until in a possession of an expert report.

2.19. Mr Moffat summarised the expenses that had been incurred as:

2.19.1. Drafting a written response to the Application;

2.19.2. Preparing for and attending a CMD;

2.19.3. Negotiating a JMA;

2.19.4. Preparation for a full hearing for 14 January 2019;

2.19.5. Dealing with the Applicant's request in February for the postponed hearing to be converted into a CMD / postponement. Following discharge of hearing on 14 January 2019, the Applicant made a request to set down a new CMD to focus issues. This was despite the fact that a CMD had already taken place and a lengthy JMA had been negotiated. Parties had indicated at the CMD that they were able to proceed to a hearing on 14 January. It was not clear what purpose an additional CMD would have achieved. The tribunal took the view that no CMD should be set down. The request was refused as no specification was provided by the Applicant's Representative as to what they required additional time to do. However, Mr Moffat stated that the Respondents did incur expenses in terms of advice tendered and a response to the tribunal.

2.19.6. Dealing with the amendment procedure and the Rule 70 Application.

2.20. Mr Moffat submitted that all of the stated expenses had been caused by the Applicant's unreasonable behaviour and could have been avoided.

2.21. The Respondent's position on unreasonable behaviour of the Applicant was that it was not competent to seek to amend in a Rule 70 Application. A Rule 70 Application should have been made at outset instead of the Rule 69 Application, or another Application made to the tribunal at the time that the Rule 69 Application was withdrawn.

2.22. Mr Moffat stated that the Respondents, as private individuals, having received the claim for £12,000, instructed solicitors. Had a report been obtained by the Applicant before the claim was made, expense would not have been incurred.

2.23. Mr Moffat referred to the overriding objective of the tribunal in Rule 2(1). He submitted that if the Respondents do not get awarded expenses at this stage and a rule 70 application is proceeded with by the Applicant, the Respondents will incur double legal fees. He submitted that a lot of work will have to be carried out again. The overriding objective requires the tribunal to deal with the proceedings justly. The statutory claim was not quantified and it has now been withdrawn. The common law damages claim could have been raised at the outset in June 2018. The prospect of another set of legal fees could affect the Respondents' ability to participate fully in proceedings if they wished to do so. Mr Moffat submitted that it would be contrary to the overriding objective.

2.24. Mr Moffat approached the question of whether there had been unreasonable behaviour on the part of the Applicant entirely based on the facts. He submitted that it is for the tribunal to consider what is unreasonable in the circumstances and whether the Respondent has therefore incurred unnecessary or unreasonable expense.

2.25. Mr Moffat submitted that the phrase *"in the conduct of the case"* in Rule 40 would include the decision whether or not to proceed with a case. His fallback position in the event that the tribunal was not with him on the issue of *"in the conduct of the case"* including conduct in making the Application, is that once the position had been stated by the Respondent and following discussion at the CMD, it would have been appropriate to obtain a valuation in advance of the hearing being fixed.

2.26. Mr Moffat referred to *Dammermann v Lanyon Bowdler LLP [2017] 2 Costs LR 393*, at page 400, paragraph 30, in which the Court of Appeal stated that in costs in small claims track appeals, *"all such cases must be highly fact-sensitive".*

2.27. Submissions on behalf of the Applicant

2.28. Mr Bryce responded to Mr Moffat's submissions.

2.29. In relation to the chronology of the matter, Mr Bryce stated that the Applicant did not enter into full-time employment until 16 February 2019. Prior to that she was a self-funding student with part-time employment one day a week. She did not have the funds to instruct a report until she entered into full time employment.

2.30. Mr Bryce submitted the Notes of the CMD may be incomplete. It may be that the positions were canvassed but on his reading it was not definitive. Mr Bryce stated that he wished to return to the Notes of the CMD.

2.31. Mr Bryce turned to the law to be applied.

2.32. In relation to Rule 40, Mr Bryce stated that he had not previously considered the question about whether *"in the conduct of the case"* included making an application.

