

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**Statement of decision: Section 48(7) Housing (Scotland) Act 2014**

**Reference number: FTS/HPC/LA/18/3454**

### **The Parties:**

**Carlos Pimenta, 23 Roundhouse Circle, Renfrew, PA4 8FL (“the Applicant”)**

**Westcoast Lettings Ltd, 19 Main Street, Kilbrnie, Ayrshire, KA25 7BX ( the Letting Agent/ Respondents “the Respondents”)**

### **Tribunal Members:**

**Josephine Bonnar (Legal Member)**  
**John Blackwood (Ordinary Member)**

### **DECISION**

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent has failed to comply with Section 20 and 21 of Letting Agent Code of Practice (“ the Code”) as required by Section 46 of the Housing (Scotland) Act 2014 and determines that a Letting Agent Enforcement Order (“LAEO”) should be made.

The decision is unanimous .

### **Background**

1. By application dated 14 December 2019 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) for a determination that the Respondent had failed to comply with the Letting Agent Code of Practice. The Applicant stated that the Respondent had failed to comply with section 2 (16,17,18, 19, 20, 21, 22, 24, 25 and 26), Section 4 (60), Section 5 (74,76 and 77), Section 6 (98), Section 7(108) and Section 8 (118, 119, 120, 123 and 124) of the Code.

2. On 16 January 2018, a Convener on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Glasgow Tribunals Centre, Room 109, 20 York Street, Glasgow on 8 March 2019.
3. The Applicant lodged a number of documents with his application including a series of emails between the Applicant and the Respondent, copy correspondence and copies of statements from the Respondent relating to a property managed by the Respondent for the Applicant. In advance of the hearing the Applicant lodged written representations and advised the Tribunal that due to work commitments he would not attend the hearing.
4. The Tribunal issued a direction to parties requiring them to lodge additional information and documentation. In response to the direction the Applicant lodged further written representations. The Respondent lodged a number of documents namely a copy letting agency agreement between the parties dated 14 November 2016, copy Complaints Procedure, copy schedule of payments relating to the property, Rent Collection Procedure, Procedure for handling clients' money and Procedure for ending tenancy. The Respondent did not lodge written representations.
5. On 7 March 2019 Stacey Herbertson, a representative of the Respondent notified the Tribunal that she was unable to attend the hearing and understood that it would proceed in her absence.

## **The Hearing**

6. The hearing took place before the Tribunal on 8 June 2018. Neither party attended and neither were represented. No witnesses were present. The Tribunal considered the correspondence and representations from the parties and noted that neither had requested a postponement of the hearing and both had indicated that the hearing could proceed in their absence. The Tribunal determined that it would proceed to consider the application on the basis of the written representations and documents which had been lodged in terms of regulation 29 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) regulations 2017

## **Findings in fact**

- (i) The Applicant was the owner of a property at 2/1 27 Main Street, Kilbirnie ("the property") until 26 October 2018.
- (ii) The Respondent was the letting agent for the property from 14 November 2016 until 26 October 2018.

- (iii) The Respondent took instructions from a third party, Marianne Elliot, in relation to the property without the written authority of the Applicant.
- (iv) The Respondent failed to issue the Applicant with regular statements regarding the property and rental income received in relation to same.

## **Reasons for Decision**

7. The Tribunal considered the terms of the application, the documents and the two sets of written representations submitted by the Applicant. The Respondent did not lodge any written representations but did provide a number of documents, in response to a direction issued by the Tribunal, which were also considered.
8. Regulation 7 of the Letting Agent Code of Practice (Scotland) Regulations 2016 regulations states "if a landlord or tenant (including former landlord or tenant) believes that a letting agent they have let a property through or from has failed to comply with the code they must notify the letting agent of this in writing,(this includes electronic communications) so the letting agent can take action to resolve the matter". This is required before an application to the Tribunal can be made. The Tribunal notes that the Applicant notified the Respondent of his complaints by letter dated 30 October 2018, a copy of which was lodged with the application. A copy of the response dated 22 November 2018 was also lodged by the Applicant together with 2 further letters from the Applicant which appear to be directed to the Respondent, although one is undated and unaddressed and the other is dated 3 December 2018 and also unaddressed. The latter states that the Applicant was not satisfied with the response which he had received from the Respondent.
9. The Tribunal notes that the Applicant's written representations refer to a number of sections of the Code which are not stipulated in his application, namely Sections 29c and 29f, and Sections 57,54 and55.. As these do not form part of the application the Tribunal determined that it could not consider whether there had been a breach of these sections. In addition, the Tribunal notes that although the application states that there have been breaches of sections 74 and 98 there is no reference in the notification letters to the Respondent of breaches of these sections and accordingly the Tribunal determined that it could not consider whether these sections had been breached. The Applicant's written representations also state that the Respondent charged him fees and commission in relation to a new tenant. He states that he had not agreed to this and was of the view that the new owner of the property ought to have paid these charges. The Applicant does not indicate which section of the code he considers to have been breached in relation to this complaint. Furthermore, there is no intimation of it in the notification letters. The Tribunal therefore makes no finding in relation to this

issue.

