

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision: Housing (Scotland) Act 2014 Section 48 and the First-tier Tribunal for Scotland Procedure Regulations 2017 Rule 26

Chamber Ref: FTS/HPC/LA/19/3156

The Parties:-

Justine Williams, 21 Hunter Hall Place, St Madoes, Perth PH1 7TZ (“the Applicant”)

Pavillion Properties, 86 Bell Street, Dundee, DD1 1HN (“the Letting Agent and Respondent”)

Tribunal Members:-

**Petra Hennig McFatridge - Chairing and Legal Member
Frances Wood - Ordinary Member (Housing)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the tribunal’), having made such enquiries as it saw fit for the purposes of determining whether the Letting Agent has complied with the Code of Practice for Letting Agents as required by the Housing (Scotland) Act 2014 (“the 2014 Act”), determines unanimously that, in relation to the present Application, the Letting Agent has not complied with the Code of Practice Section 5 Number 73, Section 7 Numbers 108, 110 and 112 and determined to issue a Letting Agent Enforcement Order (“LAEO”) in the following terms:

Within 28 days of intimation of the LAEO the Letting Agent must:-

- 1. Pay to the Applicant the sum of £278 in cleared funds and provide to the Tribunal evidence of said payment. The amount comprises:
 - a) £128 compensation for breach of the Letting Agent Code of Practice No 73 as set out in the decision document**
 - b) £100 compensation for breach of the Letting Agent Code of Practice No 108 as set out in the decision document**
 - c) £50 compensation for breach of the Letting Agent Code of Practice No 112****

- 2. In terms of Number 110 ("110: You must make landlords and tenants aware of the Code and give them a copy on request, electronically if you prefer to") provide information to the landlord regarding the Code of Practice and offer them a copy of same in either paper or electronic format and provide evidence to the Tribunal that this has been done.**

- 3. In terms of Number 112 ("112. You must have a clear written complaints procedure that states how to complain to your business and, as a minimum, make it available on request. It must include the series of steps that a complaint may go through, with reasonable timescales linked to those set out in your agreed terms of business. ") provide a copy of the complaints procedure drafted in compliance with the Code of Practice and to be used in all future dealings with their clients the landlord and the Tribunal.**

The Applicant's representative had been advised of the decision of the Tribunal after the conclusion of the hearing on 2 October 2020

Introduction

On 18 November 2020 an application under S 48 of the Housing (Scotland) Act 2014 (the Act) was made to the tribunal by the Applicant's representative Ms Lucchesi Edwards. The application was made in terms of S 48 and rule 95 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations (the Rules) and included a copy of the Letting Agent Code of Practice Notification Letter sent to the Respondent by the Applicant in terms of rule 95 (b).

Due to the Covid 19 lockdown the initial date for the hearing was discharged. The tribunal issued directions dated 11 March 2020 and 23 June 2020 to the parties to regulate the process. These are referred to for their terms and held to be incorporated herein. In these directions the tribunal ordered the production of a full bundle of documents regarding the application from the applicant and asked the respondent to advise the tribunal of their position. A paginated bundle of productions and representations with inventory of all productions was received from the Applicant's representative on 13 July 2020 and intimated to the Respondents on 23 July 2020. The Respondents were invited to participate in the hearing on 2 October 2020 and provided with the details to join the telephone conference by recorded delivery letter dated 28 July 2020 and signed for by the Respondents on 30 July 2020. The tribunal is satisfied that the Respondent received the appropriate notice in terms of Rule 24 (2) of the Rules.

The inventory and documents lodged by the Applicant on 13 July 2020 are referred to for their terms and held to be incorporated herein.

At the hearing on 2 October 2020, held by telephone conference, the Applicant's representative Ms Lucchesi Edwards took part. The Respondent had not lodged any representations, had submitted no documents to the tribunal and did not take part in the hearing. The hearing was thus held in the Respondent's absence in accordance with Rule 29 of the Rules.

