Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Sections 46 and 48 of the Housing (Scotland) Act 2014 and Paragraphs 17, 19, 26, 33, 37, 65, 66, 80, 101, 105, 108, 109, 124 and 125 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Regulations")

Chamber Ref: FTS/HPC/LA/19/2336

Parties

Mr Gary Kirkwood, 39 Burns Wynd, Stonehouse, Lanarkshire ML9 3DU ("the Applicant")

and

Hanlon Clark Lettings Limited, incorporated in Scotland (SC475658) and having their Registered Office at 8 Main Street, Strathaven, Lanarkshire ML10 6AJ ("the Respondents")

Tribunal Members: George Clark (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents had failed to comply with paragraphs 17, 19, 26, 33, 37, 65, 66, 101, 105, 108, 124 and 125 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 and that the Respondents should pay to the Applicant the sum of Six Hundred and Forty Five Pounds (£645).

Background

By application, received by the Tribunal on 25 July 2019, the Applicant sought an Order in respect of the Respondent's failure to comply with the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Code"). He stated that the Respondents had charged him £70 for an Electrical Installation Condition Report ("EICR") which they had not in fact obtained. They had also failed to pay to him the deposit of £575 which they had taken from the tenant and which the tenant had agreed should be paid to the tenant in full at the end of the tenancy. The Applicant sought payment of both these sums, totalling £645.

On 4 October 2019, Ms Donna Hanlon told the Tribunal by email that the Respondent company, which was now no longer trading, had returned £517.50 to the Applicant on 6 June 2019, after deducting a management fee. She realised that she should not have made any deduction, so would be refunding that personally to the Applicant. She also stated that the Respondent company had copy invoices and that she would keep trying to contact the company that had been instructed to provide the EICR for a copy of the relevant invoice.

The Applicant's complaint was that the Respondents had failed to comply with paragraphs 17, 19, 26, 33, 37, 65, 66, 80, 101, 105, 108, 109, 124 and 125 of the Code.

The Hearing

A Hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow on the morning of 3 December 2019. The Applicant attended the Hearing. The Respondents were neither present nor represented at the hearing.

The Applicant told the Tribunal that, when deciding to rent out the Property for the first time, he had approached the Respondents for guidance, They had inspected the Property and had advised that various matters needed to be attended to, including installing smoke detectors and obtaining the EICR. They had billed the Applicant £70 in July 2017 for the cost of the EICR.

The tenancy had started in June 2017 and had ended in May 2019. The relationship between the Applicant and the Respondents had been a complete mess. They had not provided a written contract. At the end of the tenancy, the Applicant had moved to another agent, who had identified a number of additional items, which had created legislative risk for the Applicant. The Applicant had tried numerous times to contact the Respondents' office, but with no success. He had ended up doing the leaving checklist with the tenant himself. The tenant had told him that he had been paying the rent six monthly in advance. The Respondents, however, had only been remitting, under deduction of their fees, on a monthly basis, despite the fact that they held the advance rental payments. The Respondents' payment of 6 June 2019 had been the rent due for the last month of the tenancy, not the deposit. The Applicant provided the Tribunal with a spreadsheet showing all payments received from the Respondents, the last being on 5 June 2019 which, the Applicant contended, was the rent due for May 2019. The Respondents had put the Applicant at legislative and financial risk. The Respondent company was apparently dissolved at Companies'

House, but there were still "To Let" boards up in Strathaven bearing their name as agents and some of them were new. The Respondents also still had a key to the Property, with all the risks that that involved. The Applicant told the Tribunal that his application was not about the money. For him, it had become a matter of principle. The Respondents had completely failed him.

