



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48 of the Housing (Scotland) Act 2014 and the First Tier Tribunal for Scotland Procedure Regulations 2017 Rule 26

Chamber Ref: FTS/HPC/LA/18/2909

Parties:

Mr Slawomir Radon and Mrs Iwona Radon 18 Cuthbert Place Kilmarnock “the Applicants”)

Murphy Scoular 22/24 John Finnie Street Kilmarnock (the letting agent and “the Respondent”)

Tribunal Members:

Jan Todd, Chairing and Legal Member and Elizabeth Williams, Ordinary Member

Background

This was an application by the Applicants for compensation for various alleged breaches of the Letting Agent Code of Practice, all in terms of Section 48 of the Housing Scotland Act 2014.

Section 48 of the Act states (so far as relevant to this application)

“Applications to the First Tier Tribunal to enforce the 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 ...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

(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 include a former landlord

The Applicants by lease dated and commencing on 26th August 2016 occupy the subjects of let namely 18 Cuthbert Place Kilmarnock. The lease continues by virtue of tacit relocation. A copy of the lease accompanied the application.

The Applicant complains of alleged breaches of the following paragraphs of the Code of Practice namely paragraphs 83,84,107,108,110 and 111. In addition the Applicants are seeking compensation in the sum of £36000 based on 6 alleged breaches of the Code at £6000 each.

The Applicants had sent a Letting Agent pre notification letter to the Respondents setting out their complaints on 24th September 2018. The Respondents replied in detail to that letter by letter of 3rd October 2018.

The Applicants then lodged their application alleging 6 breaches of the Code on 27th October 2018, together with a copy of the pre notification letter, copy of the Respondents response, copies of letters from the Respondents advising of a gas safety check visit dated 2nd March, 29th June and 24th July 2018.

THE HEARING

The following parties were present and gave oral evidence at the hearing namely:-

1. Mr Slawomir and Mrs Iwona Radon, the Applicants
2. Ms Laurie Weir and Mr Brian Murphy – from the Respondents
3. Ms Catriona Stuart – the Respondent's solicitor from Clyde & Co

There was also an interpreter Mr Tomasz Grudzien who provided interpretation services for the Applicants.

The following was discussed during the hearing:-

1. It was confirmed that by letters dated 2nd March and 29th June the Respondent advised the Applicants that the annual gas safety check would be carried out on 9th March and 3rd July respectively. The gas safety check was not carried out on those dates despite prior notice having been given.
2. It was not agreed by the respective parties why the gas safety engineer did not gain access. The Applicants submit they stayed in and waited but no one turned up, the Respondent through Ms Weir submitted that the gas safety engineer was not able to get access as no one was in. The Applicants agreed though that they did not make any complaint regarding the failure of the gas safety engineer to attend on either 9th March or 3rd July.
3. A third letter was sent on 24th July 2018 stating that the gas safety engineer would attend on 30th July to carry out the Annual Gas Safety Check. Both parties agreed that there was no visit on 30th July but that on 2nd August the gas safety engineer did attend and enter the house using keys supplied by the Respondents when the applicants were not in the property.
4. It is not clear and was not agreed between the parties exactly when this visit took place although it was agreed it happened in the morning of 2nd August. The Applicants submit it happened after they had visited the Respondent's office to enquire why there was no visit on the scheduled day namely the 30th July, and that they then returned to the office around 45 minutes later to complain someone had been to their home. The Respondent submitted that the Applicants only attended their office once in the morning of 2nd August and stated at that visit that when they had returned home from shopping they had found an internal door open and realised the gas safety engineer had attended without prior notice of a visit on that day. The Tribunal felt both witnesses were credible and took the view that it was not pertinent to the complaint to find which version was correct. On balance however the Tribunal found the Respondent's explanation was more likely. The main thrust of the complaint was that the visit had taken place at a time the Applicants had not been advised of and when they were not present and both parties agreed this had happened.
5. Both parties agreed that the receptionist at the Respondent's office advised on the morning of 2nd of August that the Applicants should return at 3pm that afternoon to speak to the manager Ms Weir.
6. Ms Weir phoned and spoke to the gas engineer prior to 3pm to find out what happened and why he had visited on 2nd August and not 30th July. Ms Weir

advised the engineer had admitted he had omitted to attend on 30th July and thought as it was a safety check he should carry it out as quickly as possible and did so using the keys he was given. He then returned the keys on 2nd August.

