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 Section 46 of the Housing (Scotland) Act 2014 and Paragraph 74 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/18/1428

Parties

Ms Julia Mannion, 4 Abbey Crescent, Kinloss, Forres IV36 3FJ ("the Applicant")

and

Cluny Estate Agents Limited, incorporated under the Companies Act (Company registration number 322397) and having their registered office at 91 High Street, Forres IV36 1AA ("the Respondents")

Tribunal Members: George Clark (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents had failed to comply with paragraph 74 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016, but that the Tribunal was unable to make a Letting Agent Enforcement Order.

Background

The Tribunal received an application from the Applicant on 18 June 2018. The Applicant sought an Order from the Tribunal in respect of the Respondents' failure to

comply with the Letting Agent Code of Practice ("the Code of Practice"). The following paragraphs summarise the content of the application and the supporting documents which accompanied it.

The Applicant alleged failure to comply with paragraph 74 of the Code of Practice. She was the owner of the property 4 Abbey Crescent, Kinloss and the Respondents had been her letting agents. On 26 February 2018, she had complained to the Respondents about the damage she had found when moving back into the property. Specifically, there was cracked harling on the corner wall at the back of the property, plants were growing out of the gutter, there were uneven slabs where the Respondents had had a repair carried out on a burst pipe and there was a stench from the downstairs toilet, caused by a leak, which resulted in her having to replace the toilet and the entire floor of the room. Every one of the Respondents' inspection reports during the tenancy had stated that overall everything looked to be okay and there was no mention in any of them of the downstairs toilet issue.

The Respondents had replied on 1 March 2018, referring to discussions held with the Applicant and negotiations with the deposit holder in regard to the final inspection, which had been carried out on 4 September 2017, and confirming that the full deposit of £525 had been withheld from the outgoing tenant. £70 had been paid to the handyman for repairs, £37.50 for gardening, £170 for cleaning and the balance of £247.50 had been paid to the Applicant in lieu of redecoration and further cleaning. The Respondents stated that they could not understand why the Applicant had not raised with them the issues with the downstairs toilet or the uneven slabs at the time of the handover of the property to the Applicant. They suggested that any issue the Applicant had with the quality of the repair should be directed to the person who had carried it out.

On 7 March 2018, the Applicant had responded to the Respondents' letter of 1 March. She had expressed surprise at the comment regarding the toilet, as, when she had called in to the Respondents' office in Forres. on or about 13 September 2017, she had shown the photographs taken on her mobile telephone to Mr Jim Sharpington and, at his suggestion, had then sent them to Ms Garner, their sales manager. She also expressed surprise that there had been no mention in the correspondence about the developing problem with the rendering. When it had eventually been repaired, the contractor carrying out the work had told the Applicant that such a problem does not appear overnight and that it had probably developed over a period of 12-18 months, but all the reports made at inspections by the Respondents had said, externally, "all looks ok".

On 25 April 2018, the Respondents had sent an e-mail to the Applicant, saying that they did not accept any liability and did not agree that any compensation was due to the Applicant. This was in response to an e-mail from the Applicant to them, dated 22 April 2018.

Copies of all the correspondence referred to in the foregoing paragraphs were included with the application, together with copies of the final inspection report dated 4 September 2017, previous inspection reports of 2 February and 16 July 2017 and the Rental Inventory dated 23 September 2016. The supporting documentation also

included an email from Mr Beck, a Director of Cluny Estate Agents Limited, the Respondents, to the Applicant, dated 28 November 2017, in which he referred to the cracked harling at the property. He agreed that cracking and bossing of harling did not happen overnight and that it was a progressive issue. It was, he said, a common occurrence in this type of property. He noted that the Applicant felt that his staff should have noticed the issue and made the Applicant aware of it, but they did not possess building structural knowledge. They did not know when the issue first arose and if, as he contended, it was apparent when the Respondents took over the property, it would not be unreasonable for his staff to presume that the Applicant was aware of the issue. Mr Beck stated that cracking and bossing of the harling had been mentioned in the Home Report when the Applicant bought the property and that the Report had also said that the problem would become more evident in the future. He suggested that the Applicant had, therefore, been aware of the issue before the Respondents had become involved.

On 23 January 2018, the Applicant emailed the Respondents to say that the matter raised in the Home Report had been a small problem with the render at a ground floor window of the property, but this had been repaired before the sale to her. She had had the fascia replaced in May 2014 and there had been no evidence of cracking at that time. The Respondents had undertaken to inspect the property two or three times a year, but none of their reports mentioned any problem with the external condition.

