



**First-tier Tribunal for Scotland (Housing and Property Chamber)
Decision and statement of reasons under Section 48 of the Housing (Scotland)
Act 2014.**

Reference number: FTS/HPC/LA/23/0050

The Parties:

**Mrs Amber Smith, Balclutha, Nether Drumgley, Forfar DD8 1QZ (“the Applicant”)
DJ Alexander, 1 Wemyss Place, Edinburgh, EH3 6DH (“the Respondent”)**

**Legal Member: Lesley Anne Ward
Ordinary Member: David Fotheringham**

Outcome

- 1. The tribunal decided that the respondent has breached paragraphs 21, 32j) 78, 93, 102, 107 and 110 of the Letting Agent Code of Practice and the tribunal issued a Letting Agent Enforcement Order which should be read with this decision.**

Background

- 2. This was a hearing in connection with an application in terms of rule 95 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017, ‘the rules’ and s48 of the Housing (Scotland) Act 2014, ‘the Act’. The Applicant attended the hearing and was accompanied by her husband Mr George Smith as her supporter. The Respondent was represented by Mr Raphael Bar, head of customer relations at DJ Alexander. A case management discussion (‘CMD’) took place on 28 March 2023 and the tribunal made directions. Both parties complied with the detailed directions.**
- 3. The tribunal had the following documents before it at the CMD:**
 - (a) Application dated 4 January 2023.**
 - (b) Notification letter (undated but sent on 9 December 2022).**
 - (c) Letter of complaint dated 10 November 2022.**
 - (d) Response to complaint dated 23 November 2022.**
 - (e) Check Out Reports dated 1 and 3 November 2022.**
 - (f) Check Out Report dated 8 November 2022.**

- (g) Periodic Inspection Report dated 16 February 2022.
 - (h) Move In Report dated 8 September 2020.
 - (i) PAT Certificate dated 8 August 2022.
 - (j) Electrical Installation Condition Report by Benaïrd Electrical dated 8 August 2022.
 - (k) Electrical Installation Condition Report by Horton Electrical Solutions dated 2 December 2022.
 - (l) Quote from Liberton Décor dated 10 November 2022.
 - (m) Quote from Capital Carpets dated 5 November 2022.
 - (n) Quote from Newtown Décor dated 8 November 2022.
 - (o) Statement from DJ Alexander dated 9 September 2022.
 - (p) Written representations from Respondent dated 6 February 2023.
 - (q) Email from the tenant with photographs.
 - (r) Supplementary submission by Applicant.
 - (s) Service Level Agreement with JVR Properties dated 27 July 2011.
 - (t) Letter from Fineholm dated 8 September 2020.
 - (u) Email from Fineholm dated 11 February 2022.
 - (v) Statement from Hadden Rankin dated 12 January, 14 February, 13 March 2023.
 - (w) Email correspondence between the parties from February 2023.
4. The tribunal had the following additional documents before it at the hearing:
- (a) Tenancy agreement
 - (b) DJ Alexander Complaints form (old version)
 - (c) DJ Alexander Complaints form (new version)
 - (d) EICR 2017.
 - (e) EICR 2022.
 - (f) Inventory dated 9 September 2020.
 - (g) Tenant complaint correspondence.
 - (h) Email from Respondent dated 22 May 2023.
 - (i) Adjudication Outcome of Safedeposit Scotland dated 9 May 2023.
 - (j) Tenant response to cleaning portion of third party checkout report.
 - (k) Check in report from start of the tenancy.
 - (l) Information from Pristine Clean.
 - (m) List of works from Fineholm.
 - (n) Hadden Rankin Landlord Statement dated 26 May 2023.
 - (o) Newtown Décor Receipt dated 1 June 2023.
 - (p) Emails from Applicant dated 24 April, 23 May, 1 June 2023 with additional submissions and clearer copies of the Periodical Report and Check Out Report.

