

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Statement of Decision by the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under Section 48 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/20/1654

The Parties:-

Simun Mihanovic, formerly residing at Flat 64, 14 Clyde Street, Glasgow, G1 5HN (“the Applicant”)

Primo Property Management (NW) Ltd, a company incorporated under the Companies Acts and having a place of business at 14 Wood Street, Bolton, BL1 1DY (“the Respondent”)

The Tribunal comprised:-

Paul Doyle	-	Legal Member
Gerard Darroch	-	Ordinary Member

Decision

1. The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the Tribunal’) unanimously determined that the Respondent has failed to comply with paragraphs 16, 40, 41, 45 and 68 of the Letting Agent Code of Practice but determined that a Letting Agent Enforcement Order is not necessary.

Background

2. By application dated 4 August 2020, the Applicant sought a letting agent enforcement order against the Respondent due to alleged breaches of the Letting Agent Code of Conduct (“the Code of Conduct”).
3. By Notice of Acceptance of Application, a Legal Member with delegated powers from the Chamber President confirmed that there were no grounds upon which to reject the application and fixed a Hearing.

4. The applicant submitted a detailed written submission with supporting photographs and documents. On 17 December 2020, the respondent's solicitors submitted detailed written representations and an inventory of productions.

The Hearing

5. A Hearing took place on 11 January 2021 by telephone conference. The applicant was neither present nor represented. By email dated 8 January 2021 the applicant said that he might not attend the hearing but

"I do agree with what is written in the case submissions section and have nothing to add".

The respondents were represented by Ms R Wark, Solicitor. Mr Forshaw was available to give evidence for the respondents, but Ms Wark agreed that this case should be determined on the basis of the documentary evidence and written submissions because there is no great dispute about the facts in this case.

The applicant's claim

6. The applicant originally said that the respondent breached
 - (a) Paragraphs 16, 19, 20 and 23 of section 2 of the code of conduct
 - (b) Paragraphs 40,41,43,45, 62 and 68 of section 4 of the code of conduct
 - (c) Paragraphs 75, 82, 83,84, 90, 91 & 93 of section 5 of the code of conduct, and
 - (d) Paragraphs 97 of section 6 of the code of conduct

Relevant Legislation

7. The relevant legislation is section 48 of the Housing (Scotland) Act 2014:-

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 includes—
 - (i) a person who has entered into an agreement to let a house, and
 - (ii) a former tenant,
 - (b) a landlord includes a former landlord.

Findings in Fact

8. The appellant is a Croatian national who came to Glasgow to study a Masters degree at Strathclyde University. The respondent is a letting agent who represents the individual landlords within a student complex at 14 Clyde Street, Glasgow.
9. On 7 September 2019 the appellant signed a tenancy agreement prepared by the respondent and rented flat 64, 14 Clyde Street, Glasgow ("Flat 64"). The tenancy agreement made no reference to the Private Housing (Tenancies) (Scotland) Act 2016.
10. The tenancy agreement provided for payment of a tenancy deposit. On 11 September 2019 the tenancy deposit was placed with an approved tenancy deposit scheme and a copy of the tenancy deposit certificate was emailed to the applicant on 3 October 2019.
11. On 22 September 2019 the appellant found the water was leaking into Flat 64 from around the window. He reported the defects of the respondents who instructed a roofing contractor. The roofing contractor cleared the gutter around the window, which stopped the ingress of water.

