Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Chamber Ref: FTS/HPC/LA/20/0526

Re: Property at Flat 4/1, 25 Trefoil Avenue, Glasgow, G41 3PB ("the Property")

Parties:

Mr Johar Mirza, Flat 4/1, 25 Trefoil Avenue, Glasgow, G41 3PB ("the Applicant")

Property Bureau, Melville House, 70 Drymen Road, Bearsden, G61 2RH ("the Respondent")

Tribunal Members:

Virgil Crawford (Legal Member)
Ann Moore (Ordinary Member)

Decision and Reasons

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

BACKGROUND

1. The Applicant is the tenant of the property at Flat 4/1, 25 Trefoil Avenue, Glasgow, G41 3PB. The Landlord engages the services of letting agents. The letting agents are Property Bureau, Melville House, 70 Drymen Road, Bearsden, G61 2RH;

2. On 17th February 2020 the Applicant presented an application to the Tribunal for an order seeking enforcement of The Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Code") and seeking compensation for alleged breaches of the code;

3. The application alleged breaches of two separate sections of the Code, those being Section 2, (Overarching standards of practice) and ection 5, (Management and maintenance). These alleged breaches arose as a result of two separate and distinct matters:-

    a. On 28th March 2019 the Property Bureau forwarded an email to an electrician requesting him to arrange access to the property to carry out testing of electrical equipment therein. This email stated
    "be careful what you say to this tenant as he is trouble."
    It is alleged that this breaches paragraphs 17, 19 and 21 of the Code;
    b. On 27th November 2019 an employee of the Property Bureau attended at the property to carry out a routine visit. No-one was within the

property. The Applicant had not been given at least 24 hours notice of the intended visit. It is alleged that this breached paragraphs 17, 82 and 83 of the code.

4. There had been a previous application to the Tribunal seeking an Enforcement Order as a result of separate alleged breaches of the Code by the Respondents. This previous application did not proceed to a hearing and was settled "extra judicially";

THE HEARING

5. The Hearing was conducted by teleconference. The Applicant participated in the hearing. The Respondents were represented by their Solicitor, Mr I Burke of Messrs Bannerman Burke, Solicitors, Galashiels;

6. In relation to e mail forwarded to an electrician containing the words
"be careful what you say to this tenant as he is trouble",
the Applicant asserted that this contravened paragraphs 17, 19 and 21 of the code. These paragraphs provide as follows:-

> ***SECTION 2Section 2: Overarching standards of practice***
>
> ***17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).***
>
> ***19. You must not provide information that is deliberately or negligently misleading or false.***
>
> ***21. You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way.***

7. The Applicant asserted that the email breached the Code as it was clear that the Property Bureau were not being "honest, open, transparent and fair ..." when sending the email, (paragraph 17), that it amounted to the provision of information which was "deliberately or negligently misleading or false" (paragraph 19) and that it meant that they were not using reasonable care and skill (para 21);

8. For the Respondent, Mr Burke submitted that, while the wording of the email was clearly inappropriate, it did not constitute a breach of the Code;

9. The Applicant had suggested that this email could "colour" the opinion of the electrician in relation to his examination of the electrical items, that it could "undermine" his work and that it could affect "honest reporting"

of his findings. He suggested also that, given that this electrician clearly did work for this letting agent, the possibility of him losing jobs or work in future would be greater if he was to provide an adverse report following any inspection;

10. Mr Burke was quite straight forward in relation to those comments. He submitted that it was disrespectful, to say the least, to suggest that a professional tradesman would compromise his own integrity and the quality or terms of his report because of the terms of this email;

11. The Applicant was unable to provide any information or evidence to support what was being suggested by him. He did not accept a suggestion that the comments he was making about the tradesman were disparaging of the tradesman and as bad as, if not worse, than the comment in the email of which he was complaining;

12. In relation to the attendance of an employee of the Property Bureau to carry out a routine visit without notice having been given, the Applicant asserted that this contravened paragraphs 17, 82 and 83 of the code. Paragraphs 82 and 83 provide as follows:-

> ***SECTION 5 Management and maintenance***
>
> ***Property access and visits***
>
> ***82. You must give the tenant reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours' notice must be given unless the situation is urgent or you consider that giving such notice would defeat the object of the entry. You must ensure the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant.***
>
> ***83. If the tenant refuses access, you, the landlord or any third party have no right to enter the property using retained keys without a warrant.***

13. The Tribunal asked the Applicant to address it in relation to Paragraph 83 in particular. Was there any information to suggest that anyone had entered the property? The Applicant stated that he believed that someone had entered the property although could provide no information nor evidence to support that suggestion. When the Tribunal enquired as to whether or not that suggestion was nothing more than speculation, he denied that and stated that it was the "only reasonable inference to draw";