The Applicant's position:

5. The Applicant's position was set out in her application, submissions and as recorded in the CMD note. Since the CMD the Applicant has received the sum of £292 following an adjudication by Safedeposit Scotland in respect of smoke damage to the property and additional cleaning costs. The Applicant does not agree that the adjudicator was given accurate information by the Respondent. The

adjudicator was given the Applicant's independent check out report however the inventory provided by the Respondent did not tie in with the check in and check out report. The inventory suggested the Applicant had not carried out any redecoration to the property for some years whereas some of the walls have been repainted and the curtains in the lounge have been replaced. The Applicant has not sought a review of the adjudicator's decision.

The Respondent's position:

6. The Respondent's position is set out in the CMD note. Mr Bar stated that the Respondent was prepared to concede that the Applicant should be reimbursed for the cost of the independent check out report given it was used in the adjudication process with Safedeposit Scotland. He also stated that it may be reasonable for the Applicant to be refunded the last two months management fee in the circumstances.

Sections of the code at issue

7. **Section 2 paragraph 17: You must be honest, open and transparent in your dealings with landlords and tenants (including prospective and former landlords and tenants).**
8. The Applicant's position was that Respondent was not being honest and transparent in their dealings with her. She gave a whole host of reasons for this. She stated that they denied that there was a smell of smoke in the property and that the décor and furnishings were damaged as a result. It was also the Applicant's position that there was a lack of candour in relation to the use of the electrician Benaird Limited who were a sister company. Most of the matters raised by the Applicant were relevant to other breaches of the Code referred to below. The Respondent denied that there had been a breach of the Code and submitted the Respondent has been of good faith throughout their dealings with the Applicant. The tribunal were not satisfied that the Respondent had deliberately or wilfully mislead the Applicant and did not find that this paragraph of the Code had been breached.
9. **Section 2 paragraph 21: You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely manner.**
10. It was the Applicant's position that the Respondent had failed to identify the tenant was smoking in the property at the periodic inspection and had failed to identify the smell of smoke and smoke damage at the check out stage. They had also failed to notify her that the tenant had missed his last rental payment and when they took over the management of the property, they charged her a new tenant fee in error. They also failed to take steps to market the property after the tenant had given notice on 5 September 2022. It was the Respondent's position that on two separate occasions members of staff had not identified a smell of smoke or smoke damage to the property and that this was a reasonable position to take. Mr Bar stated that

the Respondent did not accept that the second check out report was arranged because of any errors or deficiencies in the first one. This was contradicted by the email lodged by the Applicant to Amy Vaas 3 November 2022. It appeared to the tribunal that the second check out report was arranged as both parties felt there was merit in a second report being prepared. The email from the Applicant to the Respondent of 5 September 2022 clearly stated that the Applicant intended to refurbish the bathroom of the property, so it did not seem to the tribunal that the Respondent has failed to market the property. The tribunal considered that the Respondent had breached the Code in relation to the two check out reports which had not been prepared with reasonable care as they failed to identify smoke damage to the flat.

11. **Section 3 paragraph 32a): Your terms of business must be written in plain language and alongside any other reasonable terms you wish to include, must clearly set out... Communication and Complaints j) that you are subject to this Code and give your clients a copy on request. This may be provided electronically.**
12. It was conceded by Mr Bar that the Respondent had given the Applicant the wrong complaints procedure which did not refer to the Code or the tribunal. This was done by one of the Directors of the Respondent in error. The Respondent have updated their database and procedures and there should be no recurrence of this. It emerged during the hearing that there was in fact no written terms of business between the parties. Mr Bar stated that when his company took over the portfolio of Fineholm in 2022 they agreed to honour the terms of any existing agreement. The tribunal found it curious that in the exchange of emails between the parties lodged by the Applicant, on the 25 January 2023 Mr Bar asked the Applicant for a copy of the terms of business stating "Please provide a copy of the signed Terms of Business between yourself and Fineholm/ DJ Alexander, so that we can investigate further". The Applicant lodged the contract with her bundle of 15 March 2023. This was dated 21 July 2011 and was with JVR Properties which were taken over by Fineholm and subsequently the Respondent. Mr Bar stated that the Respondent had their own internal operating procedures for repairs and so on but he acknowledged there was essentially no written contract between the parties given he only become aware of this agreement when it was lodged by the Applicant. Indeed in his submissions dated 6 February 2023 in response to the Applicant's notification letter in respect of paragraph 32j) he states 'Please provide any signed Terms of Business between yourself and Fineholm/DJ Alexander so that we can investigate further as required. There were no terms of business between the parties and the complaints procedure sent did not comply with the code. This was a clear breach.
13. **Section 5 paragraph 78: You should inform the landlord in writing of the late payment of rent, in line with your written procedures or agreement with the landlord.**
14. According to the Applicant, the tenant did not pay the October payment due on 10 October 2023 until around December 2022. She was not notified of this. There was a considerable discussion about whether the Respondent had received the