Findings of Fact

- There was an unwritten agreement between the Parties whereby the Respondents acted as letting agents for the Applicant from June 2017 until May 2019.
- The Respondents had required the Applicant to pay for an EICR but had not exhibited the Certificate or the electrical contractors' invoice despite repeated requests from the Applicant to do so.
- The Respondents remitted rental payments, under deduction of 10% in respect of their fees, on a monthly basis.
- On the balance of probabilities, the Tribunal accepted the evidence that the Respondents were receiving the rent from the tenant six months in advance but remitting it to the Applicant month by month.
- The Respondents retained a key for the Property after the contract between the Parties came to an end.
- The remittance made to the Applicant on 5/6 June 2019 of £517.50 was the rent received for May 2019, minus the Respondents' management fee. I was not payment to the Applicant of the deposit that they held.

Reasons for the Decision

The Tribunal noted that the application had proceeded under a large number of Sections of the Code, but the facts relevant to all of them were the same, namely that the Respondents had failed to provide any evidence that the EICR, for which the Applicant had paid them £70, had ever been instructed or obtained, that the Respondents had been receiving rent six monthly in advance, but had not been accounting for it to the Applicant in that way and that the Respondents had taken a deposit which the tenant, at the termination of the lease, had agreed should be paid in full to the Applicant and had failed to pay it to the Applicant. The Respondents were also still holding a key which should have been returned to the Applicant when the contract between the Parties ended in May 2019.

The Tribunal considered the application under each Section of the Code:

Paragraph 17 states *"You must be honest, open, transparent and fair in your dealings with landlords."* The Tribunal held that, in the absence of any evidence to the contrary having been provided by the Respondents, they had charged for an item of expenditure that they had not incurred, namely the provision of the EICR. Despite repeated requests, they had not provided it to the Applicant and had not provided any documentary evidence to the Tribunal to support their view that they had obtained it. Accordingly, on the balance of probabilities, the Tribunal upheld the complaint that the Respondents had failed to comply with paragraph 17 of the Code.

Paragraph 19 states *"You must not provide information that is deliberately or negligently misleading or false."* For the reasons given in relation to the application under paragraph 17 of the Code, the Tribunal upheld this ground of complaint.

Paragraph 26 states *"You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement."* The Tribunal upheld this ground of complaint, having heard evidence that the Respondents had ignored communications from the Applicant.

Paragraph 33 states "*You and the landlord must both sign and date your agreed terms of business and you must give the landlord a copy for their records. If you and the landlord agree, this can be done using electronic communication including an electronic signature."* The Tribunal accepted, on the balance of probabilities, the evidence given by the Applicant that there had not been a written contract between the Parties. It was for the Respondents to issue such a contract and, as they had not provided any evidence that they had done so, the Tribunal upheld this ground of complaint.

Paragraph 37 states *"When either party ends the agreement, you must:*

a) *give the landlord written confirmation you are no longer acting for them. It must set out the date the agreement ends: any fees or charges owed by the landlord and any funds owed to them; and the arrangements including timescales for returning the property to the landlord – for example, the handover of keys, relevant certificates and other necessary documents. Unless otherwise agreed, you must return any funds due to the landlord (less any outstanding debts) automatically at the point of settlement of the final bill."*

The Tribunal accepted the evidence of the Applicant that the Respondents had not handed back to him the keys that they held and had not provided any documents, specifically the EICR. Accordingly, the Tribunal upheld the complaint that the Respondents had failed to comply with paragraph 33 of the Code.

Paragraph 65 states *"You must inform the landlord of the statutory requirements of tenancy deposits under the Housing (Scotland) Act 2006 and the Tenancy Deposit Schemes (Scotland) Regulations 2011."* There was no evidence that the Respondents had informed the Applicant of the statutory requirements. Accordingly, on the balance of probabilities, the Tribunal upheld this ground of complaint.

Paragraph 66 states *"if you lodge tenancy deposits on a landlord's behalf, you must ensure compliance with the legislation."* The Tribunal was satisfied from the evidence before it that the Respondents had taken the deposit from the tenant. Having done so, they had an obligation to ensure it was lodged in an approved tenancy deposit scheme. The Respondents had not provided any evidence to indicate that they had fulfilled this obligation and accordingly, on the balance of probabilities, the Tribunal upheld this ground of complaint.

