

Housing and Property Chamber

First-tier Tribunal for Scotland



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

DECISION WITH STATEMENT OF REASONS: Housing (Scotland) Act 2014, section 48

Chamber Ref: FTS/HPC/LA/18/2388

Re: 3 Crown Street, Flat 2/1, Greenock, PA15 1NN ("the Property")

The Parties: -

**Mr. Ian Homer, 28 Craighead Road, Bishopton, PA7 5DT
("the Applicant")**

**White Letting Limited, company number SC239955, 7 Hood Street, Clarence House, Greenock, PA15 1YH
("the Letting Agent")**

Letting Agent Registration Number: Not known

Tribunal Members:

Susan Christie (Legal Member and Chair)

Elizabeth Currie (Ordinary Member)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), having made such enquiries as it saw fit for the purpose of determining whether the Letting Agent has complied with the Letting Agent Code of Practice ("the Code"), and taking account of all of the available evidence, determined that the Letting Agent has failed to comply with paragraphs 124, 127 and 132 of the Code. The Tribunal therefore proceeded to make a Letting Agent Enforcement Order which specifies the steps the Tribunal considers necessary to rectify the failures and in addition provides that the Letting Agent must pay to the Applicant an amount of compensation for the losses suffered by the Applicant as a result of the failures to comply. The Tribunal's decision is unanimous.

Background

1. By application received on 19 September 2018, the Applicant applied to the Housing and Property Chamber under section 48 of the Housing

- (Scotland) Act 2014 and Rule 95 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules") to enforce the Code and for a determination of whether the Letting Agent had failed to comply with the Code.
2. The Application specifically referred to alleged failures to comply with Paragraphs 57,58,61,78,79,108,124,125,127 and 132 of the Code.
 3. The Applicant sought £2835 by way of losses suffered as a result.
 4. By Notice of Acceptance dated 27 September 2018, a Convenor of the Tribunal, with delegated powers, accepted the Application and decided to refer the application to a Tribunal for Determination.
 5. The Application initially proceeded in the name of White Letting, Mr Mark Brysland.
 6. Intimation of a date fixed for a Hearing for 21 November 2018 at 10 a.m. at the GTC, Room 109, 20 York Street, Glasgow G2 8GT was issued to the Parties on 8 October 2018.
 7. At that Hearing the Applicant was in attendance. An application was made by him to amend the designation of the Letting Agent and Representative as he now knew the correct designation of the company was White Letting Limited, a company registered under number SC239955. It had the same postal and e mail address as originally stated. Mr Mark Brysland did not appear to be a registered Director of the limited company albeit he was named in the company paperwork he had as having the title "Property Director". It was noted by the Tribunal that there was no reference to the limited company status of the letting agent, nor the number on any communications produced by the Applicant from the Letting Agent. It was stated by the Applicant that it did not appear on their website either. This is required by law under section 24 of The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015.
 8. The Letting Agent Registration Number (LARN) given in the Application also appeared to be wrong and it was established after enquiry by the Clerk of the Tribunal that a number could not be readily obtained. It was not clear either whether an application for registration had in fact been made.
 9. The amendment was allowed under the Rules, and the Hearing adjourned to allow for further administrative steps to be undertaken and for the Letting Agent to receive fresh intimation of the amendment to the Application. Regard was had to the overriding objective of fairness.
 10. A Direction was issued to both Parties in addition for documents and information to be given to the Tribunal by close of business on 7 January 2019. This was to allow for meaningful progress to be made and to identify the relevant issues.
 11. Intimation of the new date for the Hearing was made on all Parties by letter dated 26 November 2018.
 12. The Applicant lodged a bundle of document, including a line of e-mails he relied upon, on 7 January 2019.
 13. The Letting Agent's Representative lodged by e-mail: A Professional Indemnity Insurance policy number, AXA AB CPI 4155458, copies of an 'Internal Complaints Handling Procedure' of White Letting, a template for a style of Management Service Agreement and a cover e mail asking

for the Application to be dismissed on the grounds that the alleged breach of the Code was on or around 21 August 2017, prior to the Code coming in to force. It was noted that on the 'Internal Complaints Handling Procedure' of White Letting at the foot of page 2 that the correct designation of the company as a limited company was noted along with the company registration number and the registered office. This matched exactly the amendment to the Application which had been granted.

Relevant Legislation

The relevant legislation that the Tribunal considered is as follows:

Housing (Scotland) Act 2014

46 Letting Agent Code of Practice

- (1) The Scottish Ministers may, by regulations, set out a code of practice which makes provision about—
 - (a) the standards of practice of persons who carry out letting agency work,
 - (b) the handling of tenants' and landlords' money by those persons, and
 - (c) the professional indemnity arrangements to be kept in place by those persons.
- (2) The code of practice is to be known as the Letting Agent Code of Practice.
- (3) Before making regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate on a draft of the code of practice.