7. A meeting took place at around 3pm on 2nd August between Ms Weir and the Applicants where the Applicants explained how they felt about the intrusion into their house and how distressed they felt. Ms Weir confirmed that the meeting became quite heated and she had to ask Mr Radon in particular to calm down. Mr Radon admitted he was upset and angry but denied being intimidating. It was agreed that both Applicants were upset and distressed at the gas engineer entering their home when they were not in.
8. The Applicants have sent a letter dated 15th August prohibiting the Respondents from allowing any third party to access their home without their prior consent
9. It is agreed by both parties that a further routine property check was arranged to take place on 15th October and intimated by letter dated 28th September and that it took place.
10. It is agreed by both parties that a gas boiler service also took place on 10th September and again this was intimated by letter dated 4th September beforehand.
11. The Respondent was asked why they did not provide the Applicant with their letting agent number, and Ms Weir explained that in her response to the alleged breaches raised by the Applicants she had responded to that question with the landlord registration number by mistake. She confirmed and Mr Murphy agreed that in fact the Respondent did not have their letting agent number yet as they had applied shortly before the deadline of 30th October 2018 and understood that the application was still being processed so the number was not yet available.
12. With regard to the question of whether the Respondent had advised the Applicants as tenants of the existence of the Letting Agent Code of Practice Ms Weir advised that a copy of the Code of Practice was sitting on the coffee table in their office but admitted that they had not advised tenants directly of the existence of the Code although when asked by the Applicant's for a copy she said they had sent it in the letter of 3rd October.

FINDINGS IN FACT

1. The Respondents are relevant letting agents for the property the Applicants rent.
2. By letters dated 2nd March, 29th June and 24th July the Respondents advised the Applicant that a gas safety check would be carried out on 9th March, 3rd July and 30th July.
3. The gas safety check was not carried out on those dates despite notice having been given.
4. The Applicants did not complain about the alleged lack of visit from a gas safety engineer on 9th March or 3rd July .
5. In their letter of 24th July the Respondents added the following to their letter:- that, due to several attempts having been made "to carry out the required safety check if you do not allow access at the time and date stated please be advised that he (the engineer) will gain entry with keys issued by our office."

6. On 2nd August the gas safety engineer did attend and enter the house using keys supplied by the Respondents when the applicants were not in the property.
7. The Applicants attended the Respondents office on the morning of 2nd August to complain about the fact the gas safety engineer had entered their property without prior authorisation and after missing the planned visit scheduled for 30th July.
8. The Applicants spoke to a receptionist and an appointment was arranged for the Applicants to speak to a manager at 3pm that afternoon.
9. A meeting took place between the Applicants and Ms Weir a manager with the Respondent where the issue of the unplanned visit was discussed.
10. The Applicants were upset and distressed by the unscheduled visit.
11. Further visits have taken place without issue and with due notice having been given by the Respondent, namely on 15th October for routine property check and 10th September for annual boiler service.
12. The Applicants have by letter dated 15th August 2018 confirmed that they are refusing permission for any party to access the property without their permission.
13. On 3rd October the Respondent provided a copy of the Letting Agent Code of Practice to the Applicant in response to the Applicant's letter of 24th September 2018.

Findings in Fact and Law

Section 83 states -

"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."

Section 84 states: - *You must make it clear to the tenant or occupier beforehand if a third party will visit the property unaccompanied."*

The lease for the Property states in clause 9 that "the tenant shall permit the Landlord or his agent upon giving not less than 24 hours written notice (except in emergencies when no notice will be required) to enter upon the premises for the purpose of satisfying the Landlord that the conditions of this Agreement are being properly carried out or for inspection or for effecting repairs or maintenance or for any other necessary purpose." The lease was signed by the Applicants as tenants on 26th August 2018 and the lease commenced on 26th August 2016 for 6 months and continues under tacit relocation. The Applicants had not amended this clause, and not sought to withdraw this consent until their letter of 15th August which specifically refuses access to any party unless with their consent.

The Respondent's letter of 24th July 2018 gives notice that the Gas Safety Engineer will complete the Annual Gas Safety Check on MON 30TH JULY BETWEEN 4-8PM. It goes on to state that "Due to several attempts made by our Engineer to carry out the above legislatively Required Safety Check if you do not allow access at the time and date stated above please be advised that he will Gain Entry with keys issued by our office." Ms Weir checked with the office and confirmed that the keys were released to the Gas Engineer on the Friday 27th July the working day immediately

prior to the date of the scheduled visit i.e. 30th July. They were returned by the engineer immediately after he had visited the property on 2nd August. The Tribunal carefully considered whether the letting agent had committed any breach of paragraph 83 or 84 as a result of the visit not taking place at the correct time and place. The Tribunal found that the letting agent had given prior notice of the visit but that the visit and inspection did not take place due to the fault of the gas engineer not as a result of actions or at the request of the letting agent. The tenant (Applicant here) had not at that point on 2nd August refused access, entry was gained due to the use of keys provided for the purpose duly notified to the Applicants of gaining access on 30th July. The Tribunal did not consider that the letting agent has breached either paragraph 83 or 84 of the Code because they had taken steps to ensure the Applicant was advised of the scheduled visit and advised that keys may be used to allow the visit to proceed unaccompanied. Had the Applicant's letter of 15th August been issued prior to the visit on 2nd August by the gas engineer then use of a key in the absence of the tenant would potentially have been a breach of the code but this letter and specific refusal of consent was sent after and in consequence of the Applicant's frustration at this event. It is agreed that the gas engineer used the key to enter the property on the wrong day but to hold the letting agent responsible for the gas engineer's mistake and error would be to assume strict liability on the letting agent and in the Stair Memorial Encyclopaedia volume 15/4 it is stated that the general rule is that an employer incurs no vicarious liability for wrongs committed by an independent contractor. The Tribunal considers this to be an analogous situation where it would not be appropriate to hold the Respondent as letting agent vicariously liable for the error of the contractor.