The Legal Basis of the Complaints

The following parts of the Letting Agent Code of Practice (the Code) are engaged in this case:

5. The Code applies to every person who carries out letting agency work in Scotland, which is defined in section 61(1) of the 2014 Act as:

"things done by a person in the course of that person's business in response to relevant instructions which are—

- a) carried out with a view to a landlord who is a relevant person entering into, or seeking to enter into a lease or occupancy agreement by virtue of which an unconnected person may use the landlord's house as a dwelling, or
- b) for the purposes of managing a house (including in particular collecting rent, inspecting the house and making arrangements for the repair, maintenance, improvement or insurance of the house) which is, or is to be, subject to a lease or arrangement mentioned in paragraph (a)."

Section 5 Management and maintenance

73. If you have said in your agreed terms of business with a landlord that you will fully or partly manage the property on their behalf, you must provide these services in line with relevant legal obligations, the relevant tenancy agreement and sections of this Code.

Section 7 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.

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

Complaints resolution

112. You must have a clear written complaints procedure that states how to complain to your business and, as a minimum, make it available on request. It must include the series of steps that a complaint may go through, with reasonable timescales linked to those set out in your agreed terms of business.

The Applicant notified the Respondent by letter 30 October 2019 that she considered they had failed to comply with the undernoted Sections of the Code of Practice for Letting Agents:

Section 4 number 68

Section 5 numbers 73 and 74

Section 7 numbers 108, 110 and 112

The Tribunal application detailed the following complaints:

Section 4 number 68

Section 5 numbers 73 and 74

Section 7 numbers 108, 110 and 112

Hearing

1. At the hearing the tribunal heard evidence from the Applicant's representative Ms Lucchesi Edwards who explained that she is the mother of the Applicant and deals with all matters concerning the properties belonging to the Applicant on her behalf.
2. The tribunal legal member clarified to Ms Lucchesi Edwards that the tribunal can only consider breaches of the Letting Agent Code of Practice which came

into force on 31 January 2018 and that thus any matters which were concluded prior to the Code coming into force could not be considered by the tribunal even if the actions, had the Code of Practice been in force at that time, would have constituted a breach of the terms of the Code of Practice.

3. The Applicant's representative thus confirmed she understood that the complaints in terms of Section 4 number 68 could not be considered as the conduct of the Letting Agent in this regard related to an inspection not having been carried out in 2015. Mr Marr moved into No 46D Benvie Road, Dundee DD2 2PE ("the property") on 17 August 2015. This was prior to the Code coming into force.
4. She confirmed that the tenancy ended on 31 July 2018 after 3 years and that no inspections had taken place during the tenancy, only after the tenant left. This should be seen in light of the promise made by the Respondent to carry out regular inspections as per the email to her of 29 August 2017 (page 4/16 of the bundle).
5. She stated that the Letting Agent still dealt with the property, had not advised the landlord of the Code of Practice and had not provided the landlord with any information about a complaints procedure at any stage.
6. She had always made complaints by telephone or email and the problems with obtaining timely responses to enquiries and complaints persist to date.
7. She referred the tribunal to the email exchanges between her and the Letting Agent as contained in the bundle of 13 July 2020 and to the essential content of her claim. She specifically drew the Tribunal's attention to the summary of her claim (production A1 and A2), calculation of her financial claim (pages 52-54 of the bundle), the notification letter of 30 October 2019, her email to Mr Letley on 13 September 2019 (production C2) as well as the full explanation of her grievances as set out in her statement headed 46 D Benvie Road (pages 1-3 of the bundle), the damage to the property shown in the items marked 4 and A4-E4 and repair invoices in 2/5-13 of the bundle and the undertaking to carry out inspections in the document of 29 August 2017 (4/16 of the bundle).
8. As the Respondent did not participate in the hearing and had lodged no representations and documents the application was unopposed and the evidence of the Applicant and her representative accepted as factually correct.

Findings in Fact

The tribunal makes the following findings based on the oral evidence at the hearing and the documents lodged by the Applicant as per the bundle of 13 July 2020:

1. The Respondent is still carrying out Letting Agency work for various properties in Dundee for the Applicant and has done so since 2014.
2. The Respondent acted as Letting Agent for the Applicant for the property at No 46D Benvie Road, Dundee DD2 2PE from July 2014 onwards.