Paragraph 80 states *"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 had no evidence before it as to any key storage system employed by the Respondents, so did not uphold this ground of complaint.

Paragraph 101 states *"Before they leave the property you must clearly inform the tenant of their responsibilities such as the standard of cleaning required…in line with their tenancy agreement. You must offer them the opportunity to be present at the check-out visit unless there is good reason not to."* There was no evidence that the Respondents had informed the tenant of his responsibilities. The Applicant had, and for justifiable reasons, namely that the Respondents were not answering his attempts to communicate with them, undertaken the check-out visit himself. Accordingly, the Tribunal determined that the Respondents had failed to comply with paragraph 101 of the Code.

Paragraph 105 states *"Where you manage the tenancy deposit on behalf of a landlord you must take reasonable steps to come to an agreement with the tenant about deposit repayment. Where agreement is reached you must make a claim to the relevant Tenancy Deposit Scheme."* There was no evidence before the Tribunal that the Respondents had lodged the deposit in an approved tenancy deposit scheme and the fact that the Respondents had alleged that they had paid it to the Applicant on 6 June 2019 without there being any suggestion that this was the result of their having communicated with either the tenant or the tenancy deposit scheme indicates that they had not lodged it. The Tribunal therefore held, on the balance of probabilities, that they had not done so and had not, therefore, taken any steps to come to an agreement with the tenant. Accordingly, the Tribunal upheld this ground of the complaint. The Tribunal noted that the Applicant and the tenant had agreed that the entire deposit should be made over to the Applicant.

Paragraph 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."* The Tribunal upheld this ground of the complaint, as it accepted the Applicant's evidence that the Respondents rarely, if ever, responded to communications from him.

Paragraph 124 states *"You must ensure clients' money is available to them on request and is given to them without unnecessary delay or penalties, unless agreed otherwise in writing (for example to take account of any money outstanding for agreed works undertaken."* The Tribunal upheld this ground of the complaint. The evidence before the Tribunal was that the Respondents had had the cashflow benefit of receiving rent six monthly in advance from the tenant, but only remitting it (net of fees) on a month to month basis. This practice by a letting agent was entirely unacceptable. In addition, the Respondents had still not paid the deposit to the Applicant, so unnecessary delay in giving the Applicants their money was clearly established.

Paragraph 125 states *"You must pay or repay client money as soon as there is no longer any need to retain that money. Unless agreed otherwise in writing by the client, you should where feasible credit interest earned on any client account to the*

appropriate client." The reasoning set out in relation to the finding that the Respondents had failed to comply with paragraph 124 of the Code applied *mutatis mutandis* to paragraph 125 and the Tribunal also upheld this ground of complaint.

Having determined that the Respondents had failed to comply with the Code of Practice, the Tribunal was bound to issue a Letting Agent Enforcement Order and to consider whether the Respondents should be required to pay compensation to the Applicant under Section 48(8) of the Housing (Scotland) Act 2014.

The Tribunal was able to relate an award of compensation to the amount of the deposit that had not been refunded to the Applicant and to the direct loss which he had incurred in respect of being charged for the EICR which, it appeared, had not been carried out. The Tribunal accepted that the Applicant had been caused unnecessary and unwelcome stress and inconvenience as a result of the Respondents' failures to comply with the Code of Practice, but he had stated that it was a matter of principle for him, rather than being about the money. The Tribunal did not, therefore, feel that a further award of compensation beyond quantifiable actual loss should be made. Taking all relevant factors into account, the Tribunal decided that the Respondents should pay the Applicant the sum of £645, being the amount of the deposit, and the sum the Respondents had charged the Applicant for the EICR.

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.

George Clark

Legal Member

3 December 2019