Statement of Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland on an Application made under Section 48 of the Housing (Scotland) Act 2014

Property: Flat 3, 5 Horne Terrace, Edinburgh and 1F2, 24 Brunton Terrace, Edinburgh, EH7 5EQ and 2, 94 South Bridge, Edinburgh, EH1 1HN ("the Property")

Chamber Reference: FTS/HPC/LA/20/0697

Parties:

Sam Ensaff, 20 Mountcastle Terrace, Edinburgh, EH8 7SQ ("the Applicant")

and

Albany Lettings, 168 Bruntsfield Place, Edinburgh, EH10 4ER ("the Respondent")

Tribunal Members:

Fiona Watson (Legal Member/Chairperson) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), having made such enquiries as it saw fit for the purposes of determining the application, determined that the Respondents had failed to comply with the Letting Agent Code of Practice.

Background

1. By application dated 27 February 2020, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland under Section 48 of the Housing (Scotland) Act 2014 ("the Act") for a determination that the Respondents had failed to comply with the Letting Agent Code of Practice ("the Code of Practice") as set out in the Letting Agent Code of Practice

(Scotland) Regulations 2016, as amended.

2. The application stated that the Applicant considered that the Respondent had failed to comply with their duties under Paragraphs 21, 27, 29(d), 74, 80, 89, 90 and 94 of the Code of Practice.

3. A Hearing took place by tele-conference on 7 October 2020. The Applicant was personally present and represented himself. The Respondent was represented by an employee, Jamie More.

4. The Tribunal dealt with each individual section of the Code which the Applicant alleged had been breached in turn. There were five main areas of concern for the Applicant and the various parts of the code were applicable to many of the same areas. For the purposes of this written decision, the parties' submissions in relation to the five main issues shall be narrated first, and then consideration of each of the parts of the code in relation thereto will be dealt with thereafter.

- Water Ingress at Horne Terrace

5. The Applicant submitted that there had been an issue with water ingress into the property at Horne Terrace. The tenant reported an issue of damp in a cupboard and the Applicant was made aware of this on 18 October 2019. He was abroad at the time. The Respondent told him that they had visited the property and there was considerable damp. He had never experienced any damp in the property and had owned it for some 15 years. He had to regularly chase the Respondents for reports and progress. The Applicant submitted that the Respondent had obtained two specialist reports – from Aegis and Valentines (copies of each were lodged with the Tribunal). Both reports identified the issue of water ingress. The Applicant asked the Respondent to identify where the water was coming from as referenced in the report but they did not follow up on his instructions. He returned to the UK in December and asked to visit the property himself. He did so with Mr More on 13 December 2019. When he attended, he could hear water running when he was in the cupboard, and when he spoke to a neighbour next door

he identified that their bathroom backed on to the cupboard, and there may be a leak coming from next door. The Respondent told him that they would speak to the letting agents for that neighbouring property, DJ Alexander. He emailed the agents on 20 December for an update and was told that they would diarise to chase DJ Alexander on 3 January 2020. The tenant vacated the property on 21 January 2020 and the Applicant arranged for a plumber to attend. He identified that there was a leak from next door. He could hear water running in the cupboard and the tenant had remarked that this noise sounded different to previously. He had managed to rectify the issue in two days, when the issue had been ongoing on for around 3 months without the Respondent being able to sort matters out.

6. The Respondent submitted that when the issue was first reported to them they inspected the property and saw puddles of water on the floor in the cupboard below a pipe which showed signs of condensation. They arranged for a repair to be carried out to that pipe as they considered that this may be the source of the issue. Thereafter, they found that the problem wasn't getting better and identified that they should obtain specialist reports to ascertain the issue and the steps needed to rectify same. They instructed the reports from Aegis and Valentines. The Aegis report was dated 11 November 2019. The Valentines report was carried out following inspection on 16 December 2019.They had sent the reports to the Applicant to seek his instructions on what works he wished to instruct. He was kept updated regularly. They could not instruct any works without his instruction. When they visited the property with the Applicant in December 2019, Mr More suggested to the Applicant that he get in contact with DJ Alexander to ascertain if they'd carried out any works to the neighbouring property recently which may have caused the issue. Mr More did so and DJ Alexander advised no works had been recently done. Mr More refuted that he said that he would diarise to chase DJ Alexander on 3 January 2020 and instead submitted that the reference to this was in relation to diarising to issue the tenant with notice to quit on 3 January 2020.