payment timeously and returned it to the tenant in error. Aside from the fact that there was no written procedure to regulate matters, Mr Bar conceded that the Applicant was not advised of the late rental payment. Accordingly, the tribunal decided there had been a breach in this regard.

15. Section 5 paragraph 85: If you are responsible for pre-tenancy checks, managing statutory repairs, maintenance obligations or safety regulations (e.g. electrical safety testing: annual gas safety inspections: Legionella risk assessments) on a landlord's behalf, you must have appropriate systems and controls in place to ensure these are done to an appropriate standard within relevant timescales. You must maintain relevant records of the work.

16. It was the Applicant's position that the electrical checks carried out by the Respondent's electrician Benaird Ltd were not of an appropriate standard because the cooker hood was not included in the PAT Test, the quote for remedial work excluded the fault that they identified in their report of 8 August 2023, and the company were not at arms length from the Respondents. Mr Bar contended that the cooker hood was excluded from the PAT test as it was wall mounted and the fact that the company were a sister company of the Respondents was not material. The tribunal did not find that the Respondents had failed in relation to this part of the Code.

17. Section 5 paragraph 90: Repairs must be dealt with promptly and appropriately having regard to their nature and urgency and in line with your written procedures.

18. It was difficult to assess if repairs were carried out in accordance with the written procedure given there was no written procedure. It was Mr Bar's contention that the Respondents operated an internal procedure and that all repairs were carried out in accordance with this. There was no evidence before the tribunal to suggest that the Respondent had failed to comply with this paragraph of the Code.

19. Section 5 paragraph 93: If there is any delay in carrying out the repair and maintenance work, you must inform the landlords, tenants or both as appropriate about this along with the reason for it as soon as possible.

20. Mr Bar conceded that although the Respondents had used their best endeavours to arrange for Scottish Gas to come and inspect the property with a view to carrying out remedial work to the electrics, there was a delay which was not brought to the Applicant's attention. The tribunal was satisfied that this constituted a breach of the Code.

21. Section 6 paragraph 102: If you are responsible for managing the check-out process, you must ensure it is conducted thoroughly and, if appropriate, prepare a sufficiently detailed report (this may include a photographic record) that makes relevant links to the inventory/ schedule of condition where one has been prepared before the tenancy began.

22. It was clear to the tribunal that the check out process was not managed thoroughly

and as a result the Applicant had to obtain her own check out report at her own expense. The Applicant complained that after she received the email of 5 September 2022 she heard nothing further from the Respondent. She contacted them the week before the tenant was due to leave, and the member of staff she spoke to had no knowledge of the end of the tenancy or the check out inspection. Mr Bar disputed this and stated that the email of 5 September 2022 had all relevant information and that the member of staff made a mistake in telling the Applicant that the check out had not been arranged as it was clearly in the diary. The tribunal decided that the check out process was inadequate given at least two members of staff had failed to identify the smell of smoke or damage to decor and carpets caused by smoking in the property. If the Applicant had not obtained her own report she would have in all likelihood been unsuccessful with her deposit adjudication. The tribunal considered this was a breach of the Code.

23. Section 6 paragraph 107: You must take 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.

24. The Applicant had not been given the letting agent registration number in any communication including the complaints procedure and this was conceded by Mr Bar. This was therefore a breach of the code.