Therefore the Tribunal finds that the Respondent did not fail to comply with Section 83 or 84 of the Code.

Section 107 – *You must take all reasonable steps to ensure your letting agent registration number is included in all relevant documents and communications in line with your legal requirements under the 2014 Act*

The Respondent has explained that due to their application for registration still being processed, now and at the time this application was made, they did not have their full letting agent registration number and therefore could not provide it.

Given the foregoing the Tribunal finds that the Respondent did not fail to comply with Section 107 of the Code.

Section 108 – *You must respond to enquiries and complaints within reasonable timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as clearly as possible and to keep those making them informed if more time is required to respond.*

The Tribunal heard from both parties that by attending the office of the Respondent on the morning of 2nd August the Applicants were making a complaint about the failure of the gas safety engineer to attend on 30th July and the unexpected visit and entrance by him to their property on 2nd August. The Respondent treated it as a complaint because the Applicants were advised to come back at 3pm in the afternoon to speak to a manager. Ms Weir did speak to the Applicants and advised

the meeting was difficult and both parties agreed the Applicant especially Mrs Radon was upset. Ms Weir advised she apologised several times for the error of the gas safety engineer in attending on the wrong day. The Applicants did not interpret her response as containing any apology and did not feel their complaint was resolved as they left saying they would go to the police. Ms Weir felt she did all she could to resolve the situation although she did refer to Mr Radon's behaviour being challenging and confirmed she advised the gas safety check was for the tenant's own safety. The Tribunal considers that although the Applicants were not satisfied with the outcome of the meeting the Respondent has responded to the Complaint within a reasonable timescale offering a meeting that afternoon and after receiving the Letting Agent Code of Practice notification letter with detailed complaints dated 24th September they acknowledged it on 28th September and gave a detailed response on 3rd October. In that written response the Respondents have apologised for the mistake that was made and for any upset the contractor's error has caused and Ms Weir repeated the apology during the hearing. Given the Respondent's prompt offering of a meeting and written response including an apology in the written response, the Tribunal does not uphold that there has been a breach of this Section.

Given the foregoing the Tribunal finds that the Respondent did not fail to comply with Section 108 of the Code

Section 110 *you must make landlords and tenants aware of the Code of Conduct and give them a copy on request.*

The Respondent advised both orally and in their written representations to the Tribunal that they had provided a copy of the code of practice to the Applicants under cover of their letter of 3rd (wrongly referred to as 4th October). The Tribunal noted that however the Code expects letting agents to make tenants aware of the Code and in this instance the Respondent could only say that there was a copy lying on a coffee table in their office. The Tribunal does not agree that leaving a copy lying in the office is compliance with a duty to make tenants and landlords aware of the Code of Conduct. The Applicants advised they found the Code on the internet when they were searching for information after the 2nd August and confirmed they were not made aware of it by the Respondent.

Given the above the Tribunal finds the Respondent has failed to comply with Section 110 of the Code.

Paragraph 111 *You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening.*

There was no evidence at the hearing or in the application or pre notification letter that the Respondent had behaved in a way that was abusive or threatening or intimidating to the Applicants. The application refers to the manager not listening to arguments and being disrespectful but there was no evidence that the behaviour amounted to abuse or intimidation. Ms Weir stated that she asked Mr Radon to calm down but admitted that the meeting was able to continue and agreed that he was distressed by the events of 2nd August. This hearing was not to consider the behaviour of the Applicant but of the conduct of the Respondent and although the meeting may have been difficult, and the Respondent may have found it difficult to

communicate effectively the Tribunal did not find that there was any evidence that Ms Weir on behalf of the Respondent had acted in an abusive or intimidating way.

Given the foregoing the Tribunal finds that the Respondent did not fail to comply with Section 111 of the Code.

Compensation

The applicants had invited the Tribunal to make an order for monetary compensation for loss if a breach or several breaches of the Code were found to have occurred.

The Respondents solicitor submitted a summary of several cases showing differing amounts of solatium for distress or upset and argued that the sums sought by the Applicants were excessive.

The Tribunal has found there to be one breach of the Code namely the failure to make the tenant aware of the existence of the Code. The Act requires the Tribunal to make an order to require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.

The Tribunal considers that a letting agent enforcement order should be made requiring the Letting Agent, within 28 days of the date hereof:-

- 1. To advise all their tenants and landlords by letter addressed and sent to each landlord and tenant with whom they have dealings, of the existence of the Letting Agent Code of Practice and to advise them that if requested, a copy of the Code of Practice will be sent to any such tenant or landlord.**
- 2. To provide documentary evidence of the Respondent's compliance with the above Letting Agent Enforcement Order by sending such evidence to the office of the First Tier Tribunal (Housing and Property Chamber) by recorded delivery post.**

The Tribunal considers this appropriate to rectify the failure and that no monetary compensation is required.

In terms of Section 46 of the Tribunals (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.

J Todd

Legal Member

25/1/19

Date