

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)

Decision issued under s48 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/23/3585

The Property: 9/16 Calder Drive, Edinburgh, EH11 4LN (“The Property”)

The Parties:-

Dr Krzysztof Nowak, residing at 4 Beech Cir., Andover, Maryland, 01810, USA (“the Applicant”)

Zander Property Solutions Limited (Trading as Accommodate Edinburgh) a company incorporated under the Companies Acts and having their registered office at 13-15 Morningside Drive, Edinburgh, Scotland, EH10 5LZ (“The Respondent”)

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the Respondent has complied with the Letting Agent code of practice, determined that the Respondent has breached paragraphs 68, 70, 78 and 79 of the Letting Agents Code of Practice.

Tribunal Members

Paul Doyle
Eileen Shand

Legal Member
Ordinary Member

Background

1 By application dated 29 September 2023, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the Respondent has breached the letting agent code of practice (the code).

2 The applicant says that the respondent failed to comply with paragraphs 17, 18, 19, 20, 21, 24, 26, 27, 29(a), 29(f), 30, 38, 68, 70, 74, 75, 76, 78, 79, 95, 98, 101, 102, 104, 108, 119, 120 & 127 of the code.

3 By interlocutor dated 22 November 2023, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 Neither party made further representations.

5. A case management discussion took place by telephone conference at 10.00am on 26 February 2024. The Applicant was present and unrepresented. The respondent was neither present nor represented. The applicant agreed that the documentary evidence contained all that he had to say in support of his application. He agreed that the tribunal should determine this application on the available documentary evidence.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant was the proprietor of the top floor flat dwelling-house at 9/16 Calder Drive, Edinburgh, EH11 4LN.

(b) The respondent trades as Accommodate Edinburgh, a letting and estate agency company.

(c) The applicant purchased the property in 2004, whilst working at Heriot Watt University. In 2006, the applicant and his wife removed from the property. They decided to let the property out and signed a contract with Re-Max City Properties to manage the letting of the property.

(d) The applicant's contact with Re-Max City Properties was James Alexander Grant, one of their directors. In March 2008, the applicant and Mr Grant agreed to transfer management of the property to the respondent, a company of which Mr Grant was a director. Between 2008 and 2023, the respondent's managed the letting of the property for the applicant.

(e) In 2022 the applicant decided to sell the property. The property was still occupied by a tenant. The respondent advised the applicant about the eviction moratorium. Throughout 2022, there was a sequence of emails and telephone calls passing between the appellant and Mr Grant for the respondent. Not all of the emails and telephone calls were responded to promptly.

(f) The applicant tried to arrange alternative accommodation for the tenant of the property, but the tenant remained in the property. The applicant instructed the respondent to serve a notice to leave on the tenant on 26 January 2023. In February 2023, the applicant sent two emails asking about progress with the notice to leave. On 24 February 2023 the respondent confirmed that a notice to leave had been served.

(g) The property had been marketed for sale since November 2022. In November 2022, the applicant and the respondent were optimistic that a potential buyer would submit an offer, but no offer materialised.

(h) It was not until February 2023 that an offer was received for the property. The respondent recommended the services of a solicitor. The appellant contacted that solicitor without success. In the meantime, the respondent told the applicant to expect an offer in the region of £112,000 for the property.

(i) In March 2023. The applicant instructed surveyors to carry out the presale home report (the single survey). That report put a market value on the property of £95,000.

(j) Having been unable to instruct the solicitor recommended by the respondent, the applicant instructed Lindsay's, solicitors, on 5 April 2023.

(k) The tenant remained in the property. The applicant hoped to find a purchaser who would buy the property as an investment, and preserve the tenancy. In an email dated 26 April 2023, the applicant asked the respondent to confirm that the prospective purchaser was

“...purchasing the flat with the tenant in it?”

(l) The applicant did not receive a response to his enquiry.

(m) One week earlier, on 19 April 2023, the applicant's solicitors received an offer to purchase the property for £95,000. The purchaser relied on the Scottish standard clauses and asked for vacant possession of the property.