2.33. Mr Bryce stated that the term *"unreasonable behaviour"* has appeared in the Simple Procedure in the Sheriff Court. He stated that the way in which

the Simple Procedure works is that expenses are capped subject to certain exceptions. One exception is where one of the parties has acted unreasonably. Mr Bryce stated that he had been unable to find any authority in Simple Procedure claims in Scotland or in the First-tier tribunal in Scotland.

2.34. Mr Bryce submitted that the English equivalent to Simple Procedure is Small Claims. He turned to consider *Dammermann v Lanyon Bowdler LLP* (above), submitting that a judicial body must be governed by the black letter of the law and that the construction by the English Court of Appeal has to be highly persuasive to the First-tier Tribunal in Scotland. Mr Bryce stated that Mr Dammermann had a mortgage called up against him by a bank. As part of the sums called up, the legal fees by the solicitors acting on behalf of the lender were incorporated into the debt. Mr Dammermann thought that he had been overcharged by the lender. He raised an action in the English small claims court for a refund. Mr Bryce referred to paragraph 6, stating that it showed that the issue raised by Mr Dammermann was one in which there was scope for legal debate.

2.35. Mr Bryce submitted that in relation to the present matter, he happens to have advised the Applicant that the Applicant's argument was not a viable approach. Mr McPhee took the approach that as the Applicant could not afford an expert Report the tribunal should take a broad brush to the issue of valuation. Mr Bryce submitted that that could have been argued in this case. It is precisely because Counsel has become involved that the argument has been abandoned. The unreasonable conduct would have been to persist in a line of argument which did not appear to have any prospects.

2.36. Mr Bryce turned back to consider *Dammermann*. He stated that the Court ultimately found that the plaintiff had not behaved unreasonably despite the fact that the plaintiff had already had identified to him a judicial decision. By comparison, Mr Bryce submitted that is not the case in the present application, in which it is alleged that there was an unlawful eviction. The issue is whether the Applicant behaved unreasonably in advancing that position. Mr Bryce submitted that there is a difference between over optimism and unreasonableness.

2.37. Mr Bryce turned back to consider the Notes of the CMD, observing that he did not see in the Notes any warning to Mr McPhee that he was acting unreasonably. Mr Bryce referred to para 6.15. Mr Bryce does not agree with Mr McPhee's position in that paragraph, submitting that it has not been excluded by any case law. It may be stateable but it is a position

which the Applicant has now been advised not to state. The position for the Respondent is put at paragraph 7.9. Mr Bryce stated that he is of the view that what the Respondent says at para 7.9 is correct but that is simply a matter of professional opinion. At paragraph 9, what Mr Bryce sees is simply a record by the tribunal of Mr McPhee's submission on the point that the Applicant could not afford an expert valuation and if the claim fell because of that it would be contrary to the interests of justice. Mr Bryce submitted that if at the CMD the Applicant had been given a clear steer that it would be unreasonable to proceed without a professional valuation, it would be arguable that the Applicant would have acted unreasonably. He further submitted that the critical point is that the Applicant did obtain a valuation report as quickly as she could have given her resources. As soon as it came into existence it was disclosed. Mr Bryce submitted that it only becomes inevitable because of the analysis at which he has arrived. The Application is stateable and it is not the case that it was absolutely inevitable that that would be the outcome.

2.38. Mr Bryce turned to consider the context of the PRS jurisdiction which used to be in the Sheriff Court. Legal Aid is not available but he thinks that ABWOR is available. He submitted that if a policy decision has been made to transfer an entire jurisdiction from outside the scope of the Legal Aid scheme, it is inevitable that unqualified people are going to be in the field.