48 Applications to First-tier Tribunal to enforce code of practice

- (1) A tenant, a landlord or the Scottish Ministers may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.
- (2) A relevant letting agent is—
 - (a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,
 - (b) in relation to an application by a landlord, a letting agent appointed by the landlord,
 - (c) in relation to an application by the Scottish Ministers, any letting agent.
- (3) An application under subsection (1) must set out the applicant's reasons for considering that the letting agent has failed to comply with the code of practice.
- (4) No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.
- (5) The Tribunal may reject an application if it is not satisfied that the letting agent has been given a reasonable time in which to rectify the breach.
- (6) Subject to subsection (5), the Tribunal must decide on an application under subsection (1) whether the letting agent has complied with the code of practice.

(7) Where the Tribunal decides that the letting agent has failed to comply, it must by order (a "letting agent enforcement order") require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.

(8) A letting agent enforcement order—

(a) must specify the period within which each step must be taken,

(b) may provide that the letting agent must pay to the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

(9) References in this section to—

(a) a tenant include—

(i) a person who has entered into an agreement to let a house, and

(ii) a former tenant,

(b) a landlord include a former landlord.

The Scottish Ministers, by regulations produced a Code which came into force on 31 January 2018, namely

The Letting Agent Code of Practice (Scotland) Regulations 2016

The paragraphs of the Code relevant to this Application were stated as follows:

References and checks

57. You must agree with the landlord what references you will take and checks you will make on their behalf.

58. If you are to check references and make other checks, you must explain to the applicant and any guarantor what information you will check and who will do the checking and get their written permission.

61. You must take all reasonable steps to confirm the applicant's identity and to verify references, in line with your agreement with the landlord.

Rent collection

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).

Communications

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.

Client accounts

124. 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).

125. 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.

Debt recovery

127. You must have a clear written policy and procedure for debt recovery that lists a series of steps you will follow unless there is good reason not to. This should include setting out at what point you will contact any guarantor. The procedure must be clearly, proportionately and reasonably applied. It must set out how you will deal with disputed debts.

Professional indemnity arrangements

132. You must give further details (such as the name of your provider, your policy number and a summary of your policy) to them on request.

The Tribunal in the course of the Application also had regard to:

The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, specifically:

Registered name to appear in communications

- 24.(1)** Every company shall disclose its registered name on—
- (a) its business letters, notices and other official publications;
 - (b) its bills of exchange, promissory notes, endorsements and order forms;
 - (c) cheques purporting to be signed by or on behalf of the company;
 - (d) orders for money, goods or services purporting to be signed by or on behalf of the company;
 - (e) its bills of parcels, invoices and other demands for payment, receipts and letters of credit;
 - (f) its applications for licences to carry on a trade or activity; and
 - (g) all other forms of its business correspondence and documentation.
- (2)** Every company shall disclose its registered name on its websites.

The Hearing

14. The Tribunal held a Hearing at which was fixed for 16 January 2019 at 10 am in Glasgow Tribunals Centre, Room 109, 20 York Street, Glasgow G2 8GT.

15. The Applicant was the only Party in attendance. The Hearing commenced around 10.20 due to a delay in making enquiry as to whether a LARN could be obtained for the Letting Agent. It did not appear that an application had been made for registration as yet. A Company search confirmed the status of the Company as current.