10. **Failure to follow the Applicants instructions/ taking instructions from third parties. Section 2 (16, 17, 21 and 24).** The Tribunal notes that the Applicant is the former owner of the property, and that the Respondent managed that property on his behalf. On 12 October 2018 the tenant of the property vacated it and another tenant moved in shortly thereafter. The Applicant was in the process of selling the property and the sale concluded around 26 October 2018. The Applicant complains that while acting on his behalf as owner of the property, the Respondent took instructions from a third party, namely Marianne Elliot, when he had not authorised them to do so. In addition, they took instructions from the new owner of the property before the sale had been completed, rather than from him. The Tribunal notes that the Respondent concedes, in their letter of 22 November 2018, that they did take instructions from Ms Elliot who they understood to have a “business arrangement” with the Applicant. They further advised that if the Applicant had not wanted them to deal with Ms Elliot, he should have informed them. The Tribunal is not satisfied with this explanation. The letter seems to accept that the Applicant had not specifically authorised the Respondent to deal with Ms Elliot and, in the absence of such authorisation, they should not have done so. It appears from the remainder of the communications produced that the Applicant was aware of what was happening with the property and throughout October 2018 the Respondent emailed the Applicant directly with updates in relation to same. The Tribunal notes that the Applicant considers the Respondents action to amount to a breach of section 16, 17, 21 and 24. The Tribunal is not persuaded that there has been a breach of 16 or 17. Section 16 states “You must conduct your business in a way that complies with all relevant legislation”. Section 17 states “You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants)” Neither of these appear to apply to the conduct in question. Nor does 24 appear to have been breached as this relates to record keeping. The Tribunal is however satisfied that there has been a failure to comply with Section 21 which states that “You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way”. The Respondents actions by taking instructions from a third party without authority to do so demonstrates a lack of reasonable care and skill and as such they have failed to comply with this section of the Code.
11. The Tribunal is not satisfied that the Respondent took instructions from the new owner of the property before the sale had concluded. An email from the Respondent to the Applicant dated 23 October 2018 states that the Respondent had “tied in with new owner come Friday I believe and she is more than happy with the tenancy in place and will forward a copy of paperwork on to her, when its officially in place as of Friday”. The Tribunal is not persuaded that this establishes that the Respondent was acting on the instructions of the new owner in relation to the letting of the property. It merely confirms that the prospective owner had been advised that the property was let. The Tribunal also notes that a great many emails were exchanged between the parties throughout the month of October 2108 which clearly

demonstrate that the Respondents were continuing to take instructions from the Applicant regarding property. No breach of the Code is therefore established.

12. **Failure to provide the Applicant with information about the new tenant/ references for the new tenant/ copy of the new tenancy agreement. Section 2 (18, 19, 24 and 25).** The Applicant states that the Respondent failed to send him the tenancy agreement for the tenant who moved in to the property around 15 October 2018 and did not give him copies of the tenants' references. In their letter of 22 November 2018 the Respondent refers to the terms of the management agreement between the parties which states that the Respondent will provide the following services "Advertising as necessary, selecting tenants, arranging/carrying out viewings, obtaining references, dealing with negotiations" and "Preparing and signing as agent for the owner a suitable tenancy agreement in accordance with current law". The Applicant does not dispute the terms of the agreement in his written representations. It therefore appears that the Respondent was acting within the terms of the agreement in relation to checking references and re-letting the property. Furthermore, no evidence has been produced by the Applicant that he asked for copies of the references. There are produced a number of emails between 16 and 25 October 2018 relating to the tenancy contract. The Applicant states that he did not receive a copy and the Respondent insists that it was sent. In the absence of any additional evidence on this issue the Tribunal concludes that it is not possible to determine whether the document was or was not sent. As the Applicant sold the property only a few days after the new tenant moved in, and therefore ceased to be the owner and landlord of the property, it is hard to see what the implications of not receiving the agreement could have been and the Applicant does not address this issue. The Tribunal is satisfied that no breach of the code has been established in relation to this complaint.
13. **Failure to pay rent due timeously/withholding rent and failure to pay rent still owed. Section 8 (118,119,120,123 and 124).** In his application and written representations the Applicant states that the Respondent unilaterally changed the date upon which he would receive rent paid by the tenant of the property, that a payment of £172 was due on 1 November but not paid until 10 December 2018 and that he is still owed rent from the former tenant for the period 9 to 14 October 2018. The Tribunal notes that the Respondent deals with the issue of the payment dates in its letter of 22 November 2018, explaining that they could not pay the Applicant until funds were received from the Council. It appears that this is a reference to Housing Benefit payments. The Tribunal notes that the Applicant produces no evidence which contradicts this reasonable explanation and is satisfied that no breach of the code is established.
14. From the information available the Tribunal is unable to establish the reason for the alleged delay in the final payment of £172 being received by the Applicant. The Respondent states in correspondence that it was paid on 1 November 2018 by bank transfer. In any event the Applicant confirms that the payment was received a few weeks later. The Tribunal is not satisfied that

the Applicant has established that the payment was deliberately withheld or delayed and accordingly no breach of the Code is established.

