



Written Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48(1) of the Housing (Scotland) Act 2014 and Rule 27 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Reference number: FTS/HPC/LA/21/2547

The Parties:

Mr Elfatih Eltahir, Mrs Jawahir Hamid, 232 Ripon Road, Harrogate, HG1 3JR (“the Applicants”)

Central Letting Agency, 737 Pollokshaws Road, Glasgow, G41 2AA (“the Respondent”)

Property Flat 1/1 84 Kent Road Glasgow

Tribunal Members:

Valerie Bremner (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The Tribunal dismissed the application in terms of Rule 27 of the Tribunal rules of procedure having found that it has no jurisdiction in relation to the application in its entirety as the application cannot competently be made in terms of section 48 of the Housing (Scotland) Act 2014 and the Letting Agent Code of Practice (Scotland) Regulations 2016. The Tribunal continued consideration of a motion for expenses in terms of Rule 40 of the Tribunal rules of procedure to allow the Respondent to answer this motion and this motion will be considered at the Hearing for the related application HPC.LA.21.2548.

The decision of the Tribunal was unanimous.

Background

1.This application along with another with reference FTS/HPC/LA/21/2548 called for a case management discussion on 17th October 2022 after a number of callings. On 17th October 2022 a preliminary hearing took place as to whether the Tribunal had jurisdiction to deal with all of the alleged breaches of the Letting Agent Code of Practice said to relate to paragraphs 17, 18, 19, 20, 21, 23, 24, 26, 27, 29, 30, 31, 32, 35, 37, 38, 39, 43, 46, 73, 74, 85, 86, 90, 93, 108, 109, 110, and 112 in relation to the property at Flat1/1 84 Kent Road, Glasgow. After the hearing the application was continued to allow for a motion for expenses to be made and called again on 28th April 2023.On that date the Tribunal gave its decision and considered a motion for expenses made on behalf of the Respondent.

2.The Respondent's solicitor Mr Bryson had lodged representations raising issues around jurisdiction of the Tribunal in relation to all the alleged Letting Agent Code of Practice breaches set out in this application and the Tribunal had required parties to submit their representations on the matter.

3.The Applicants indicated that they could not respond to the Direction and have been unable to obtain affordable legal advice and they indicated that they trusted the Tribunal to make the "right decision" regarding jurisdiction.

4.The Respondent's solicitor also indicated that the application had no legal foundation,was vexatious and ought to be struck out with expenses in favour of the Respondents.

5.In advance of the Hearing through a number of case management discussions it was noted that there was no dispute between parties that all of the issues raised under various paragraphs of the letting Agent Code of Practice in this application predated 31st January 2018 or related to complaints submitted after the contract between the parties for Letting Agent Services at the property had been terminated and noted that the contract between the parties had been terminated by the first Applicant with immediate effect on 24th January 2018.

Hearing

6.The hearing was attended by both of the Applicants and by Mr Bryson on behalf of the Respondents. Mr Eltahir represented the position of both Applicants.

7.As he was challenging the jurisdiction of the Tribunal to hear the applications the Tribunal heard first from Mr Bryson and then from Mr Eltahir on behalf of the Applicants.

8.Mr Bryson submitted that in terms of application with reference LA/21/2547 the Tribunal had no jurisdiction to deal with any of the alleged breaches of the Letting Agent Code of Practice, He submitted that the contract between the parties for the property at Flat 1/1 84 Kent Road had been terminated by the Applicant on 24th January 2018, a week before the Letting Agent Code of Practice came into force. Mr Bryson referred to Walker's Principles Volume 1 at p19 and referred to the paragraph

on that page which referred to legislation having prospective effect and submitted that a statutory provision could be made retrospective by a clear expression to that effect. He said there was no such provision in terms of the Letting Agent Code of Practice

9. Mr Bryson submitted that if a complaint is made after the code comes into effect, then that would bring matters into play for the Tribunal to consider. He submitted that the contract cannot be resurrected to allow something which was not grounds for complaint at the time to become a breach under the Code of Practice.