2.39. Mr Bryce returned to consider *Dammermann* and submitted that the position advanced by Mr McPhee on behalf of the Applicant is a position that could be advanced. Mr Bryce does not agree with his position but submitted that it is not unreasonable behaviour. Mr Bryce referred to paragraph 11 which refers to the fact that Mr Dammermann was a party litigant. Mr Bryce submitted that the present case is a half way house in that there is a charity specialising in providing housing advice but it does not employ legally qualified people to do so, which is closer to lay people than solicitors. Mr Bryce referred to paragraph 13, which deals with the costs regime applicable to cases under the Small Claims Track in CPR part 27.14, which provides: *"the court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except: ..."* with a list of exceptions including *"(g) Such further costs as the court may assess by the summary procedure and ordered to be paid by a party who has behaved unreasonably"*. Mr Bryce referred to paragraph 16 in which three points were made regarding unreasonable behaviour, submitting that the first two are relevant. Mr Dammermann's conduct has to be seen in the light of the fact that the same judge had granted him permission to appeal. Mr Bryce then turned back to his earlier submission that although he was not at the

CMD, according to the Notes, the tribunal was content to allow the Applicant to proceed to proof on the basis of the scenario in paragraph 6.15 of the CMD Notes and submitted that the Applicant's behaviour is not obviously unreasonable.

2.40. Mr Bryce's second submission was based on paragraph 18, which was that Mr Dammermann argued that the seeming obscurity of the point of law must be taken into account. Mr Bryce submitted that the broad brush approach advised by the Applicant's Representative is not excluded by the case law, particularly as the chamber of the tribunal is at such an early stage of development. Mr Bryce submitted that Mr McPhee was mistaken in calculating damages of £12,000 on the basis of a percentage but that it was not unreasonable. He further submitted that conduct cannot be described as unreasonable simply because it leads to an unsuccessful result. Counsel has advised applicant not to proceed with that line of attack. Mr Bryce submitted that Rule 2 in the tribunal is the overriding objective, which includes the duty to ensure so far as practicable that the parties are on an equal footing and able to participate and that the tribunal must have regard to the necessity of equality of arms.

2.41. The tribunal chair asked Mr Bryce if he had any submissions to make regarding the Court of Appeal guidance *Ridehalgh*, above, in which the court considered what constitutes *"unreasonable conduct"* in the context of professional lawyers, holding that *"the acid test is whether the conduct permits of a reasonable explanation"* [para 20]; and the decision of the Upper Tribunal (Lands Chamber) in England in *Willow Court Management Co (1985) Ltd* above, in which the Upper Tribunal applied the formula in *Ridehalgh*, stating at para 24 that *"the test may be expressed in different ways: Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"*

2.42. Mr Bryce submitted that even if one applies the particular formula to which the chair referred, it cannot be said that the application advanced by the Applicant is one that no reasonable person would have considered. The argument which was advanced was a stateable argument but just not one which Mr Bryce favours or commended to the Applicant. It is not perverse, it is not unstateable. Therefore, it is not unreasonable.

2.43. The tribunal Chair asked for Mr Bryce's submissions in relation to the fact that the Applicant was not representing herself but had had advice from a lay representative from a charity offering housing advice.

2.44. Mr Bryce submitted that the Applicant is closer to the party litigant end of the spectrum than the legally represented litigant as the Representative is not legally qualified, particularly when the contrast is made between the unqualified representative at a charity and the very senior solicitor for the Respondents. Mr Bryce submitted that the Applicant did resort to and avail herself of the advice of the FLRU and received certain advice as a result of which a line of attack has been abandoned as soon as it could be. In Mr Bryce's submission that was the paradigm of acting reasonably. By contrast, acting unreasonably would have been to proceed along that route.

2.45. Mr Bryce said that the question of whether to make an award of expenses is highly fact sensitive and a matter for the tribunal to approach on the facts of the case. Mr Bryce stated that he is citing *Dammermann* as the leading authority and cannot cherry pick the facts. He returned to the judgment in *Dammermann*, para 32, in which it was stated that it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have acted unreasonably.