16. The Applicant presented his case to the Tribunal. He was aggrieved that having engaged the services of the Letting Agent that he had not received a good service with the most recent tenant and as a result he had incurred a substantial loss. He had initially engaged the Letting Agent in 2016 and had a meeting with Mr Brysland in which the work needed to the Property was identified and general terms were agreed including a percentage for commission for services, 10% of the rental income per month and a fixed setting up fee for finding a tenant and preparing the paperwork etc. He was paying the commission for them to manage the Property and to be the middleman, liaising with the tenant collecting rent and asking him for approval before any work was carried out and a cost incurred. He could not recall all of the exact details and did not receive a written agreement or written terms of business. After the initial tenant left, the Property was re-let via the Letting Agent to another tenant between 21 August 2017 and 19 April 2018 when she left having accrued rent arrears. The relationship between the Applicant and the Letting Agent was never formally brought to an end by him or the Letting Agent. He had tried to meet or speak with Mr Brysland as he was unhappy and felt he was in the dark about what was happening when the recent tenant defaulted in rental payments. He received the keys to the Property when they were sent to him by special delivery post on 10 May 2018 without any covering letter or explanation. His deposit was returned less deductions that were not agreed in advance or evidenced, around 22 June 2018. His main grievance had been around the failure to carry out any financial vetting of the tenant or identification checks before taking her on or obtaining a guarantor. Insurance details had been requested and never given to him. He felt that the lack of communication was shocking. He was seeking compensation.
17. The Tribunal made it clear to the Applicant that they could only consider alleged breaches of the Code from 31 January 2018 when it came into force. The Applicant took on board this information and asked the Tribunal to consider the remaining parts of his Application which were relevant after that date. This meant that the Tribunal could not consider the alleged failures in complying with the Code surrounding the selection of the tenant complained of but could consider those elements for any alleged failures after that date.
18. The parts of the Application that fell out with the valid timeframe were referred to by reference to paragraphs 57,58,61,78 and 79.
19. This left paragraphs 108,124, 125, 127 and 132 to be considered.
20. The evidence before the Tribunal consisted of written evidence in the form of the Application form with the supporting documentation including First Invoice and Re-Let Invoice, e mail exchanges between the Parties and all communication exchanges with the Tribunal by the parties along with the oral evidence of the Applicant.

21. Paragraph 108 (Communications and resolving complaints)- The Applicant referred to having made several telephone calls to speak to Mr Brysland. No calls were ever returned. However, these calls were made in the weeks prior to the Code coming into force. E mail exchanges had then taken place from early February 2018 onwards between them as produced to the Tribunal and whilst the quality of the information received by Applicant may have been lacking, responses were received within timescales that could be said to be reasonable. Accordingly, the Tribunal could not on balance find that the Letting Agent has failed to comply with that paragraph of the Code.
22. Paragraph 124 (Handling Landlords' and tenants' money, and insurance arrangements)- On 20 June 2018 the Letting Agent contacted the Applicant by e mail and advised him that they had deposited £230 into his account. This represented the deposit of £450 less deductions of £130 attributed to 'rubbish to go', £55 locksmith and £35 clean-up. It was clear from the e mail exchanges produced that prior written agreement for those specific deductions was not sought or obtained from the Applicant. In addition, the Applicant stated he had asked for evidence of those costs being incurred and invoices and this was never provided to him. He had never agreed to those specific deductions and sums being deducted. Accordingly, there was a failure to comply with this paragraph of the Code.
23. Paragraph 125 (Handling Landlords' and tenants' money, and insurance arrangements)-The tenant had left the Property around 19 April 2018. The Letting Agent indicated in an e mail of 12 May 2018 that the Deposit which had been placed with My Deposit Scotland had been received after a claim having been made by the tenant against it. They had indicated that the locksmith and clearing/cleaning would be deducted, and the balance sent. It was not clear when those tasks had been done or were to be done. Mr Brysland was said to be on holiday until 21 May 2018. The balance was not deposited into the account of the Applicant until 22 June 2018. On balance, the Tribunal did not find that the deposit was held longer than was necessary.
24. Paragraph 127 (Debt Recovery)- It was clear that the Applicant had never received a written debt recovery procedure or outline from the Letting Agent either before or after the Code came into force. The initial agreement between the Parties pre-dated the Code coming into force and was a verbal one. E mail exchanges had then taken place from early February 2018 onwards between them as produced to the Tribunal. It was clear from the e mail exchanges that after the Code came into force that the Applicant was looking for early action to be taken on an ongoing basis to recover the rent owed and for information about the procedures to be undertaken. In the view of the Applicant and the Tribunal the answers contained the e mail exchanges coming from the Letting Agent were not sufficiently clear and precise in their terms to succinctly clarify for the Applicant the procedures, timescales, actions actually taken (rather than proposed) or in relation to the forum (court or

tribunal) to ensure clarity. The Letting Agent could have provided the Applicant with a copy of their written procedure (if they had one) but they did not.

25. Paragraph 132 (Professional Indemnity Arrangements)-the Applicant had asked by e mail on 26 March 2018 for the professional indemnity insurance provider and policy number. The reason for this request was queried by the Letting Agent by e mail on 27 March 2018. The Applicant reiterated in response on 27 March 2018 that it was the professional indemnity insurance details he was looking for. Those details were never given to the Applicant. Accordingly, the Letting Agent failed to comply with this paragraph of the Code.

Findings in fact

It should be noted that the Tribunal disregarded complaints that centred solely around the events that occurred prior to 31 January 2018 when the Code came into force.