10. Mr Bryson submitted that if there was a continuing failure to deal with a complaint and the contract continued then that might be a different matter but that was not the case here. As the property was no longer managed for the Applicants by the Respondents after 24th January 2018 he questioned how anyone could be said to have failed to comply with the Code of Practice.

11. Mr Bryson stated that his perception of the Applicants' argument was that in general terms the Applicants recognised that legislation could not have retrospective effect and because Mr Eltahir had sought answers after the Letting Agent Code of practice came into force on 31st January 2018, he understood he was entitled to make a complaint under the code to the Tribunal.

12. In response to these submissions Mr Eltahir for the Applicants accepted that the matters he had referred to in the alleged code breaches at paragraphs 17, 18, 19, 20, 21, 23, 24, 26, 27, 29, 30, 31, 32, 35, 37, 38, 39, 43, 46, 73, 74, 85, 86, 90 and 93 related to matters which pre dated the Code of practice coming into force. He had also made complaints under paragraphs 108, 109, 110 and 112 of the Letting Agent Code of Practice and these related to failure to respond to complaints and failure to provide terms and conditions and a copy of the Letting Agent Code of Practice.

13. Mr Eltahir's submission for the Applicants was that the matters he had raised in his application had never been dealt with by the Letting Agent and that was the basis of his application. He did not suggest that the Code of Practice should have retrospective effect but simply that the issues he had raised had never been addressed to this day despite his efforts to do that. He accepted that the contract for management of the property at Flat 1/1, 84 Kent Road, Glasgow had been terminated by him on 24th January 2018.

Expenses Motion

14. Mr Bryson moved for expenses and said that the application was unreasonable and based on a legal misapprehension that the Letting Agent Code of Practice was in force at the time and said that this affected the whole procedure and could have been avoided with legal advice. He said that the First Applicant knew that he had terminated the contract before the Code of practice came into force. When asked about the fact that the Tribunal had accepted the application, he said that as a lay person the Applicants were entitled to make the application and have the procedure considered. He said the application was not frivolous or vexatious and it was proper that the points regarding jurisdiction be considered when they were raised.

15. Mr Bryson sought expenses to cover the callings on 2/8/22, 17/10/22 when the hearing took place and 28/4/23 but did not seek to include the calling on 26/1/23 which he had not attended as he had been aware of the date of that calling.

16.Mr Bryson invited the Tribunal to explain the rule on expenses to the Applicant and also the definition of “ unreasonable”.

17.The Tribunal legal member set out the terms of Rule 40 of the Tribunal rules of procedure which states

Expenses

40.—(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.

The Tribunal legal member read out the definition of “ unreasonable “ from Willow Court Management Company v Alexander [2016] L and TR 34, which states :-

“ The expression [unreasonable] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case , and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioners’ judgement, but this is not unreasonable”.

18.The First Applicant Mr Eltahir indicated that he had made the applications, and these had been accepted for determination. He was not legally qualified and wanted time to consider his position in relation to expenses. There was no objection to this, and the Tribunal allowed the Applicants time to consider their response to the motion in terms of Rule 40 of the tribunal rules of procedure. Consideration of this motion was continued to the same date and time as the hearing on the related application HPC.LA.21.2548.

Applicable Law

19. Section 48 of the Housing (Scotland) Act 2014

Applications to First-tier Tribunal to enforce code of practice

(1)A tenant, a landlord or the Scottish Ministers may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.

(2) A relevant letting agent is—

(a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,

(b) in relation to an application by a landlord, a letting agent appointed by the landlord,

(c) in relation to an application by the Scottish Ministers, any letting agent.

(3) An application under subsection (1) must set out the applicant's reasons for considering that the letting agent has failed to comply with the code of practice.

(4) No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.