2.46. Mr Bryce submitted that it appears to be a fact that a sitting tenant was locked out of her tenancy. He submitted that the reason that this application has come off the rails is because of the legal categorisation of the claim as being under statute when it might have been better had it been commenced under both the statutory and the common law heads and however it is characterised, the facts seem to be the same. It would be unfortunate. Mr Bryce submitted that there should be a diffidence about creating a barrier between this tribunal and tenants who are locked out of their properties. He submitted that what has happened here has been legal error but not a categorically clear legal error. The argument advanced at para 6.15 of the Notes on the CMD may be advanced in another application and may succeed. It is not excluded by the case law. It is not unreasonableness. It should not be a deterrence to people in these circumstances.

2.47. Mr Bryce made a further point that there has never been at any stage anything to stop the Respondent from instructing a valuation report. The Respondent is the party with the resources. If the Respondent had obtained this valuation report and produced that to the Applicant and the Applicant had failed to respond, either by failing to obtain her own report or advice, that would have been unreasonable behaviour. It is the Applicant who ultimately obtained the report.

2.48. Mr Bryce concluded by submitting that the Applicant behaved reasonably.

2.49. Response on behalf of the Respondents

2.50. Mr Moffat responded by submitting that the whole purpose of proceedings was not to determine whether a sitting tenant has been locked out. It is the Applicant's case to prove and not for the Respondents to seek to prove the Applicant's case by obtaining a valuation. He reiterated that the Respondents are private individuals.

2.51. Mr Moffat made a final point with regard to the obtaining of representation. He submitted that the Applicant has not explained why she did not seek free legal advice when representations were obtained, as the matter could then have been progressed and the Respondents could have avoided the expense occasioned by the Applicant's change in position, rather than proceeding on one basis and then the Applicant attempting to change the basis.

2.52. Mr Moffat stated that he understands from Mr McPhee that there was a delay in processing the Application for free legal services. If that is the case, the Applicant could have approached the Respondents and requested a halt on proceedings. It is understood that she applied for assistance on 22 July 2018. Mr Moffat stated that he is not suggesting the applicant was unreasonable herself because of the delay in obtaining assistance, or that the delay in and of itself was unreasonable. Rather, the Applicant could have sought a different course in proceedings. There was the option for the Applicant to pause the current action or ask for the case management discussion to be paused.

2.53. Further response on behalf of the Applicant

2.54. Mr Bryce submitted that any lack of efficiency on his part or that of the FLRU in engaging with the request is not the Applicant's fault. He stated that he had no response to Mr Moffat's submission that the Applicant could have asked for the Application to be paused. Mr Bryce stated that the difficulty he is in is that what has happened in this case is that the Applicant did apply to the FLRU, Mr Bryce became involved and gave advice which has sorted matters out. He submitted that that does not reflect in any unreasonableness on the part of the Applicant.

2.55. Further response on behalf of the Respondents

2.56. Mr Moffat submitted that Para 32 of *Dammermann* considers that it would be unfortunate if litigants in small claims actions were too easily deterred. At the same time, the Respondents cannot be disadvantaged by having a double set of litigation against them when one of these applications could have been avoided. The overriding objective of the tribunal is to ensure that proceedings progress fairly. If the Respondents incur double expenses in doing so it goes against the overriding objective of the tribunal.

2.57. Adjournment

2.58. The Tribunal adjourned to consider parties' submissions and issue a written decision.

3. Discussion

3.1. Applicable Law

3.1.1. Rule 40 of the 2017 Rules provides:

"40— Expenses
(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.
(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

3.1.2. The general principle is that such expenses can only be awarded if the tribunal is satisfied that one party has, through unreasonable behaviour in the conduct of a case, put the other party to unnecessary or unreasonable expense; and the question of whether to award expenses is at the discretion of the tribunal.

3.1.3. In applying Rule 40, the tribunal is also obliged in terms of Rule 3, to have regard to the overriding objective is in Rule 2 of the 2017 Rules, *"to deal with the proceedings justly."*

3.1.4. Parties in the tribunal can appear themselves or appoint any legal or lay representative to represent them, in accordance with Rule 10. Rule 10(4) provides that *"[a]nything permitted or required to be done by a party under these Rules, a practice direction or an order may be done by a lay representative or legal representative".*

3.1.5. *"Unreasonable behaviour"* for the purposes of Rule 40 is not further defined in the 2017 Rules, nor are there any reported Scottish authorities on the interpretation of *"unreasonable behaviour"* for the purposes of Rule 40.