Further Written Representations by the Parties

The Applicant made further written representations to the Tribunal by letter received on 20 August 2018. They comprised copies of e-mail exchanges between the parties between 23 February 2014 and 27 November 2017, photographs sent by email by the Applicant to Ms Garner on 13 September 2017, showing damage to the floor of the downstairs toilet of the property, further photographs showing the cracked harling, sent by the Applicant to Ms Garner on 30 September 2017 and an e-mail from the Applicant to the Respondents, dated 26 November 2017, in which, having had no response to her email of 30 September she reiterates her dissatisfaction with the Respondents, draws attention again to the cracked harling, the plants growing out of the gutter and the issue of the slabs not having been properly replaced following the repair to a leaking pipe in the garden. A further e-mail to the Respondents' recommended plumber, dated 17 September 2017, refers to the downstairs toilet and toilet floor. The written representations also include photographs of the cracked and replaced harling, the uneven slab after the pipe repair, the plants growing out of the gutter, the downstairs toilet and the toilet floor. The photographs are not dated.

The Respondents made written representations, received by the Tribunal on 3 August 2018. They stated that the harling crack was mentioned in the Home Report at the time of the Applicant's purchase. They felt it was unreasonable to expect their staff to have enough knowledge to assess and advise on harling cracks and other structural issues. It was not unreasonable for them to assume that the Applicant was

already aware of the issue. The weeds in the gutter had not been brought to their attention for some time after the final inspection and handover. This was also the case with the uneven slabs. The issue of the downstairs toilet had never been brought to their attention by the tenant of the property. They contended that if the smell was as bad as the Applicant was saying, it would surely have been brought to their attention earlier. They understood that the Applicant had moved back in to the property on 4 September 2017 and the first mention of the toilet issue had been in her letter of 26 February 2018.

The Respondents included with their written representations copies of inspection reports dated 16 April 2015, 16 July 2015, 22 October 2015, 22 January 2016, 28 April 2016, 28 July 2016, 2 February 2017 and 18 May 2017. There was no mention in any of these reports of issues with the downstairs toilet, cracking in the harling, vegetation growth in the gutter or uneven slabs following on a drainage repair. In each report, the comment on the external condition was "All looks ok". Copies of photographs taken at the final inspection in September 2017 were also included. They did not include photographs of the downstairs toilet or external pictures of gutters, the area of cracked harling or any uneven slabs.

The Hearing

A hearing was held at Mercure Hotel Inverness, 33 Church Street, Inverness on the morning of 3 September 2018. The Applicant attended the hearing. The Respondents were represented at the hearing by Stephen Beck, one of their Directors and by Rebecca Garner, their Sales Manager.

The Applicant told the Tribunal that she had bought the property in November 2013. It was to become her home when she retired, and she decided to let it out in the meantime. The relationship with the Respondents had gone perfectly well until she moved back in on the evening of Thursday 7 September 2017. The smell from the toilet hit her whenever she opened the front door and it made her physically sick. She had commitments on the Friday and was away for the weekend. On the following Tuesday morning, she went in to the Respondents' office. Their handyman then came to the property and lifted the flooring. He was carrying out other work at the property anyway, in connection with the final inspection which had been carried out on 4 September.

At this point, Ms Garner advised the Tribunal that the tenants had not carried out a final clean before she inspected the property on 4 September. It needed to be hoovered and generally cleaned, but she there was no smell evident to her and the property was not dirty enough to suggest that it needed more than a surface clean. This was done, and the hard floors were hoovered and mopped with anti-bacterial cleaner. The cost of this work was £170, which ultimately was retained from the deposit. The cleaners did not report any smell and the Respondents were not in the property after that date.

The Applicant told the Tribunal that the handyman had identified a leak at the cast iron foul water pipe of the toilet and had recommended lifting the flooring. That was

when the damage to the underlying floor was discovered. The wooden floorboards under the chipboard flooring were also soaked.

Mr Beck stated that the Respondents now accepted that they knew about the problem when the Applicant reported it to them in September.

The Tribunal explored with the Respondents the extent of their regular inspections of properties, noting that at least one of them had been carried out after daylight hours. Mr Beck said that the external inspection was visual, looking, for example, at window paintwork. Any defects noted would have to be very obvious. His staff were not specialists in building construction. Buildings such as the property all had harling cracks. The problem with the harling at the property was at the top of the wall, right at the back of the building. He accepted that if it had been in a more obvious position, his staff might have seen the cracked harling. He repeated that it was highlighted in the Home Report. Mr Beck accepted that the inspection of the exterior fabric of the property had been based on a "walk up look" at the exterior and could not give an assurance that other areas of the property had been examined during inspections. This was, he said, an important point to make, given that the harling issue was at a rear corner of the property

The Applicant then advised the Tribunal that the Home Report had mentioned a hairline crack in the harling, but that was below the kitchen window and it had been repaired at the time.

Mr Beck reminded the Tribunal that even if the crack had been seen at inspection, it would still have been the responsibility of the Applicant to have the work carried out. The Applicant was of the opinion that if it had been reported sooner, the extent of the remedial work might have been less.

There was agreement that the vegetation in the gutter and the uneven slab were very minor matters. In relation to the gutters, Ms Garner advised that the September inspection was focused more on issues which might be the responsibility of the outgoing tenants.