7. Mr More considered that they had done enough to allow the Applicant to make an informed decision of what works needed to be done. They took

reasonable steps to resolve the issue of the pipe which was suffering from condensation. This was the first obvious step to rectify the issue and it was reasonable for them to assume that this may be the cause in the first instance. It was thereafter when the tenant said the issue was not getting any better that they instructed Aegis to attend and report. This report was sent to the Applicant for instruction and he was advised that the works required were likely to be significant. There were also other areas of concern in the property. For the long term betterment of the property they encouraged him to consider allowing the tenant to move out so that fundamental works could be carried out to the property whilst vacant. Thereafter they obtained the Valentines report for a comparison, on instruction of the Applicant and for the purposes of a potential insurance claim. Their recommendations for extensive works were similar to Aegis. Mr More had heard some water running when he was in the cupboard, but did not consider this to be unusual in a flat within a tenement as there were a number of pipes running through the building which could be heard at any time.

- Bi-Fold Door at Horne Terrace

8. The Applicant submitted that he had paid £455 for a bi-fold door to be installed in 2016. Upon reading the Aegis report, he noticed that it stated that the bi-fold door for the shower cubicle was not in situ. He had to email the agents to ask what this was referring to, and they told him that it had been broken, could not be replaced and had been disposed of and they had put up a shower curtain instead. He submitted that they had failed to inform him of this. The agents could have contacted Scotia who supplied the door to see if they could supply the necessary part but they failed to do so.

9. The Respondent submitted that because of the uniqueness of the design of the door, a repair was not possible as the necessary part was not available. Something had to be done in the short term so they put up a shower curtain. They had their handyman attend to see if he could fix the door. He reported he was unable to, but instead of leaving the door in the property he had disposed of it, which he shouldn't have done. He confirmed that Scotia had not been contacted.

- South bridge flat - end of tenancy

10. The Applicant submitted that the tenants had vacated the property on 7 February 2020. The property was left in a poor state and he asked the Respondents when it had last been inspected. There was a smoke detector missing, damage to the wall, and white goods were damaged (including a fridge full of mould which had not been used during the tenancy because the tenant had his own, and had to be disposed of). The Applicant asked the Respondent to put together a proposal to submit to the tenancy deposit scheme for the deposit to be reclaimed. He chased this on 4, 9, 21 and 25 February and never received any response. Thereafter, on 19 March he was advised that the deposit reclaim had been submitted (without his approval or knowledge). The sum of £614 from the deposit held of £840 was awarded back to the landlord by the tenancy deposit scheme.

11. The Respondent submitted that the tenant had left the property in poor condition, and it required a lot of work to settle the tenant's deposit thereafter. The Respondent submitted a claim to the deposit scheme for recovery of costs. He considered the sum received had been a good result. There was no record of if, or when, any inspections had been carried out.

- Keys to properties

12. The Applicant moved his property portfolio to a different agent in February 2020. It was thereafter discovered that there were three sets of keys missing and which the Respondent could not trace, nor find any record of whether they ever had them, or if they did, if they had been handed out to a contractor or simply lost. The cost of having copies cut (£35.50) was refunded to the Applicant by the Respondent.

13. The Respondent admitted that three sets of keys had been lost. The cost of

having these cut was refunded to the Applicant and no loss was suffered by him.