12. On 27 September 2019, whilst repairs were carried out to Flat 64 the appellant was moved to another flat within the complex where he stayed for five days until the leak was repaired. On 4 October 2019 the applicant returned to Flat 64. On returning to Flat 64 the appellant found that a roof hatch had been left open and a pool of water had formed. He reported the problem with the hatch to the respondents. On 8 October 2019 the respondent told the applicant that the roof hatch had been fixed.
13. On 15 October 2019 the respondent refunded to the appellant 12 days rental to take account of the time that Flat 64 could not be occupied because repairs were being carried out.
14. On 12 February 2020 water leaked into Flat 64 at the same place. The applicant reported the leaked to the respondents. The next day, the respondent's employee visited Flat 64 to investigate, and on 14 February 2020 repairs were carried out, however, in the next few days, the applicant continued to hear dripping water.
15. On 10 April 2020, the applicant saw a wet line on the ceiling of Flat 64, which he feared was water ingress. He reported his concerns to the respondent. On 30 April 2020 the applicant saw further signs of water ingress, which he reported to the respondent, and, on that same day, water started to leak through the smoke detector. He immediately reported water ingress to the respondent.
16. On 1 May 2020 the respondent's roofing contractor carried out repair works to loose tiles and a missing skylight. He also removed a bird's nest.
17. On 23 May 2020, Flat 64 suffered water ingress again. The applicant reported water ingress immediately. On 24 May 2020 the maintenance manager for the respondent confirmed that a roofing contractor had been instructed, and, on 25 May 2020 the respondent's roofer came to inspect the damage. Some of the applicant's personal possessions had been damaged by water ingress. The respondent has reimbursed the applicant for the cost of damaged items.
18. On 1 June 2020 the applicant asked to move to flat 70 within the accommodation complex
19. On 2 June 2020, the claimant notified the respondent that he intended to raise a complaint under the Letting Agent Code of Conduct. The respondent considered the heads of claim and on 17 June 2020 refunded the applicant's rent for the period that he could not occupy his flat and reimbursed the applicant for the cost of damaged goods. The respondent made three offers of alternative accommodation to the applicant.
20. On 14 July 2020 the applicant accepted the offer of compensation for distress and inconvenience and inability to use flat 64 and accepted an offer of alternative accommodation. He accepted the offer of payment of the cost of

damaged goods, and so compromised those heads of claim in his letter notifying complaint under the code of conduct.

21. The applicant persists in his claims that the respondent should have offered him a private residential tenancy.
 22. On 17 June 2020 the respondent told the applicant that he could terminate his lease by giving 28 days' notice, the respondent also said they would accept seven days' notice because of the Covid19 pandemic. Instead, the applicant accepted alternative accommodation.
 23. After taking legal advice, the respondents ensured that all tenants of the academic year starting in August 2020 are issued with private residential tenancies, in accordance with Private Housing (Tenancies) (Scotland) Act 2016.
24. The applicant left the property at the termination of his tenancy on 29 August 2020.

Findings in Law

25. (a) Section 2 of the code of conduct sets out the overarching standards of practice. Paragraphs 16, 19, 20 and 23 of section 2 of the code of conduct say

16. You must conduct your business in a way that complies with all relevant legislation.

19. You must not provide information that is deliberately or negligently misleading or false.

20. You must apply your policies and procedures consistently and reasonably.

23. You must ensure all staff and any sub-contracting agents are aware of, and comply with, the Code and your legal requirements on the letting of residential property.

(b) The applicant's complaints about the overarching standards of practice fall into 3 categories

(i) the respondent's failure to provide a lease the wording of which complies with the Private Housing (Tenancies) (Scotland) Act 2016.

(ii) a failure to adhere to the Tenancy Deposit Schemes (Scotland) Regulations 2011 and

(iii) Flat 64 suffered from water ingress a number of times during the tenancy.

(c) It is true that the respondent used the wrong form of words in the lease. The respondent acknowledges that failure and establishes that, since August 2020, only private residential tenancies have been offered. Sections 1, 2 & 3 of Private Housing (Tenancies) (Scotland) Act 2016 make it clear that, notwithstanding the wording used to create the tenancy, as a matter of both fact and law the only tenancy that the applicant could have was a private residential tenancy. The applicant consistently

enjoyed the same rights of a tenant who had signed the Scottish government model tenancy agreement.

(d) The respondent acknowledges making a mistake, but the applicant was not deprived of any rights and suffered no loss because the wrong form of words was used in the tenancy agreement he signed. The respondent has learnt from the mistake and now uses the Scottish government model tenancy agreement. The applicant was always able to terminate his lease by giving 28 days' notice, and the respondent reduced the period of notice to 7 days because of the Covid-19 outbreak.

(e) The respondent produces a receipt from MyDeposits Scotland which adequately demonstrates that by 11 September 2019 the tenancy deposit had been placed with the tenancy deposit scheme. In light of that production The applicant changed his claim to complain that he did not receive the tenancy deposit certificate until 11 June 2020 but, in later correspondence, the applicant concedes that the tenancy deposit certificate was sent to him on time, but had been diverted into a spam email folder. In any event, if there was a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011, the applicants remedy would lie not against the letting agent, but against the landlord.

(f) On the facts as we find them to be, there was no breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

(g) The remainder of the applicant's complaint that section 2 of the code of conduct is engaged relates to the history of water ingress and repairs. The applicant says that the respondent did not act quickly enough to carry out repairs. The applicant concedes that not every repair can be carried out within 24 hours but argues that the respondent took nine months to carry out repairs.