(n) The applicant sought advice on eviction procedure, and then withdrew from the bargain.

(o) The applicant then began to look back over his records of dealings with the respondent. The applicant discovered that two months rent had not been accounted for. The applicant was unsure about certain charges that the respondent had made. The applicant asked the respondent for a full accounting. He then decided to employ a new letting agent.

(p) The applicant attempted to reconcile his accounts and found that the rent had only been partially paid in September 2022, and no rent was paid in October 2022.

(q) In June 2023, the applicant's new letting agents provided a schedule of photographs showing the condition of the property. The property was let to the last tenant in 2020. When the tenant moved in, a schedule of condition of the property was prepared by the respondent. Between 2020 and 2023 the condition of the property deteriorated. The tenancy ended in 2023. When the tenancy ended, the property was in poor condition. Furniture and furnishings required replacement and the property required redecoration.

(r) Arrears of rental in September and October 2022 totalled £1000.

Reasons for decision

7 (a) There are five heads of claim in the appellant's application. Four of the heads of claim are financial claims. The fifth relates to the recovery of documentation.

8. The appellant's financial claims are

(i) Reimbursement of the cost of the Home Buyers Report and solicitors fees for the aborted sale of the property in 2023 (£1248).

(ii) Payment of arrears of rent accrued in September and October 2022 (£1,000)

(iii) Reimbursement of “unexplained charges” (£922.10 & £89)

(iv) Reimbursement of management fees for the last period of tenancy (£2,005)

9. The recovery of documentation is summarised simply as

Hand over all documentation on file for the property.

10. To support those five heads of claim, the applicant alleges 28 breaches of the code. The evidence produced lacks focus. Some of the allegations of breach of the code are misconceived, several lack specification. Only 7 of the alleged breaches are properly engaged.

11. Paragraph 29 of the code relates to the procedure before the respondent takes instructions. The applicant says that the respondent breached paragraphs 29(a) and 29(f), but in his written submission, the applicant makes it clear that the respondent was engaged in 2008 (before the code was written), and that the applicant had no concerns until July 2022. The applicant’s comments on the terms and conditions entered into in 2008 is

I’ve been with them ever since and there have been no issues which could not be resolved.

12. Paragraph 38 of the code relates to marketing and advertising. The applicant relies on a 10 page submission, none of which relates to advertising and marketing.

13. The allegations of breaches of paragraphs 29 and 38 are misconceived.

14. Paragraphs 17 and 19 of the code proceed on honesty and deliberate or negligent misleading and falsehood. The applicant is not happy with the accounting received when the relationship between the parties broke down. What the applicant says does not cross the threshold of dishonestly or negligence. Reference to paragraphs 17 and 19 are misconceived.

15. Paragraph 20 of the code requires the respondent to apply policies and procedures consistently and reasonably. Paragraph 30 relates to the terms of business. Paragraph 76 relates to written procedures and processes in relation to rent collection. Paragraph 95 regulates the use of third-party contractors. Paragraph 98 deals with the written procedures in place for managing termination of tenancy. Paragraphs 101, 102, and 104 relate to interaction between the respondent and the tenants at the termination of the tenancy. Paragraphs 119 and 120 relate to financial record-keeping & duties

to account, and paragraph 127 relates to written policies and procedures for debt recovery.

16. Although the applicant complains about arrears of rental, and about not understanding certain specific charges that have been made, his complaints about the various sections listed on [15] above are completely lacking in specification. The 10 page submission that the appellant makes does not make specific, relevant, complaints about the paragraphs of the code (and so does not competently engage the paragraphs) listed at [15] above.

17. The remaining paragraphs of the code raised by the applicant are perhaps engaged.

18. A fair summary of the facts (as we find them to be) is

(a) The applicant was happy with his arrangement with the respondent between 2008 and 2022. The applicant's ambition to sell the property in 2022 was complicated by the eviction moratorium in Scotland. The applicant asked the respondent to find a purchaser who would buy the property with a sitting tenant. The respondent was not able to find that purchaser. The respondent might have thought that he'd been successful, but when the offer was received, the prospective purchaser wanted vacant possession.