25. Section 6 paragraph 108: You must respond to enquiries and complaints within reasonable time scales. 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.

26. From the information provided to the tribunal it appears that the Respondent did respond timeously to the Applicant's complaint. The Applicant was not satisfied with the terms of the response. This had led to the application being made. The tribunal was not satisfied that this was a breach of the Code.

27. Section 6 paragraph 110: You must make landlords and tenants aware of the Code and give them a copy on request, electronically if you prefer.

28. Mr Bar conceded that the Respondent had not made the Applicant aware of the Code and this was a breach of the Code.

29. Findings in fact

- The Applicant is the owner of the property.
- The Applicant has used a letting agent to let the property since 21 July 2011.
- The Applicant entered into a contract with JVR Properties on 21 July 2011 for them to act as letting agents.

- Fineholm subsequently took over as letting agents as successors to JVR Properties, but no new contact terms were drawn up.
- The Applicant let the property on 8 September 2020 to Mr C McCreanor through her agents Fineholm.
- Fineholm wrote to the applicant on 11 February 2022 and said they were rebranding as DJ Alexander and would be acting as letting agents on the same terms and conditions.
- DJ Alexander carried out a periodic inspection of the property on 16 February 2022.
- Benaïrd Ltd Electricians carried out an electrical inspection on 8 August 2022. They issued a PAT Test certificate and also identified problems with the property regarding some new wiring and some very old imperial sizes cables and a neutral to earth fault on circuit 4.
- The overall assessment of Benaïrd Ltd was that the electrical installation was unsatisfactory.
- The Applicant requested that the Respondent arrange for Scottish Gas to inspect the property with a view to them carrying out remedial work. There was a delay in arranging this due to difficulties with the tenant, but the Respondent did not notify the Applicant of the delay or the reason for it.
- The Applicant arranged for a further inspection by Horton in December 2022 and on 2 December they concluded the existing circuit should not be reenergised and requires to be rewired in full.
- The Respondents notified the Applicant on 5 September 2022 that the tenant was planning to leave the property.
- A check out report was carried out on 1 November 2022.
- A second check out report was carried out on 2 November 2022.
- Neither report identified a smell of smoke out the property or any smoke damage to the carpets or décor.
- The Applicant arranged for a new letting agent to inspect the property on 1 November 2022. Both representatives identified a strong smell of smoke.
- The Applicant arranged her own independent check out report via her new letting agent, Hadden Rankin Property Management, and that report identified a smell of smoke and smoke damage to carpets and décor.
- An adjudication by Safedeposit Scotland made an award of a portion of the deposit in the Applicant's favour due to damage to carpet and décor and for extra cleaning costs.
- The Applicant made a complaint to the Respondents on 10 November 2022. The Applicant was not provided with the correct complaints procedure, and it made no mention of the Code, the tribunal or the letting agent number.
- The outgoing tenant's October 2022 rent payment was made late and the Respondent did not advise the Applicant of this.