The Applicant pointed out that the lease required the tenants to take out insurance against accidental damage and asked the Respondents if they had seen a copy of the insurance policy. They confirmed that the had not asked to see it, but they were encouraging tenants to add this type of insurance to their contents cover. Mr Beck also reminded the Tribunal that the Applicant had received payment of £247.50 of the deposit. He felt it unfair that the Respondents were being blamed for the things that had happened.

The Parties then left the hearing and the Tribunal considered all the evidence, written and oral, that had been presented to it.

Reasons for the Decision

Paragraph 74 of the Code of Practice states 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*".

The Tribunal determined that there was no evidence to support the Applicant's assertion that the Respondents should have detected the problem with the downstairs toilet. The Tribunal was not suggesting there had not been a leak or that there was no smell when the Applicant entered the property, but the evidence suggested that it was not there at the time of the final inspection as it had not been mentioned by three parties who had been in the property, all of whom would have had nothing to lose by reporting it, those three parties being the outgoing tenants, Ms Garner, who inspected the property on 4 September 2017, and the cleaners who were in the property on the following day. Accordingly, the Tribunal determined it was unable to hold that this ought to have been picked up at the final inspection, so did not uphold this element of the Applicant's complaint.

The Tribunal noted that the clearing of the gutter would have been the Applicant's responsibility, had the requirement to do it been noticed. The Tribunal held that this was a very minor matter, as was the issue of the uneven slab. The likelihood was that the vegetation was not visible at the time of the inspection in July 2018 and the Tribunal accepted that the main purpose of the final inspection on 4 September was to identify defects for which the outgoing tenants might be held responsible.

The Tribunal then considered the issue of the cracked harling. The Respondents had attempted to justify in retrospect their failure to report this in their periodic inspections by saying that it was highlighted in the Home Report in late 2013. The Tribunal did not accept this argument, as the Respondents had not sought out the Home Report before the Applicant complained to them. The Tribunal held, on the balance of probabilities, that the Respondents would have had no idea of the Home Report contents during the currency of their contractual relationship with the Applicant. The Tribunal also determined, however, that, even if the Respondents believed the Applicant was aware from the outset that there was cracking in the harling, they still had a clear duty to report it, if it was visible at the times of their inspections. The Respondents had said in evidence that they only carried out a superficial visual inspection and the Tribunal accepted that their staff were not buildings specialists, but the photographs before the Tribunal indicated that the cracking should have been evident even on the most cursory inspection and should have been reported to the Applicant after their inspections. The Tribunal noted that one inspection had actually been carried out in the dark. There had been two inspections in 2017, prior to the final one in September, and, while the Tribunal would not speculate on when the problem should first have been spotted, it was satisfied, on the balance of probabilities, that it must have been evident by the time of the inspection in July 2017 and was probably visible for some time prior to that. Accordingly, the Tribunal determined that the Respondents had failed to comply with paragraph 74 of the Code of Practice.

Decision

In terms of Section 48(7) of the Housing (Scotland) Act 2014 ("the 2014 Act"), having determined that the Respondents have failed to comply with paragraph 74 of the Code of Practice, the Tribunal *must* make a Letting Agent Enforcement Order and, as provided in Section 48(8) of the Act, *may* provide in that Order that the Respondents 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.

Section 48(7) of the 2014 Act also provides, however, that a Letting Agent Enforcement Order *must* require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure and Section 48(8) of the Act states that the Tribunal *must* specify the period within which each step must be taken. The Tribunal had determined that the Respondents had failed to comply with the Code of Practice, but was of the view that there were no steps that they could now require the Respondents to take to rectify the failure and, therefore, no period that could be specified in terms of Section 48(8) of the Act. Accordingly, the Tribunal determined that it could not make an Order which would comply with the requirements of Sections 48(7) and 48(8). Any Order would be meaningless unless the Tribunal held that compensation should be paid in terms of Section 48(8) of the 2014 Act.

The Tribunal then considered the question of compensation. The view of the Tribunal was that the cracking would have appeared in an area where the render was already "boss" and that, as a result, the cost of repair and making good would not have been significantly less had the problem been identified earlier, as substantially the same work would have been required, the main cost element being the hire of scaffolding, which would have been necessary in any event. The Tribunal was unable to determine when the cracking had first appeared, so any attempt to quantify an alleged loss would have been speculative. Accordingly, the Tribunal was unable to determine that there had been any quantifiable loss to the Applicant arising from the failure to comply with the Code of Conduct, so an order for compensation was not appropriate.

The Tribunal determined that, as there were no steps that it could require the Respondents to take to rectify their failure to comply with the Code of Practice and as the Tribunal had decided not to provide for a compensation payment, it was unable to make a Letting Agent Enforcement Order, notwithstanding the terms of Section 48(7) of the 2014 Act.

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 3 September 2018

Legal Member