(b) In 2022 and 2023 the respondent was not quick to respond to the applicant's communications. The unsuccessful sale of the property in 2023 ended the business relationship between the parties. It was only then that the applicant looked back and found that in 2022 arrears of rental of £1000 accrued, and the applicant could not understand some of the entries in final account sent by the respondent.

19. Section 18 of the code says

18. You must provide information in a clear and easily accessible way.

20. At document 539 of the papers before us, the applicant produces a summary of what he describes as unexplained expenses charged by the respondent. The document produced by the applicant has satisfactory explanation for each of the highlighted entries. Tribunal members are able to understand the explanation for the entries. They are charges which are normally made for any properly maintained tenancy.

21. The evidence produced by the applicant indicates that the respondent provided information in a clear and easily accessible way. There is no breach of section 18 of the code.

22. Section 21 of the code says

21. You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way.

23. After considering each strand of evidence, it is still not clear what services the applicant says the respondent did not provide using reasonable care and skill and in a timely way. There is no reliable evidence of a breach of section 21 of the code.

24. Section 24 of the code says

24. *You must maintain appropriate records of your dealings with landlords, tenants and prospective tenants. This is particularly important if you need to demonstrate how you have met the Code's requirements.*

25. The core of the applicant's complaint is an allegation of a breakdown in communication throughout 2022 and 2023, leading to a failed sale transaction. There is no reliable evidence driving at the quality of the maintenance of records. There is no reliable evidence of a breach of section 24 of the code.

26. Section 74 of the code says

74. *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).*

27. On the evidence presented to us it is not clear whether or not the respondent carried out routine visits and inspections. What is clear (from the email exchange produced) is that the respondent reported concerns to the applicant. It is also clear (from the limited glimpse of the accounts which have been produced) that the respondent produced accounts which detailed necessary expenditure to maintain the tenancy. The applicant fails to produce sufficient evidence to demonstrate a breach of section 74 of the code.

28. For the same reasons, the applicant cannot establish a breach of section 75 of the code which says

75. *Breaches of the tenancy agreement must be dealt with promptly and appropriately and in line with the tenancy agreement and your agreement with the landlord.*

29. Seven allegations of breach of the code remain. It is the allegations of a breach of sections 26, 27, 68, 70, 78, 79, and 108 of the code of conduct which the evidence produced in this case focuses on properly.

30. Those sections of the code say

26. *You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement.*

27. *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.

68. *If you are responsible for managing the check-in process, you must produce an inventory (which may include a photographic record) of all the things in the property (for example, furniture and equipment) and the condition of these and the property (for example marks on walls, carpets other fixtures) unless otherwise agreed in writing by the landlord. Where an inventory and schedule of condition is produced, you and the tenant must both sign the inventory confirming it is correct.*

70. *You must take reasonable steps to remind the tenant to sign and return the inventory. If the tenant does not, you must inform them, in writing, that you will nevertheless regard it as correct.*

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.*

79. *In managing any rent arrears, you must be able to demonstrate you have taken all reasonable steps to recover any unpaid rent owed to the landlord (see also section 8).*

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 fully as possible and to keep those making them informed if you need more time to respond.*

31. The relationship between the parties deteriorated in 2022. The applicant became concerned when his enquiries were not responded to swiftly. It was not until 2023 that an unsuccessful attempt to sell the property led to the breakdown of the business relationship between the parties.

32. The applicant demonstrates that there were delays of two weeks or so before the respondent replied to his emails. It is difficult to take those delays and say that they are breach of section 108 of the code. There were delays in responding to enquiries, but there is no reliable evidence that those delays exceeded reasonable timescales.

33. The applicant says that he was kept in the dark about the management of the tenancy, but, in reality, he only made enquiry after the unsuccessful attempt to sell the property. Between 2008 and 2022, the applicant was quite happy to leave the management of the rental property in Edinburgh entirely in the hands of the respondent.