(5) The Tribunal may reject an application if it is not satisfied that the letting agent has been given a reasonable time in which to rectify the breach.

(6) Subject to subsection (5), the Tribunal must decide on an application under subsection (1) whether the letting agent has complied with the code of practice.

(7) Where the Tribunal decides that the letting agent has failed to comply, it must by order (a "letting agent enforcement order") require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.

(8) A letting agent enforcement order—

(a) must specify the period within which each step must be taken,

(b) may provide that the letting agent must pay to the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

(9) References in this section to—

(a) a tenant include—

(i) a person who has entered into an agreement to let a house, and

(ii) a former tenant,

(b) a landlord includes a former landlord.

Letting Agent Code of Practice (Scotland) Regulations 2016

1. These Regulations may be cited as the Letting Agent Code of Practice (Scotland) Regulations 2016 and come into force on 31st January 2018.

1.1 Letting Agent Code of Practice

2. The Letting Agent Code of Practice, which is set out in the Schedule, has effect.

Findings in Fact and Law

20. The First Applicant entered into a contract with Central Letting Services in 2008 for them to provide property management services for the property at Flat 1/1/ 84 Old Kent Road Glasgow.

21. This contract was terminated by the First Applicant with immediate effect on 24th January 2018.

22. The Letting Agent Code of Practice for Scotland(“the code”) came into force on 31st January 2018.

23. The code does not have retrospective effect and Letting Agents must comply with the code with effect from 31st January 2018.

24. As of 31st January 2018 the Respondents were not “relevant” Letting Agents in terms of section 48(2) of the Housing (Scotland) Act 2014 in relation to the property in this application as they ceased to be Letting Agents for the property before the Code came into force and therefore an application to enforce the code against them cannot competently be made.

25. Since the issues raised in this application predate the coming into force of the Letting Agent Code of Practice or relate to matters raised with the Respondents when they were no longer engaged as Letting Agents for the property, again before the code of practice came into force, then any issues raised cannot be considered to be breaches of the Letting Agent Code of Practice.

Reasons for Decision

26. The tribunal dealt with the matter of jurisdiction as a preliminary issue. It did not consider the merits of the alleged breaches of the code. It was accepted by the Applicants that all of the issues raised by them predated the coming into force of the Letting Agent Code of Practice on the 31st of January 2018 or related to matters which they raised as queries or complaints after the contract to provide Letting Agent services for the property had been terminated on the 24th of January 2018. The Property was no longer managed by the Respondents after the 24th of January 2018

and it appeared to the tribunal that any alleged failings on their part could not constitute breaches of the Letting Agent Code of Practice which at that stage was not in force.

27. Although it was not raised in submissions the tribunal considered section 48 of the Housing (Scotland) Act 2014 and noted that an application to enforce the Letting Agent code of practice must be made against a “relevant letting agent” appointed by the landlord in an application of this nature. The tribunal noted that as of 31st January 2018 when the code came into force the Respondents were no longer engaged in providing Letting Agent services for the property for the landlord. It therefore appeared that the application could therefore not be competently made in terms of the Code of Practice. Whatever the merits or otherwise of the alleged failings on the part of the Respondents when they were acting as Letting Agents before the code came into force these are not matters which can be dealt with by the tribunal which has jurisdiction only in relation to breaches of the Letting Agent code of Practice.

Decision

The Tribunal dismissed the application in terms of Rule 27 of the Tribunal rules of procedure having found that it has no jurisdiction in relation to the application in its entirety as the application cannot competently be made in terms of section 48 of the Housing (Scotland) Act 2014 and the Letting Agent Code of Practice (Scotland) Regulations 2016. The Tribunal continued consideration of a motion for expenses in terms of Rule 40 of the Tribunal rules of procedure to allow the Respondent to answer this motion and this motion will be considered at the Hearing for the related application HPC.LA.21.2548.

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.

Legal Member

Date 28.4.23