14. In relation to this part of the application, Mr Burke accepted on behalf of the Respondents that no notice had been given of the intended visit and, as such, Paragraph 82 of the Code had been breached. He considered that this was a minor or technical breach. It arose due to the fact that this property had not been removed from a list of properties to be inspected in that particular area;

15. In relation to the alleged breach of paragraph 83, this was not accepted. A breach of paragraph 83 requires entry to the property. No-one attended within or entered the property. There was no attempt at entry made. There was no evidence to suggest that any entry had been effected;

16. Separately, Mr Burke stated that this particular matter had already been the subject of discussions and negotiations which led to settlement of the previous application by the Applicant and, as a result, was of the view that this matter should no longer be before the Tribunal. In relation to that particular submission, the Applicant disputed that. For reasons stated below, the Tribunal did not need to consider this particular aspect of the discussion further;

17. While the application referred to paragraph 17 of the Code in relation to this particular matter, this was not advanced in submissions at the hearing;

18. On the morning of the Tribunal the Applicant forwarded copies of two reported decisions to the Tribunal, those being as follows:-

    a. Jenson .v. Fappiano
    b. Mack .v. Glasgow City Council

    In relation to Jenson, the Applicant referred to this to draw support for his claim for compensation and the level of it by referring to paragraphs 13 and 18 of the decision. In relation to Paragraph 13, the Sheriff issuing the decision made the following comment:-

    "In this case I accept the Respondent is an "amateur" Landlord in the sense that he is not a seasoned or professional Landlord."

    The Applicant stated that the Property Bureau were clearly professional Letting Agents and, therefore, this Judgement would tend to indicate that they should be treated harshly for breaching the code;

19. In relation to Paragraph 18, the Sheriff in the case stated:-

    "Turning then to sanction, I do not considered this case to be one, such as repeated and flagrant non participation in, or non-compliance with the regulations by a large professional commercial letting

undertaking which would warrant severe sanction at the top end of the scale ….”

Again, the Applicant suggested that this part of the Judgement supported his position that the Tribunal was dealing with a professional commercial letting organisation and, referring to the previous application, suggested that there had been repeated failures to comply. The Tribunal pointed out, however, that the previous application was not before it, the previous application had been settled between the parties and, as such, there was no written decision in relation to it and, in the circumstances, the Tribunal had no information before it to suggest that there had been repeated breaches of the code by the Respondents;

20. The Tribunal, while offering the Applicant an opportunity to make any further comment or submissions he wished in relation to the case, suggested, and ultimately concluded, that the case of Jenson .v. Fappiano was no assistance to it. That case related to entirely different regulations. The case related to a breach of the tenancy deposit regulations. Those regulations were introduced to address a specific mischief relating to landlords failing to protect deposits and, by their nature, covered landlords of all descriptions, from large professional letting agents and commercial enterprises to inexperienced landlords. By definition, any application seeking an enforcement order in relation to a breach of the Code requires to be taken against a professional organisation. The Jenson case was of no assistance to the Tribunal in any decision it required to make in this particular case;

21. In relation to the case of Mack .v. Glasgow City Council, the Applicant referred to this case as support for the proposition that compensation could be awarded for inconvenience. Mr Burke confirmed to the Tribunal that, as a general legal proposition, he accepted that compensation could be awarded for inconvenience. In this particular case, however, he submitted that there was no inconvenience which would merit compensation being awarded. Given that the legal principle was a matter of agreement, no further consideration required to be given to this particular case;

22. The Applicant struggled to identify any inconvenience, other than the time taken to make this application to the Tribunal and the delay thereafter in the matter being concluded. It was accepted that a significant part of the delay was as a result of the coronavirus pandemic and the inability of the Tribunal to deal with cases for a number of months as a result;

23. Mr Burke disputed that there was any inconvenience. The presentation of an application to the Tribunal did not amount to inconvenience. It was a step taken by the Applicant to seek an order for a perceived legal wrong. It is not a matter which could be classed as inconvenience meriting an award of compensation;

FINDINGS IN FACT

24. The Applicant is the tenant of the property. The Respondents are letting agents;

25. On 28th March 2019 the Property Bureau forwarded an email to an electrician requesting him to arrange access to the property to carry out testing of electrical equipment therein. This email stated
"be careful what you say to this tenant as he is trouble";

26. On 27th November 2019 an employee of the Property Bureau attended at the property to carry out a routine visit. No-one was within the property. The Applicant had not been given at least 24 hours notice of the intended visit;