Reasons

30. The tribunal was satisfied that there had been clear breaches of the letting agent code. Some of the breaches were conceded by the Respondent's representative Mr Bar, at the hearing, and others were determined by the tribunal having heard the available oral and written evidence. Mr Bar conceded that the wrong complaints procedure had been given to the Applicant in error. There were multiple occasions where Mr Bar made reference to the service the Applicant received were 'not good enough' or that errors had been made. However, the use of the wrong complaints procedure was the only instance in which Mr Bar made reference procedures being updated by the Respondent as a result of an error or failure of service.
31. The tribunal decided on the balance of probability that the property had been damaged by smoke as set out in the independent check out report. The two witnesses Mrs Kate Poddles (New Business Director at Hadden Rankin) and Mrs Jill Pearce (Property Manager at Hadden Rankin) both spoke to the strong smell of smoke in the property, and this was the report used for the deposit scheme adjudication.
32. The Applicant described in detail how she was accustomed to dealing with one member of staff at Fineholm for all of her enquiries and requests. After the change of letting agent in February 2022 she had to deal with at least 4 different departments. Electrical matters were dealt with by compliance, repairs by maintenance, rent by accounts and complaints by customer relations. Whenever she called one person with a query, she was inevitably told to contact a different department. She was never given a written business terms and when Mr Bar was dealing with her complaint, he asked her for a copy of the business terms (from the previous agency Fineholm) that were supposedly working to. The failure to have written terms of business was a clear breach of the Code.
33. The Applicant's evidence was that the Respondent was never available when she called with any request, and she was constantly obliged to leave messages. Mr Bar's explanation was that things were going on behind the scenes even if this was not communicated to the client. Failure to communicate is a clear breach of the code and Mr Bar conceded that there had been failures..
34. The Applicant understandably had a complete lack of faith in the Respondent so that when she discovered the connection between the Respondent and Benaird Ltd, she felt she could not trust the results of the electrical check and wanted to involve Scottish Gas as she had a service contract. The tribunal was not satisfied on the balance of probability that there was a breach of the code in connection with the Respondent's use of Benaird Ltd. It was not clear to the tribunal that the Respondent should have been aware as a letting agent that the cooker hood

should have formed part of the PAT test or that Benaird Ltd had failed to quote for all relevant matters. The fact that the Applicant arranged for another contractor assess the electrics four months later in December 2022 (who said a complete rewiring was needed) did not mean that Benaird Ltd had done anything wrong or that the Respondent should have identified that Benaird Ltd failed in some way. The tribunal did not therefore make any award to refund the outlay from Benaird Ltd.

35. The tribunal did not make any award for any loss of rental incurred by the Applicant. According to the Applicant's email to the Respondent of 5 September 2022, she intended to refurbish the bathroom before a new tenant took occupancy. The arrangement between the parties came to an end on 10 November 2022 when the Applicant wrote to the Respondent and made her complaint. Given the Applicant was given notice that the tenant was leaving on 5 September 2022, and she notified the Respondent the same day that she wanted to refurbish the bathroom, there was no delay in marketing the property that justified a claim for loss of income.
36. The tribunal noted the terms of the adjudication from the Safedeposit Scotland. The Applicant was awarded £292 in respect of smoke damage to the carpets and décor and for additional cleaning of the property. The Applicant had not sought a review of that decision. The tribunal did not consider it to be fair proportionate or just to make any award in respect of a matter already adjudicated beyond making an award for the outlay incurred in obtaining the independent check out report.
37. The tribunal was satisfied that the Applicant had been inconvenienced as a result of the breaches identified by the tribunal. The Applicant had submitted that this amounted to around 40 hours work, which calculated at £9.50 per hour amounted to £380. Much of the time spent appeared to relate to the electrical issue which the tribunal did not consider to be a breach for the foregoing reasons. The refund of the management fees and a further sum of £250 is considered by the tribunal to be fair proportionate and just in all of the circumstances.

Letting Agent Enforcement Order.

38. The tribunal consider that it is reasonable in all of the circumstances to issue a letting agent enforcement order.
39. The tribunal has decided that it was reasonable in all of the circumstances for the Applicant to have her management fees between February 2022 and October 2022 refunded. This amounts to 8 months at £70.20 per month totalling £541.60.

40. The tribunal decided to Award the applicant the sum of £108 in respect of the outlay for the independent check out report.
41. The tribunal awarded an additional £250 for the inconvenience the Applicant has suffered.
42. The total financial penalty is therefore £899.60.
43. The Respondent is also required to provide a copy of their current terms of business to the tribunal. They require to satisfy the tribunal, as required by the Code, that all clients both new and historical (transferred from other companies such as Fineholm), are aware of the terms and have been provided with a copy.
44. The Letting Agent Enforcement Order accompanies this decision and should be read in conjunction with it.

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.

In terms of section 51(1) of the Housing (Scotland) Act 2014, a letting agent who, without reasonable excuse, fails to comply with a Letting Agent Enforcement Order commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale.

14 June 2023

Lesley A Ward Legal Member

Date