

# Housing and Property Chamber First-tier Tribunal for Scotland

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**First-tier Tribunal for Scotland (Housing and Property Chamber)**

## **Refusal of Variation and Certificate of Compliance**

Under Sections 49 and 50 of the Housing (Scotland) Act 2014

**Chamber Ref: FTS/HPC/LA/18/1720**

### **The Parties:-**

**Lucinda Willis, Flat 18, Caird House, 4 Scrymgeour Place, Dundee DD3 6TU  
("the Applicant")**

**Rent Flats Dundee Limited, (company number SC578355) having a place of  
business at 214 Blackness Road, Dundee, DD1 5PL ("the Respondents")**

Represented by Bannatyne Kirkwood France & Co, 16 Royal Exchange Square,  
Glasgow G1 3AG

### **The Tribunal comprised:-**

**David Bartos** - Chairperson  
**Helen Barclay** - Ordinary Member

### **Decision**

The Tribunal :

- (1) refuses to vary the Letting Agent Enforcement Order in respect of the Property dated 8 November 2018 as varied by the Tribunal on 9 January 2019; and
- (2) certifies that part (b) (i) of the said Letting Agent Enforcement Order has been complied with.

The decision of the Tribunal is unanimous

### **Reasons**

1. Following its decision of 9 January 2019 the only existing part of the Letting Agent Enforcement Order (“LAEO”) dated 8 November 2018 which remained unimplemented was part (b)(i) which provided as follows:

“The Tribunal requires the Respondents to:-

...  
 (b) Lodge with the Tribunal a style of Private Residential Tenancy Agreement which :

- (i) in the clause dealing with deposit omits the provisions in clause 11 of the Scottish Government Model Private Residential Tenancy Agreement where its fourth paragraph provides, “By law, the deposit . . . refundable)”, and where its sixth and seventh paragraphs provide “Where it is provided . . . due by the tenant” and replaces these provisions with provisions permitting deductions which do not go beyond the purposes of deposit permitted by section 90(3) of the Rent (Scotland) Act 1984 . . .

. . . The Tribunal orders that the non-monetary steps specified in this Order must be carried out and completed within the period of four weeks from the date of service of this Order.”

The time limit for compliance with part (b) (i) of the LAEO was varied and extended to 31 January 2019. Any right of appeal against part (b)(i) has expired.

2. Part (b) (i) of the LAEO as varied was not complied with. This failure to comply was confirmed by the decision of the Tribunal dated 4 March 2019. There has been no appeal against that decision. By e-mail of 20 March 2019 the Respondents’ solicitors forwarded to the Tribunal a further revised style of Private Residential Tenancy Agreement. This style accompanied the Respondents’ application to have the decision of 4 March 2019 reviewed and also the Respondents’ application to have the LAEO varied a second time by extending retrospectively the time for compliance. The Respondents also sought the issue of a certificate of compliance.

3. Following the Respondents' application for a review and setting aside of the decision of 4 March 2019 the Tribunal issued a Notice of Proposed Review dated 1 April 2019 to the parties. This indicated that the style supplied on 20 March remained non-compliant with the LAEO. The Tribunal's Notice was followed by a letter from the Respondents' solicitors dated 5 April and received by the Tribunal on 8 April 2019. This letter enclosed a further revised style of tenancy agreement and written representations in support of the application for review. The further revised style was copied to the Applicant for her comments but none were received by the Tribunal.
4. The application for review and setting aside was refused in a separate decision taken on the same date as the present decision. That decision is not appealable.
5. That left the Tribunal with the applications for retrospective variation of the time limit in the LAEO and for the issue of a certificate of compliance. Unlike section 21(1) of the Property Factors (Scotland) Act 2011, section 49(1)(a) of the Housing (Scotland) Act 2014 does not specify a test to be satisfied for the variation of an LAEO. In these circumstances the Tribunal took it that as for section 21(1), section 49(1)(a) of the 2014 Act gave the Tribunal a discretion to vary a letting agent enforcement order in such manner as it considers reasonable.
6. Section 51 of the Housing (Scotland) Act 2014 provides:  
“ (1) A letting agent who, without reasonable excuse, fails to comply with a letting agent enforcement order commits an offence.  
(2) A letting agent cannot be guilty of an offence under subsection (1) unless the First-tier Tribunal has decided that the letting agent has failed to comply with the order (but such a decision does not establish a presumption that the letting agent has committed an offence under subsection (1))  
(3) A letting agent who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

Whether a criminal offence was committed by the Respondents in their non-compliance with the LAEO after 31 January 2019 is something that has already taken or not taken place. The Tribunal refused the Respondents' application for a review, setting aside and re-deciding of the decision of 4 March 2019 which had found that there had been a failure to comply with the LAEO without reasonable excuse. The reasoning was set out in detail in the decision dealing with the review. However in short it was that it was not in the interests of justice that the Respondents should have a 'second bite at the cherry' and seek to re-write the history of their failure to comply.

7. That reasoning applied equally to the application for a variation. It did not appear reasonable to the Tribunal to alter retrospectively a time limit of 31 January which itself was the product of an earlier variation. No reason had been put forward for non-compliance with the time limit. All that the Respondents submitted was that as they did not intend to claim "certain deductions" from the deposit in the future it was convenient for them to use an unaltered version of the Scottish Government's Model Private Residential Tenancy. This appeared to be a challenge to the LAEO rather than related to the time limit. But if the Respondents had been dissatisfied with the original part (b) (i) of the LAEO they could have sought to appeal it. Having not done so and been given an extension for compliance it should have been plain that they required to comply with it by no later than 31 January 2019 and certainly by the decision of 4 March 2019. Yet no attempt to comply had been made in January or February 2019. Equally the possible criminal sanction should have been plain. Given the existence of the unappealed order and the potential criminal sanction the Tribunal found the failure to comply inexplicable. In these circumstances a belated compliance in April 2019 did not appear a reasonable ground for the retrospective variation of a time limit in the LAEO. Accordingly the Tribunal made the first part of the decision stated above.
8. Nevertheless a finding of non-compliance does not mean that the letting agent is left in non-compliance in perpetuity. That would be a nonsensical situation. It is possible for compliance to take place belatedly. In that

situation if the Tribunal is faced with a submission by the letting agent that there has been belated compliance the Tribunal must decide it. That might be relevant to the decision of any prosecution authority.

9. Was there belated compliance with part (b)(i) of the LAEO as submitted by the Respondents ? The Applicant did not take issue with either the Respondents' solicitors' e-mail of 20 March or letter of 5 April 2019 or any of their enclosures or anything said in those enclosures. The Tribunal was satisfied that the style enclosed with the letter of 5 April 2019 (received by the Tribunal on 8 April 2019) satisfied, albeit belatedly, part (b) (i) of the LAEO.
10. In the light of the above, the Tribunal was satisfied that part (b)(i) of the LAEO had in substance been complied with. Accordingly it made the second part of the decision stated above.

### **Appeals**

11. **Any 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.**

D Bartos

Legal Member and Chairperson

30 April 2019 \_\_\_\_\_ Date