15. The Tribunal considered the Applicant's claim that he is still owed rent for the period 9 to 14 October 2018. This is not specifically mentioned by the Applicant in his correspondence to the Respondent although he does refer to a "discrepancy" in the second undated and unaddressed letter. It does not therefore appear that there has been proper notification of this issue to the Respondent. In any event the Tribunal notes that a gap between one tenancy ending and another beginning might well explain the discrepancy, if indeed a discrepancy exists. Furthermore, no evidence has been produced that the Respondent failed to pay to the Applicant rent actually received from either tenant and accordingly no breach of the code is established with regard to this complaint.
16. **Failure to issue regular statements. Section 2(20)** The Applicant states that he did not receive regular statements from the Respondent. In the response letter the Respondent apologises for this omission stating that they would have provided these statements had he requested them. However, the Tribunal notes that both the management agreement between the parties and the Respondent's rent collection procedure indicate that monthly statements will be issued. Section 2(20) of the Code states "You must apply your policies and procedures consistently and reasonably". The Respondent ought to have issued regular statements to the Applicant and their failure to do so amounts to a breach of this section of the Code.
17. **Discrimination. Section 2(22).** The Applicant states that the Respondents discriminated against him, as a non-UK national. The Applicant does not explain how he was discriminated against and no evidence is produced in support of this claim. The Tribunal notes that the Applicant states that he has difficulty with verbal and written communication. However, the emails and letters produced indicate that he was able to communicate with the Respondent and the written representations lodged clearly articulate his complaints against the Respondent. In the absence of any evidence in support of this claim, no breach of the code is established.
18. **Failure to follow the complaints procedure. Section 2 (20), (26) and 7(108).** The Applicant states that the Respondent failed to respond to his complaint within the timescales set out in their Complaints Procedure and that their handling of the complaint was in breach of the code. Section 2(26) states "You must respond to enquiries and complaints within reasonable timescales". Section 108 states "You must respond to enquiries and complaints within reasonable timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and fully as possible and to keep those making them informed if you need more time to respond" Section 2(20) states that "You must apply your policies and procedures consistently and reasonably". In terms of the Complaints Procedure provided by the Respondent, complaints are to be acknowledged within 3 working days with a full response within 15 working days. The initial complaint letter from the Applicant is dated 30 October 2018. The acknowledgement letter from the Respondent is dated 6

November 2018 and advises that the Applicant's letter was received on 6 November 2018. The full response to the complaint letter is dated 22 November 2018, 16 days but 12 working days after it was received. There are 2 further complaint letters produced by the Applicant – one undated and the other dated 3 December 2018. Neither is addressed to anyone. No evidence is produced that these letters were sent to or received by the Respondent. In the absence of such evidence the Tribunal is not satisfied that they were received. The Tribunal is satisfied that the letter of complaint which was received by the Respondent was dealt with in accordance with the Respondent's complaints procedure and that the response was issued within a reasonable timescale in compliance with sections 26 and 108 of the Code. Accordingly, no breach of the Code is established in relation to this matter

19. **Failure to handle private information sensitively and in line with legal requirements.** Sections 2(25) and 4(60). The Applicant states that the Respondent breached these sections by discussing tenancy related matters with a third party, Marianne Elliot, and the new owner of the property. The Tribunal notes that the Respondent concedes that they had updated Ms Elliot about the tenancy because she had been in touch with them on a regular basis. In addition, an email has been produced which confirms that the Respondent had been in contact with the new owner of the property. However, none of the documents produced establish that the Respondent disclosed the Applicant's personal data or sensitive personal data to either of these parties. In the absence of such evidence the Tribunal is not satisfied that a breach of these sections of the code has been established.
20. The Tribunal is satisfied that the Respondent has breached Section 2(21) of the Code by taking instructions about the property from a third party without the Applicant's authority (Paragraph 10). The Tribunal is also satisfied that they breached Section 2(20) by failing to issue regular statements to the Applicant, as required by both the management agreement between the parties and the Respondents procedures (paragraph 16 above). No other breaches of the Code have been established by the Applicant.
21. The Tribunal notes that the Applicant no longer owns the property. The breach of section 2 (21) does not appear to have caused any material detriment to the Applicant, indeed he was unaware of the situation until the Respondent advised him that they had been in contact with Ms Elliot. The Tribunal was not provided with any information about Ms Elliot and her connection to the Applicant, but the Tribunal is satisfied that the Respondent did believe that there was a connection and that they could discuss the property with her. With regard to the breach of 2(20) the Tribunal notes that the Applicant did not take issue with the Respondent's failure to provide him with regular statements until October 2018. When he did so he was provided with a number of these statements although he indicates that some are missing. The Tribunal is not persuaded that any material detriment resulted from this breach, although there may have been a degree of inconvenience. Lastly, the Tribunal notes that the Applicant states that he has been caused stress and anxiety but no details of this or evidence of same has been provided. The Tribunal concludes that no award of compensation is

appropriate but that a LAEO should be issued requiring the Respondent to review its procedures and carry out staff training in relation to its policies and procedures and the Code of Conduct.

## **Appeals**

**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.**

Josephine Bonnar, Legal Member  
18 March 2019