- Saniflo system at Brunton Terrace

14. The Applicant submitted that on the recommendation of the Respondent, he agreed for a Saniflo system to be installed in October 2018 at a cost of £170. In August 2019 a tenant reported a problem with the system. This was still under warranty and he asked the Respondent to arrange for a repair under the terms of the warranty. They had a plumber attend, who removed it but they never arranged for it to be re-instated and said the tenant was happy. He then had to pay his new agents the cost for a new Saniflo system to be installed in February 2020 when the tenant requested it. The Respondent had told him that they had tried to track down the plumber who removed the system but they had been unable to do so and that as they no longer acted for him, they could take no further action. He did not believe that they had done anything. They did not update him at all to tell him of the problems they were having with being unable to contact the plumber.

15. The Respondent submitted that they had indeed instructed a plumber to rectify the issue with the Saniflo. He had attended at the property and removed same. He then did not return to the property, nor did he return any phone calls, emails or text messages they sent him to try and resolve the issue. They made all reasonable efforts to track down the plumber and have the Saniflo system returned but they were unable to do so due to the actions of the plumber. The Applicant moved management of the property over to another agency and they had passed all details they had for the plumber to them to take forward on the Applicant's behalf.

Findings of fact

16. The Tribunal makes the following findings of fact:

(i) The Respondents are letting agents who were formerly appointed by the Applicant as Landlord of the Property to manage the letting

of the Property on their behalf. Accordingly, their work falls within the definition of letting agency work in Section 61(1) of the Act and they are subject to the requirement to comply with the Letting Agent Code of Practice which came into force on 31 January 2018.

(ii) On 27 February 2020, the Applicant notified the Respondents of hisr belief that they had failed to comply with the Code of Practice, as required by Section 48(4) of the Act.

(iii) The Respondents were in breach of sections 21, 27, 74 and 80 of the Letting Agent Code of Practice.

Reasons for the decision

17. Paragraph 21 of the Code provides that "*you must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way."* The Tribunal found that this paragraph had been breached. The Respondent had failed to carry out reasonable inspections of the property at South Bridge. Further, they had failed to notify the Applicant of the issue with the bi-fold door and had gone ahead with a repair (and disposal of the door) without his instruction or knowledge. On the basis of the evidence before it, the Tribunal did not consider that they had breached this part of the Code in relation to their actions taken to deal with the water ingress at Horne Terrace. This was a unanimous decision.

18. Paragraph 27 of the Code of Practice provides that "*You must inform the appropriate person, the landlord or tenant (or both) promptly of any important issues or obligations on the use of the property that you become aware of, such as a repair or breach of the tenancy agreement."* The Tribunal found that this paragraph had been breached. The Respondent had failed to notify the Applicant of the issue with the bi-fold door and had gone ahead with a repair (and disposal of the door) without his instruction or knowledge. This was a unanimous decision.

19. Paragraph 29(d) of the Code of Practice provides that *"In your dealings with potential landlord clients you must: if you become aware in the course of your business that a property does not meet appropriate letting standards (e.g.*

repairing standard, houses in multiple occupation and health and safety requirements), inform the landlord of this." The Tribunal did not find that this paragraph had been breached. There was no evidence presented to the Tribunal that the Respondent had failed to notify the Applicant that the property failed to meet appropriate letting standards. Whilst the issue with the damp at Horne Terrace could have meant that the property failed to meet the Repairing Standard (and no view is being taken on this) the Respondent had made the applicant fully aware of the issues being investigated. This was a unanimous decision.

20. Paragraph 74 of the Code of Practice provides that "*If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and landlord's attention where appropriate (see also paragraphs 80 to 84 on property access and visits, and paragraphs 85 to 94 on repairs and maintenance)."* The Tribunal found that this paragraph had been breached. The Respondent had inspected the property at Horne Terrace and identified that the bi-fold door was broken. They failed to bring this to the Applicant's attention. This was a unanimous decision.