3.1.6. There are, however, a number of English authorities which may be of assistance in the tribunal's approach to such applications, always recognising the different contexts of such applications in English courts and tribunals and the fact that such applications are highly fact sensitive.

3.1.7. Those include the leading English authority on wasted costs orders in court litigation under Rule 51(6) of the Supreme Court Act 1981, *Ridehalgh v Horsefield and Anr [1994] 3 WLR 462* in which the court considered what constitutes *"unreasonable conduct"* in the context of professional lawyers, holding that *"the acid test is whether the conduct permits of a reasonable explanation"* [para 20]. The tribunal observes that *Ridelhaugh v Horsefield* is not directly in point with the present matter, in that it considers whether professional solicitors' conduct was *"improper, unreasonable or negligent"* in terms of section 51(7) of the 1981 Act. However, the formula for *"unreasonable conduct"* was adopted by the Upper Tribunal (Lands Chamber) in England in *Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290*, in which the UT considered three appeals against orders for costs made by the First-tier Tribunal under rule 13(1)(b), Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, against a party for *"acting unreasonably in bringing, defending or conducting proceedings"*. The Upper Tribunal applied the formula in *Ridehalgh*, stating (at para. 24) that *"the test may be expressed in different ways: Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"* Thereafter the Upper Tribunal proposed a three-stage systematic or sequential approach to applications, with the first stage question as whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the order should be.

3.1.8. This tribunal is not bound by the decisions in *Willow Court Management* or *Ridehalgh*, above, nor any of the other English authorities referred to therein. The statutory provisions under consideration in those English cases differ in their terms from Rule 40 in the 2017 Rules. The decisions are persuasive in that they suggest that the tribunal should first decide what is meant by *"unreasonable"* in the relevant context, having regard to the facts of the case, and thereafter adopt a sequential approach to such applications, having regard to the terms of the statutory provisions.

3.1.9. Application of Rule 40 to the facts of the present case

3.1.10. The tribunal considered whether the Applicant has through unreasonable behaviour in the conduct of the case, put the Respondent to unnecessary or unreasonable expense. In so doing, the tribunal considered the procedural history of the case, from the time that the Application was submitted to the tribunal, as summarised in part 1 of this decision.

3.1.11. The tribunal first considered whether the words *"in the conduct of a case"* in Rule 40 catch the Applicant's decision to lodge an Application to the tribunal on 19 June 2018 in terms of Rule 69 and Section 36, without first having obtained a valuation. The tribunal notes that an Application is not "made" in terms of the Rules until the mandatory requirements for lodging are met and that further requests for information may be made but the tribunal with information required to be provided by the Applicant prior to an Application being "made". The tribunal is of the view that the words *"in the conduct of a case"* may be capable of catching the conduct in relation to the subsequent requests for further information made by the tribunal and the responses by the Applicant's Representative in which a valuation of £12,000 was amended into the Application, followed by a supposed basis for said valuation with reference to a percentage of the property value, with reference made to an authority which was said to support such an approach. It is now accepted on behalf of the Applicant that the housing adviser gave the Applicant bad advice.

3.1.12. The three points that the tribunal notes about Mr McPhee's email to the tribunal of 20 July 2018 are that (1) It is not clear who Mr McPhee is referring to when he says that he was "advised that the difference is usually around 7%". (2) He cited the authority of *Mackay v Leask 1996 Hous LR*, which was a case which does not substantiate or support his position, as the Court in that case applied the statutory formula in Section 37 and accepted the unchallenged evidence of a chartered surveyor about

the relative difference in value between the property in which there was a continued right to occupy and the factual situation in which the occupier had been deprived of his occupation. The case, in fact, provides no support for the Applicant's Representative's contention that the amount of damages should be calculated with reference to any percentage of the property value or that expert evidence would not be required. The editor's note on the case report makes clear that the choice of the applicant is to seek common law damages for solatium and related claims or to seek statutory damages under Sections 36 and 37 of the 1988 Act. (3) Mr McPhee refers to "further evidence" when in fact he has provided no evidence of the valuation in this case.