(h) The applicant's argument is misconceived. The respondent, on the facts as we find them to be, did not take nine months to carry out repairs. The respondent acted as fast as possible, and, each time a leak was reported, sent a roofer to repair the leak. Sources of water leaks can be difficult to identify. Ingress of water can occur time and time again. The respondent did not just instruct repairs timeously, the respondent also arranged alternative accommodation for the applicant; the respondent refunded rental for the period when the applicant could not use Flat 64, the respondent has paid for the damage to the applicant's property. The applicant concedes that he has accepted compensation for loss caused by water ingress.

26 (a) Section 4 of the code of conduct deals with lettings. Paragraphs 40,41,43,45, 62 and 68 of section 4 of the code of conduct say

40. You must take all reasonable steps to ensure your letting agent registration number is included in all property advertisements or communications.

41. You must comply with relevant legislation on the marketing and advertising of properties for rent. For example, you must include a landlord's registration number (or clearly state 'landlord registration pending') and the energy performance indicator from the property's energy performance certificate (EPC) in your property advertisements and remove lettings boards within 14 days of the property being let.

Giving correct information to prospective tenants

43. You must give prospective tenants all relevant information about renting the property – for example, the type of tenancy; the rent; the deposit; other financial obligations such as council tax; any guarantor requirements and what pretenancy checks will be required at the outset.

45. You must make prospective tenants aware of the Code and give them a copy on request, this may be provided electronically.

62. If you prepare a tenancy agreement on the landlord's behalf, you must ensure it meets all relevant legal requirements and includes all relevant information (such as the name and address of the landlord or name and address of the letting agent and the identity of the landlord; type; length of tenancy where it is a short assured tenancy; amount of rent and deposit and how and when they will be paid; whether it is a house in multiple occupation; as well as any other responsibilities on taking care of the property, such as upkeep of communal areas and the cleaning required at the end of the tenancy); and any specifically negotiated clauses (for instance whether there will be landlord or agent inspections/visits) agreed between the landlord and the prospective tenant. The agreement must also include the landlord's registration number.

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.

(b) It is a matter of agreement that the letting agent registration number was not included in the respondent's adverts. The energy performance certificates were not included in the respondent's adverts. The respondent thanks the applicant for pointing out this error and has changed the advertisements to include the letting agent registration number. The respondent now makes energy performance certificates available with their website advertising.

(c) The respondent concedes that they did not tell the applicant about the letting agent code of conduct. Now that they know that should, they have included details of the letting agent code of conduct in the materials given to new tenants.

(d) The applicant was not given an inventory of contents when his tenancy started. The respondent acknowledges that this is a mistake and now provides each new tenant with an inventory of contents for each room.

(e) The remainder of the applicant's comments in relation to section 4 of the code of conduct relates to a complaint under the Tenancy Deposits Scheme (Scotland) Regulations 2011 (which the applicant now accepts is without foundation) and the failure of the respondent to provide the correct wording for a private residential tenancy.

(f) On the facts as we find them to be the respondent used the wrong wording in the tenancy agreement signed by the applicant and respondent, but the applicant was not deprived of any rights, and suffered no loss. The respondent has learned from the mistake and now issues correctly worded private residential tenancy agreements.

27. (a) Section 5 of the code of conduct deals with management and maintenance. Paragraphs 75, 82, 83,84, 90, 91 & 93 of section 5 of the code of conduct,

73. 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.

82. You must give the tenant reasonable notice of your intention to visit the property and the reason for this. At least 24 hours' notice must be given, or 48 hours' notice where the tenancy is a private residential tenancy, unless the situation is urgent or you consider that giving such notice would defeat the object of the entry. You must ensure the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant.

83. If the tenant refuses access, you, the landlord or any third party have no right to enter the property using retained keys without a warrant.

84. You must make it clear to the tenant or occupier beforehand if a third party will visit the property unaccompanied.

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

91. You must inform the tenant of the action you intend to take on the repair and its likely timescale.

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.

(b) The applicant says that section 5 of the code of conduct is engaged because the wrong form of wording was used in his lease and because of the history of water leaks and necessary repairs. We have already dealt with the wording of the lease.