DECISION AND REASONS

27. The decision of the Tribunal was unanimous.

28. The Tribunal decided that there was no breach of Paragraphs 17, 19, 21 nor 83 of the code. The Tribunal decided that there was a breach of Paragraph 82 of the Code;

29. The Tribunal made no award of compensation, The Tribunal decided that, while there had been a breach of Paragraph 82, there was no loss, damage nor, indeed, any inconvenience to the Applicant and, as such, it was inappropriate to make any award of compensation;

30. The Tribunal, as is required of it, made an Enforcement Order as hereinafter detailed;

31. In relation to the email forwarded to the electrician containing the phrase "be careful what you say to this tenant as he is trouble" the Tribunal did not consider that this breached Paragraph 17 of the code. Paragraph 17 of the code requires letting agents to be "honest, open, transparent and fair in your dealings with landlords and tenants ….". This email was not forwarded to the tenant. It was forwarded to a third party, that being a professional tradesman being engaged by the Respondents. Given that it did not amount to a dealing with the tenant, there can have been no breach of paragraph 17;

32. There was no breach of paragraph 19. A breach of paragraph 19 requires there to have been information provided "that is deliberately or negligently misleading or false." While the comment within the email was, to be charitable to the Respondents, inappropriate, the Tribunal was

unable to conclude that it was deliberately or negligently misleading or false. It contained an expression of opinion in relation to the character of the Applicant. While the Applicant was clearly unhappy at being referred to as "trouble" the Tribunal was unable to conclude that this was a comment which was struck at by paragraph 19 of the code.

33. The Tribunal was unable to accept the submissions of the Applicant that this comment could affect the decisions or report of the electrician instructed.

34. In relation to paragraph 21, to comply with that paragraph, the letting agents "must carry out the services you provide to Landlords or tenants using reasonable care and skill and in a timely way". The Tribunal was unable to find any information or evidence to suggest that there had been any breach of that paragraph. The Tribunal was unable to conclude that the speculation on the part of the Applicant that the email forwarded to the electrician would "colour", "undermine" or affect the "honest reporting" of the electrician was merited;

35. In relation to Paragraph 82, written submissions on behalf of the Respondents accepted that there had been a breach of this paragraph for the reasons stated. In the circumstances, the Tribunal accepted and decided that there was a breach of this paragraph;

36. Paragraph 83 is breached if entry is obtained to the property without permission and without a warrant. There was no information or evidence before the Tribunal to suggest that this paragraph had been breached. The Tribunal could not accept speculation to this effect on the part of the Applicant. The Tribunal did not accept that "the only reasonable inference to draw" was that entry to the property had been effected;

37. Having decided that there was a breach of the code, the Tribunal required to consider whether or not an award of compensation should be made to the Applicant. The Tribunal had little difficulty in deciding that it was not appropriate to make any award of compensation. The only breach of the code which was established was in relation to Paragraph 82 which arose because no advance notice had been given of an intention to carry out a routine inspection at the property. The Applicant was not home when the agent attended. The Applicant, therefor, cannot have been inconvenienced by something he was entirely unaware of at the time it was happening. The Applicant only became aware of the matter as a result of an email being forwarded pointing out that someone had attended, had been unable to gain access and seeking to arrange an alternative date and time for the inspection. That cannot amount to inconvenience. That, indeed, is exactly what the Applicant had been seeking. His complaint was that there had been no advance notice or request for an inspection.

38. The Tribunal was unable to accept that making an application to the Tribunal and the delay in it being dealt with, a large part of which arose due to the coronavirus lockdown, amounted to inconvenience. The decision to make an application to the Tribunal was one for the Applicant. It amounted to him taking steps to seek an order in enforcement of legal rights. That is not an inconvenience. It is a step taken to enforce legal rights. To award compensation for inconvenience arising from the application to the Tribunal would be akin to making an award of expenses which can only be done in exceptional circumstances;

39. The Tribunal considered that the Breach of Paragraph 82 was minor in its nature. That being said, in terms of paragraph 9 of the code, if the Tribunal finds a letting agent has failed to comply with the code, it must issue an enforcement order setting out the steps the Letting agent must take to rectify the problem and by when. In the circumstances, an enforcement order is made as detailed below.

ENFORCEMENT ORDER

The Tribunal makes an Enforcement Order requiring the Respondents to confirm to the Tribunal that its procedures for arranging inspection of properties have been reviewed and updated to ensure that no member of the Respondents, nor any agent acting on their behalf, will attend at any property without at least 24 hours notice of the intended attendance at the property having been given to the tenant. The Respondent is required to confirm this to the Tribunal no later than 12 noon on Friday 30th October 2020.

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.

25 September 2020

_____ _____

Legal Member/Chair **Date**