3.2. However, having said all of that the tribunal takes account of the fact that the Applicant presumably thought that she had a case against the Respondents on the basis of the advice she had received from Mr McPhee at that stage. She went to him as a specialist housing adviser. The Applicant decided, having received Mr McPhee's advice, to pursue a claim. That advice included Mr McPhee's position that no expert evidence, such as a valuation report was required in order to prove a statutory claim in terms of Sections 36 and 37.

3.3. The tribunal is not therefore satisfied that in relation to "making" the Application (including the further information provided in relation to valuation and the basis for it) the Applicant acted unreasonably, given the advice she had received.

3.4. However, the tribunal has now been advised that the Applicant applied for free legal advice from the FLRU on 22 July 2018. The tribunal was not advised that the Applicant had applied for any such advice until February 2019 (which is around the time that Mr Bryce was instructed by Mr McPhee). The lengthy wait does not appear to have been due to any fault on the part of the Applicant and the tribunal was not provided with any information as to the reasons for the same.

3.5. In the meantime the Respondent was put to the expense of instructing solicitors to defend the claim for £12,000, which the tribunal considers to be reasonable given the relatively high value of the claim to two private individual property owner/landlords.

3.6. The tribunal considers it of importance that on 11 October 2018, the Applicant was put on notice by receipt of the Respondents' written representations that there was criticism for the lack of fair notice of the

legal basis of the quantification of the statutory claim and an enquiry was made about the lack of expert evidence to substantiate it.

3.7. The Applicant and her Representative, having already thought it necessary to seek legal assistance, could at that point have taken steps to notify the Respondents and the tribunal that a response was awaited in relation to the Applicant's application to FLRU. In fact, all stages of procedure up until 6 February 2019 took place without the Applicant or McPhee informing either the tribunal or the Respondents of the same.

3.8. During that time period, the Respondents were put through various stages of procedure, including lodging further written representations, lodging productions, preparation for and attendance at a CMD and the procedure which followed thereafter.

3.9. The tribunal also considers it of importance Mr McPhee did not advise the tribunal at the CMD that the Applicant was awaiting a response from FLRU and a statement was made by him to the tribunal that the Applicant was ready for an oral hearing to be fixed and that there was agreement to negotiate a Joint Minute of Agreed Facts with the Respondents' Representative. Mr McPhee could have stated at the CMD that assistance had been applied for and an answer was awaited. Further procedural step(s) could have been discussed which did not involve the fixing of a hearing.

3.10. As a result of parties' positions a hearing was fixed for 14 January 2019, for which the Respondents and their Representative required to prepare. The only reason for that hearing being postponed on the day was that Mr McPhee lodged documents late on the afternoon of Friday 11 January before the Monday hearing, which lead to the tribunal agreeing to the Respondents' Representative's request for a postponement in order to consider the documents and take instructions.

3.11. The tribunal considers that the Applicant, through her representative Mr McPhee, acted unreasonably on 21 November 2018 in letting the tribunal fix further procedure as a full oral hearing when they were awaiting a decision on whether the Applicant was to be given *pro bono* legal advice and representation and did not advise the tribunal or the opposing party of that matter. The Applicant could have asked for the hearing to be postponed for that reason; or could have asked for a longer date for written submissions, the JMA and lists of witnesses and documents. Even if the Applicant and her Representative were not familiar with tribunal procedure, had they advised the tribunal and Mr Moffat of that matter, it

would undoubtedly have led to a different procedural course than the one which was adopted.