(c) The history of water leaks and repairs indicates that, because of the nature of the problem, the respondent was unable to remedy the water leak, every time, within 24 hours. In his written submission, the applicant concedes that the previous tenancy was not troubled with water leaks. The respondent concedes that an electrician entered Flat. 64 to carry out repairs without prior notice. The respondent produce sufficient evidence to demonstrate that they have a clear written policy about periods of notice given to tenants and that policy was not adhered to in this instant. The respondent apologises.

(d) The applicant concedes that he has accepted compensation offered by the respondent for damage to his property and inconvenience caused. On the facts as we find them to be, the applicant had a rent-free period of 12 days whilst remedial works were carried out to Flat 64.

(e) The long and short of it is that, every once in a while, a water leak can happen. During the applicant's tenancy of Flat. 64 there were four water leaks. That is unfortunate, but it is not the respondent's fault. The respondent acted quickly each time to remedy the fault and to minimise the inconvenience to the applicant. Poring over the code of conduct to try to blame the respondent for a naturally occurring inconvenience which, on the facts as we find them to be the respondent repeatedly tried to remedy, is a misinterpretation of the purpose of the code of conduct.

28. (a) Section 6 of the code of conduct deals with ending tenancies. Paragraph 97 of section 6 of the code of conduct says

97. The correct procedure for ending a tenancy depends on such factors as the type of tenancy and the reason it is ending. But in all circumstances you must comply with relevant tenancy law and ensure you follow appropriate legal procedures when seeking to end a tenancy.

(b) The applicant relies on paragraph 97 because the wrong form of words was used to create the tenancy. For the reasons already given, we find that the applicant had a private residential tenancy so that there is no breach of paragraph 97. On the facts as we find them to be, the applicant was entitled to terminate the contract on 28 days' notice. In light of the Coronavirus (No 2) (Scotland) Act 2020, the respondent restricted the notice period to seven days. The applicant chose not to take advantage of his ability to terminate the contract.

Observations

29. Having considered all matters, we find that the respondent used a form of lease, which did not acknowledge the Private Housing (Tenancies)(Scotland) Act 2016. Insofar as there may be a breach of the overarching standards of practice in section 2 of the code of conduct, it is a breach which has been remedied already. On the facts as we find them to be, the applicant was not deprived of any rights. As a matter of law, regardless of the wording of the tenancy agreement, the applicant had a private residential tenancy. The respondent may have breached paragraph 16 of the code of conduct, but the breach had been remedied so that there is no need for an enforcement order.

30. The applicant argues that the allegations of disrepair were matters that fell within the landlord's duties under the Repairing Standard - which is governed by a separate statutory regime under the Housing (Scotland) Act 2006. The Respondent is obliged to take instructions from the landlord prior to carrying out repairs, and whilst staff could offer advice to him in this regard, they could not compel the landlord to carry out works. The appropriate remedy in the event that the landlord chose not to do so would be an application to the Tribunal against the landlord (not against this respondent) in respect of alleged breaches of the Repairing Standard.

31. On the facts as we find them to be, the respondent breached paragraphs 40, 41, 45 and 68, of section 4 of the code of conduct, but the respondent candidly accepts that errors were made. Those errors have already been remedied. On the facts as we find them to be, the respondent's advertising material has already been changed so that the respondent's letting agent registration number and the energy performance certificates are clearly displayed in their advertising. The respondent's practice has change and an inventory for each unit let in the larger subjects is now prepared. Insofar as there has been a breach, an enforcement order would serve no purpose because the defect has already been remedied.

32. On the facts as we find them to be, the respondent met the requirements of sections 5 and 6 of the code of conduct.

33. The applicant might think that they had been breaches, the breaches have been remedied, so that there is no point in making an order directing the respondent to change their practice, but the fact that there are breaches raises an entitlement to compensation. The applicant seeks a payment order.

34. A payment order is inappropriate for three reasons. The first is that the applicant does not quantify his loss. The second is that, on the facts as we find them to be, the applicant did not suffer any loss. The third is that the applicant has already compromised his claim by accepting the compensation offered by the respondent for inconvenience when he had to remove temporarily from Flat. 64 and for the damage to his possessions.

Decision

35. Having found the Respondent to be in breach of paragraphs 16, 40, 41, 45 and 68 of the Letting Agent Code of Conduct the Tribunal determined not to make a letting agent enforcement order under Section 48(7) of the Housing (Scotland) Act 2014 because the breaches have already been remedied.

36. The decision of the Tribunal was unanimous.

Right of Appeal

37. 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.

Paul Doyle
Legal Member

11 January 2021