The Tribunal finds the following facts to be established:

- I. The Applicant engaged the Letting agent to act on his behalf in the letting of the Property from around 2016, that is prior to the Code coming into force.
- II. No written contract existed, and the Agreement was a verbal one.
- III. The agreement between the parties comprised of the Letting Agent agreeing to carry out letting agent services on behalf of the Applicant for the Property to secure tenants, prepare paperwork and the lease and thereafter to act in the day to day management of the let including collecting rent and acting as an intermediary for any issues arising.
- IV. In return for the services provided the Letting Agent received a 'Management Fee' of 10% of the monthly rent and secured an additional fee 'Introduction and set up fee' for each tenant.
- V. The Agency agreement between the Parties continued with neither Party formally terminating it either verbally or in writing.
- VI. On 10 May 2018 the Letting Agent returned the keys to the Property to the Applicant.
- VII. On 22 June 2018 £230 was returned to the Applicant which represented the balance of the Deposit of £450 less deduction of the sums of £130, £55 and £35.
- VIII. The Applicant had not agreed to the deductions made from the Deposit
- IX. The Applicant had instructed the Letting Agent to seek recovery of unpaid rent owed by the tenant after the Code came into force.
- X. No written Debt Recovery Policy and Procedure that lists a series of steps to be followed was ever issued to the Applicant by the Letting Agent (either before or) after the Code came into force.
- XI. The Letting Agent has not evidenced to the Tribunal that it has a Debt Recovery Policy and Procedure
- XII. The Applicant had asked for the professional indemnity insurance provider and policy number of the Letting Agent on 26 & 27 March 2018. It was never given to the Applicant.

- XIII. The letting Agent was given sufficient Notice after the Code came into force prior to the making of this Application of the complaints contained in the Application and has been given a reasonable time to rectify them prior to this Application having been made.

Finding in fact and law

- XIV. The Letting Agent has failed to comply with paragraphs 124, 127 and 132 of the Code.

Reasons for Decision

Paragraph 124 (Handling Landlords' and tenants' money, and insurance arrangements)- On 20 June 2018 the Letting Agent contacted the Applicant by e mail and advised him that they had deposited £230 into his account. This represented the deposit of £450 less deductions of £130 attributed to 'rubbish to go', £55 locksmith and £35 clean-up. It was clear from the e mail exchanges produced that prior written agreement for those specific deductions was not sought or obtained from the Applicant. In addition, the Applicant stated he had asked for evidence of those costs being incurred and invoices and this was never provided to him. He had never agreed to those specific deductions and sums being deducted. Accordingly, there was a failure to comply with this paragraph of the Code.

Paragraph 127 (Debt Recovery)- It was clear that the Applicant had never received a written debt recovery procedure or outline from the Letting Agent either before or after the Code came into force. The initial agreement between the Parties pre-dated the Code coming into force and was a verbal one. It was clear from the e mail exchanges that after the Code came into force that the Applicant was looking for early action to be taken on an ongoing basis to recover the rent owed and for information about the procedures to be undertaken. In the view of the Applicant and the Tribunal the answers contained the e mail exchanges coming from the Letting Agent were not sufficiently clear and precise in their terms to succinctly clarify for the Applicant the procedures, timescales, actions actually taken (rather than proposed) or in relation to the forum (court or tribunal) to ensure clarity. The Letting Agent could have provided the Applicant with a copy of their written procedure (if they had one) but they did not. Accordingly, there was a failure to comply with this paragraph of the Code.

Paragraph 132 (Professional Indemnity Arrangements)-the Applicant had asked by e mail on 26 March 2018 for the professional indemnity insurance provider and policy number. The Applicant reiterated in response on 27 March 2018 that it was the professional indemnity insurance details he was looking for. Those details were never given to the Applicant. Accordingly, there was a failure to comply with this paragraph of the Code.

The Tribunal proceeded to make a Letting Agent Enforcement Order which specifies the steps the Tribunal considers necessary to rectify the failures of paragraphs 127 & 132.

The Tribunal exercised its discretion and considered that in addition the Letting Agent must pay to the Applicant an amount of compensation for the losses suffered by the Applicant as a result of the failures to comply. The Tribunal determined that it

was reasonable to award compensation to reflect the value of the unilateral deductions that had been made from the Deposit of £220 plus an element for the inconvenience to the Applicant in expending time and effort in attempting to obtain information from the letting Agent at a figure of £90, totalling £310.

The decision of the Tribunal is unanimous.

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.

Please note that in terms of section 51(1) of the Act, a Letting Agent who, without reasonable excuse, fails to comply with an LAEO commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Susan Christie

Legal Member and Chair

16 January 2019 Date