3.12. The tribunal also observes that Mr McPhee accepts in his written representations of 12 March 2019 that he was told by the tribunal chair at the CMD that the Applicant would require to produce evidence, stating that *"the Chair had stated at the CMD that the Applicant should produce what she could to substantiate the valuation"*. The Notes of the CMD are not a verbatim record of everything said but rather they summarise parties' respective positions and the outcome of the CMD. The tribunal did not order the Applicant to produce a surveyor's valuation, having taken into account Mr McPhee's submissions that he was instructed to withdraw the claim if the tribunal insisted that she did so and having regard to the overriding objective. However, the tribunal chair stated to Mr McPhee that the burden was on the Applicant to prove her claim and it was for her to adduce evidence in support of her claim. Parties were ordered to lodge lists of witnesses and documents by a stated date. Additionally, Mr McPhee was told in response to his proposal that a surveyor member might sit on the tribunal for a hearing that no surveyor members are trained to sit in the Private Rented Sector jurisdiction of the tribunal and that a hearing would be fixed with a legal member and an ordinary (housing) member.

3.13. The tribunal makes no finding that it was unreasonable of the Applicant to pursuing the proposed Minute of Amendment and the proposals to change further procedure from a hearing to a CMD, once assistance had been obtained from the FLRU, albeit that the Applicant was ultimately unsuccessful with those applications for the reasons already given.

3.14. The tribunal also notes that the Applicant has stated that she intends to make another Application to the tribunal in terms of Rule 70. The Respondents face the prospect of defending a second set of proceedings.

3.15. The tribunal should be accessible to those representing themselves or using the services of lay representatives with or without specialist experience in housing law. Tribunal proceedings must be just. However, this is not a case where the Applicant can make a strong argument about inequality of arms. The Respondents were private individuals who only chose to instruct a firm of solicitors having had the valuation of £12,000 intimated by the Applicant in July 2018. The Respondents reasonably sought legal advice because of that. The Applicant cannot now rely on the fact that the Respondents have been legally represented by an experienced solicitor to state that there was an inequality of arms such

that none of her conduct or that of her lay representative should be viewed as unreasonable. The tribunal also reiterates that the Applicant had obviously felt it necessary to seek legal advice in addition to her housing representative and the only reason she did not have that legal advice at an earlier stage than February 2019 was because of a delay by the FLRU in processing her claim.

3.16. In reaching its decision, the tribunal has taken account of the fact that the Applicant was represented by a housing volunteer from in or around June 2018 up until the point that the Applicant received the assistance of Counsel in February 2019. The tribunal was not addressed by parties on whether the Applicant had any recourse against the volunteer or the charity in respect of the advice tendered to her by Mr McPhee. However, during the period over which Mr McPhee was representing the Applicant his actings in the case have been taken to be the actings of the Applicant who appointed him to act for her in terms of the Rules.

3.17. The tribunal is satisfied that the Applicant has behaved unreasonably in the conduct of the case in terms of Rule 40 of the 2017 Rules.

3.18. The tribunal is exercising its discretion to award expenses to the Respondents in terms of Rule 40 of the 2017 Rules as taxed by the Auditor of the Court of Session, on the basis that the Applicant through unreasonable behaviour in the conduct of a case has put the Respondents to unnecessary or unreasonable expense, in respect of the following unnecessary or unreasonable expenses incurred by the Respondents in terms of Rule 40(2):

(i) Negotiating a Joint Minute of Agreed Evidence with the Applicant's Representative; (ii) Lodging Lists of Witnesses and Documents for the Hearing on 14 January 2019; (iii) Preparation for the hearing on 14 January 2019 (discharged on the day); and (iv) Preparation for and attendance at the hearing on 15 March 2019, at which the parties were required to appear or be represented in order to make submissions in relation to the application for expenses.

4. 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.

_____ **2 May 2019**

Susanne L M Tanner Q.C.
Legal Member/Chair

That party must seek permission to appeal within 30 days of the date the decision was sent to them.

S Tanner

2 May 2019

Susanne L M Tanner Q.C.
Legal Member/Chair