21. Paragraph 80 of the Code of Practice provides that *"If you hold keys to the properties you let, you must ensure they are kept secure and maintain detailed records of their use by staff and authorised third parties – for instance, by keeping keys separate from property information and holding a record of the date the keys were used, who they were issued to and when they were returned."* The Tribunal found that this paragraph had been breached. By the Respondent's own admission, three sets of keys had been lost and no appropriate records could be found. This was a unanimous decision.

22. Paragraph 89 of the Code of Practice provides that *"When notified by a tenant of any repairs needing attention, you must manage the repair in line with your agreement with the landlord. Where the work required is not covered by your agreement you should inform the landlord in writing of the work required and seek their instructions on how to proceed."* The Tribunal did not find that this paragraph had been breached. The Tribunal was not satisfied that there was any evidence before it that the Respondent had failed to adequately deal with repairs. Whilst clearly the Applicant considered that the leak at Horne Terrace was not dealt with

appropriately, the Tribunal was satisfied on the evidence before it that the Respondent took reasonable steps to address the issue, including repairing a pipe initially when condensation and puddling was identified, obtaining two specialist reports and liaising with the letting agent of the property next door. This was a unanimous decision.

23. Paragraph 90 of the Code of Practice provides that *"Repairs must be dealt with promptly and appropriately having regard to their nature and urgency and in line with your written procedures."* The Tribunal did not find that this paragraph had been breached. On the basis of the evidence before it, the Tribunal was satisfied that the Respondent took reasonable steps to address repairing issues and within appropriate timescales. This was a unanimous decision.

24. Paragraph 94 of the Code of Practice provides that *"You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided."* The Tribunal did not find that this paragraph had been breached. The Tribunal was satisfied with the Respondent's submissions that they had made numerous attempts to contact the plumber who had removed the Saniflo system and that he had failed to respond to them. The Tribunal did not consider that the Respondent could have done much more under the circumstances and the Applicant could take his own steps to pursue the plumber for any losses he considers he has incurred due to his removal of the Saniflo system and failure to re-instate. This was a unanimous decision.

25. Accordingly, the Tribunal upheld the Applicant's complaint under Paragraphs 21, 27, 74 and 80 of the Code of Practice.

26. The Tribunal was not satisfied that there was sufficient evidence before it to find a breach of paragraphs 29(d), 89, 90 or 94 of the Code of Practice.

27. The Tribunal determined that a Letting Agent Enforcement Order would be issued ordering the Respondent to pay to the Applicant the sum of £486.40. This was calculated firstly on the basis of the sum due of £386.40 in respect of the cost of the missing bi-fold door. The Tribunal noted that the door had cost £552 when purchased a few years prior. Taking into account age and fair wear and tear, a

percentage apportionment of 70% was deemed reasonable under the circumstances. Further a payment of £100 was awarded as compensation towards loss incurred at the end of the tenancy at South Bridge. The Applicant sought payment in the sum of £850 in this regard. However, it was noted that the deposit lodged was £840 and the sum of £614 had been repaid by the tenancy deposit scheme. There was no evidence submitted by the Applicant to substantiate his claim for an award of £850, nor specification of the cost of the appliances he claimed had to be disposed of, nor information as to age or condition of those items. However, the Tribunal was satisfied that if the Respondent had adequately inspected the property, issues may have been identified at an earlier stage. Accordingly the sum of £100 was awarded as compensation in this regard.

28. The Applicant's claim for £590 for loss of two months' rent at Horne Terrace and £2200 for the cost of repairs effected at the said property was refused. The Applicant submitted that due to the Respondent's failure to identify the source of the water ingress in October 2019, his costs to rectify the issues had increased. There was no evidence submitted to back up this submission whatsoever. By his own admission the Applicant confirmed that the tenant would always have had to leave the property to have the necessary works completed, therefore loss of rental was inevitable and there was no evidence to attribute this to the actions of the Respondent. Nor was there any evidence before the Tribunal that the costs of rectifying the damage had increased over time.

29. The decision of the tribunal was unanimous.

Right of Appeal

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.

Where such an appeal is made, the effect of the decision and of any

order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Legal Member/Chairperson 7 October 2020