3. The property was rented out to Mr Marr from 17 August 2015 to 31 July 2018.
4. At the end of the tenancy it transpired that various repairs had to be undertaken as there had been damage to furniture and the walls which had arisen during the tenancy and in particular from the cats the tenant held in the property.
5. Various repairs were undertaken after the end of the tenancy to deal with the damage and partly to deal with issues of wear and tear as set out and quantified in the email headed CLAIM of 9 March 2020 (pages 52-54 of the bundle) and claimed by the Applicant at a total of £773 attributable to the Respondent's failure to carry out inspections and to prepare a moving in inventory.
6. The amount of £100 only from the deposit was allocated to the Applicant by SafeDeposits Scotland as set out in the "Report of independent adjudication" from SafeDeposits Scotland (pages 22-24 of the bundle).
7. On 11 April 2019 the Applicant sent an email to the Respondent asking for the evidence of damages the Respondent had sent to the deposit scheme administrator and the reply. This was not forwarded to the Applicant.
8. The Applicant had to spend considerable time and a total of 56.30 Euros to obtain the Adjudication report directly from SafeDeposits Scotland.
9. The landlord contract between the Applicant and the Respondent dated 20 April 2017 (pages 45-51 of the bundle) makes no provision for regular inspections of properties.
10. The Respondent undertook to make regular inspections of the properties held by the Applicant every 3 to 6 months in an email dated 29 August 2017.
11. In the time between 29 August 2017 and the moving out date of the tenant on 31 July 2018 no inspections of the property were carried out.
12. The full extent of the damage to the property only came to light at an inspection carried out after the end of the tenancy.
13. The Respondent did not make the Applicant aware of the Code of Practice once this came into force in January 2018.
14. The landlord contract between the Applicant and the Respondent dated 20 April 2017 (pages 45-51 of the bundle) makes no provision for a complaints procedure.
15. No complaints procedure complying with the Code of Practice has been shown to exist and to have been intimated to the Applicant by the Respondent.
16. On 30 October 2019 the Applicant had notified the Respondent of alleged breaches of the Code in relation to the property as per the list stated above.

Findings in Law and Reasons:

Section 5 numbers 73 and 74

Section 6 numbers 102 and 104

Section 7 numbers 108, 110 and 112

1. In terms of S 48 of the Act an application can be made by a landlord to the tribunal. The Applicant is a landlord.
2. **The Tribunal did not find that there was a breach of Section 4 number 68 of the Code of Practice**

3. The jurisdiction of the Tribunal for applications in terms of S 48 of the Act only commenced in January 2018. The complaint relating to a check in inventory which should have been prepared at the moving in of the tenant to the property at 46 D Benvie Road, Dundee on or before 15 August 2015 predates the date when the Tribunal's jurisdiction commenced.
4. **The Tribunal did not find that there was a breach of the Code of Practice Section 5 Number 74**
5. Number 74 requires Letting Agents if they carry out routine visits/inspections to "record any issues identified and bring these to the tenant's and landlord's attention where appropriate". The Respondent did not carry out any inspections of the property during the tenancy of Mr Marr and thus the part of the Code is not engaged.
6. **The Tribunal did find that there was a breach of the Code of Practice Section 5 Number 73**
7. Although routine inspections were not part of the original Terms and Conditions agreed between the parties as per the "Pavillion Properties Full Management Service" document of 20 April 2017, which was the only document setting out the agreement between the parties provided to the Tribunal, the document clearly indicates that the provision of services would be a full management service.
8. In any event, the terms and conditions were clearly amended by the email from the Respondent to Ms Lucchesi Edwards on 29 August 2017, when the Respondent undertook "In future I will send you the inventory reports once they are carried out. I will also ensure the properties are inspected every 3-6 months depending on your preference." There was thus a legal obligation of the Respondent to carry out regular inspections of the property.
9. Despite this, no inspections were carried out between the date of that undertaking and the moving out date of the tenant on 31 July 2018.
10. The Tribunal considers that the lack of inspections despite the obligation to inspect constitutes a breach of Number 73 of the Code. It considers that in terms of S 48 (8) (b) of the 2014 Act an award of compensation to the Applicant should be made for the "loss suffered by the applicant as a result of the failure to comply."
11. The Tribunal considered that a fair way to calculate said loss was to use the claim figure of the Applicant calculated in the documentation as £773 as a starting point. The Tribunal notes that this claim arose out of a tenancy which lasted 3 years, from 15 August 2015 to 31 July 2018. The Code only came into force on 31 January 2018 and was thus only in force for 1/6th of the tenancy duration. During that time there should, as per the email of 29 August 2017, have been at least one inspection carried out in or about February 2018 and potentially another, depending if there had been a request to carry out another inspection after 3 months due to the condition of the property, in May 2018. This would have brought to light some any damage to the property prior to the tenant moving out and in any event would have documented any deterioration