34. The best way to determine whether or not there has been a breach of the code of conduct is to consider the applicant's heads of claim.

35. The applicant seeks reimbursement of the solicitor's fees for the aborted sale of the property and the cost of the Home Buyer's Report. There is no reliable evidence to show that the respondent was responsible for incurring those fees. It was the applicant who wanted to sell the property. To sell property in Scotland a Home Buyer's Report is necessary. That is a cost the

applicant would incur whether he was successful in selling the property or unsuccessful in selling the property. Exactly the same argument applies to the solicitor's fee for the unsuccessful sale.

36. The applicant fails to establish that a crucial part of his instructions to the respondent was that the purchaser must take the property with the tenant in place. Even if the applicant could establish that was the central part of his instructions, he could still not succeed. The applicant instructs an agent to sell the property with a sitting tenant in place. The agent cannot find a willing purchaser. Those facts do not give the applicant a right of action against the agent.

37. This is an application under the Letting Agents Code of Practice. Instructions to sell a property do not form part of the Letting Agent Code of Practice, so that even if the applicant could establish that the respondent either dishonestly or negligently disregarded his instructions, there would not be a breach of the code.

38. The failed sale of the property led to the break down in relationship between the parties, and forms the foundation for this application. The foundation for the application has no relevance to consideration of the Letting Agent Code of Practice.

39. Even if the applicant establishes that his instructions were to find a purchaser who did not want vacant possession, the applicant cannot establish what passed between the respondent and the prospective purchaser.

40. The applicant does not establish grounds for recovery of expenses related to the aborted sale.

41. The applicant seeks recovery of outlays charged by the respondent that the applicant does not understand. The spreadsheet produced by the applicant sets out those charges and against each of the charges there is an adequate explanation. The applicant does not establish a ground in law for reimbursement of £1011.10.

42. The applicant seeks reimbursement of £2005 and management fees for the period of the last tenancy. The last tenancy ran from 2020 until 2023. In the applicant's written submission, he concedes that he was happy with the services of the respondent until 2022. Although the applicant makes oblique reference to dishonesty or negligence, he offers no reliable evidence which would approach the high threshold for establishing either dishonesty or negligence. There are no grounds in law for repayment of the management fees incurred by the applicant.

43. The applicant seeks payment of £1000 representing rent arrears. The rent arrears are recoverable from the former tenant, not from the respondent.

44. There is, however, no reliable evidence that the respondent took any steps to recover unpaid rent. It was not until the final accounting that the applicant discovered rent arrears had accrued. The respondent offers no

evidence. Paragraph 79 places the burden on the respondent to demonstrate that they have taken reasonable steps to recover unpaid rent. The respondent's silence is a failure to discharge that burden of proof.

45. The respondent has breached paragraph 79 of the code.

46. The applicant produces a series of photographs of the condition of the property when his tenant left in 2023. On the applicant's own evidence, the respondent prepared an inventory of condition of the property when the tenant moved in. The respondent is not responsible for the deterioration of the condition of the property, however, neither the inventory, nor the lease, was signed. That is a breach of paragraphs 68 and 70 of the code.

47. The weight of reliable evidence indicates that the applicant only became aware of £1000 arrears of rental after the relationship between the parties ended. That is a breach of paragraph 78 of the code.

48. We therefore find that the applicant establishes breaches of sections 68, 70, 78, and 79 of the code of conduct. None of the remaining alleged breaches are made out.

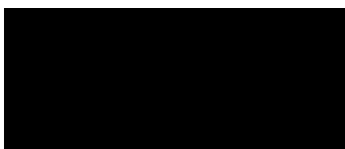
Decision

49. The respondent breached paragraphs of the Letting Agent Code of Practice. We make a Letting Agent Enforcement Order requiring the respondent to pay the applicant £150 as compensation for inconvenience caused by those breaches and requiring the respondent to release the file of papers relating to the tenancy of the property to the applicant within 28 days of intimation of the LAEO.

Right of Appeal

50. 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.

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.



29 February 2024