of the property between the date of such an inspection and the end of the tenancy, for which a claim could then have been made from the deposit lodged. The Tribunal thus considered that a fair approach to calculating an element of compensation to the Applicant for the failure of the Respondent to carry out regular inspections as obliged would be to award to the Applicant compensation to the amount of 1/6th of the claim made, thus £128. This reflects the duration of the breach from the date the Code came into force..

12. **The Tribunal did find that there was a breach of the Code of Practice Section 7 Communications Number "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."
13. The Respondent continues to act as Letting Agent for the property. The Applicant's representative requested specific information in an email to the Respondent dated 11 April 2019 for which the Applicant's representative stated at the hearing no reply was received. This failure to reply to the request falls into the jurisdiction of the tribunal as it occurred after the Code of Practice came into force. Similarly the Applicant's representative wrote to the Respondent on 13 September 2019 and received no reply. In her email of 25 February 2019 to the Respondent Ms Lucchesi Edwards again referred to having waited 8 weeks for a reply about an enquiry regarding Benvie Road.
14. The Tribunal notes that considerable time was expended on behalf of the Applicant to chase up information and considers that an amount of compensation of £50 should be awarded for the time and a further £50 for the expenses with regard to the telephone calls to SafeDeposits Scotland on behalf of the Applicant, which were a direct consequence of the failure of the Respondent to provide information regarding the deposit claim process and outcome within a reasonable timescale. The total amount of compensation for breach of Number 108 is thus £100.
15. The Tribunal considers that as the information regarding the SafeDeposits Scotland report has since been obtained by the Applicant the failure to produce the information requested by the Applicant in the email of 11 April 2019 would no longer be required.
16. **The Tribunal did find that there was a breach of the Code of Practice Section 7 Communications Number "110** You must make landlords and tenants aware of the Code and give them a copy on request, electronically if you prefer."
17. The Respondent did not deny that they did not make the Applicant aware of the Code of Practice. They made no representations to the tribunal and provided no evidence. Thus the breach is considered to be admitted.
18. **The Tribunal did find that there was a breach of the Code of Practice Section 7 Communications Number "112** You must have a clear written complaints procedure that states how to complain to your business and, as a minimum, make it available on request. It must include the series of steps that a complaint may go through, with reasonable timescales linked to those set out in your agreed terms of business.

19. The Respondent did not deny that they do not have a written complaints procedure complying with the requirements of the Code of Practice. The only document setting out the Respondent's procedures is the agreement with the Applicant from April 2017, which contains no indication of a compliant complaints procedure being in place. The Respondent made no representations to the tribunal and provided no evidence. Thus the breach is considered to be admitted.
20. The Tribunal is satisfied that considerable time was expended on behalf of the Applicant to try to elicit satisfactory responses regarding the complaints about the lack of inspections and the damage to the property from the tenancy of Mr Marr as set out above. The Tribunal thus considers that an award of £50 compensation for the breach of Number 112 of the Code is appropriate.
21. The Tribunal considers that as the Respondent continues to act as Letting Agent for the Applicant the obligations under numbers 73, 108, 110 and 112 still apply and thus makes the LAEO with regard to payment of compensation to the Applicant and provision of documents to the landlord and the Tribunal as stated above to ensure that the Respondent now complies with these requirements and the Applicant is compensated for the loss arising out of the non compliance with the Code.

The Respondent should note that failure to comply with an LAEO may constitute a criminal offence.

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.

Petra Hennig McFatridge
Legal Member and Chair

Date 8 October 2020