



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 48 of the Housing (Scotland)
Act 2014**

Chamber Ref: FTS/HPC/LA/21/0871

**Craiglea Properties Ltd, 16 Craiglea Road, Perth, PH1 1LA
("the Applicant")**

**Belvoir Perth, 8 Bridge Lane, Perth
("the Letting Agent")**

Tribunal Members:

**Joel Conn (Legal Member)
Mark Andrew (Ordinary Member)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1. This is an application by the Applicant to enforce the Letting Agent Code of Practice ("the Code") in terms of rule 95 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Procedure Rules"). The application was in regard to paragraphs of Sections 2 to 8 of the Code referred to below. The Applicant formerly employed the Letting Agent in regard to a number of properties.
2. The application was lodged with the Tribunal on 31 May 2021. The application was accompanied with various emails as well as a Notification Letter dated 6 May 2021 to the Letting Agent setting out the paragraphs of the Code relied upon. In short, though the Applicant had now ceased to use the Letting Agent, there were a number of outstanding complaints regarding: accounting for payments received; the termination of tenancies (including missing items and the handling of return of deposit); and the final accounting for management fees charged.

The Hearing

3. On 6 October 2021, at a Hearing of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote telephone conference call, we were addressed by Elizabeth Smith, director of the Applicant, and for the Letting Agent, by Aimi Lewis, Regional Manager.
4. This was a continued Hearing, the matter first calling for a Hearing on 19 August 2021. Reference is made to the Note of that Hearing as a fuller narration of events. In summary, at the first Hearing the Tribunal took the Applicant through the orders sought in resolution of the alleged breaches that were relied upon. The following proposed orders were identified:
 - I. The Applicant sought from the Letting Agent:
 - i. the "ID and references" for the tenant at 12E Crieff Road, Perth.
 - ii. A statement detailing the calculation behind a refund of management fees of £80.61 that the Applicant had already received.
 - II. Payment of £220.77 in compensation for failure to request such sums retained in regard to unpaid rent from the deposit of 10D Crieff Road, Perth.
 - III. Payment of £174 and £60 in compensation for failure to request such sums retained from the deposit of 10C Crieff Road, Perth in regard to (respectively) items missing from the property at check-out and cleaning costs.
 - IV. Payment of £200 in compensation for the Letting Agent "not dealing with the end of tenancy at 10C Crieff Road and 10D Crieff Road correctly and for [the Applicant] having to chase these up again and again".
 - V. Repayment of £336.64 said by the Applicant to be the total of refunds (set out in her application) that she believed were due on management fees charges on five properties. The Applicant further sought a statement setting out any refund once paid, so she may have full paperwork of the charges paid on the properties.
5. On 29 September 2021, the Letting Agent wrote to the Tribunal by email narrating steps taken since the first Hearing and stating (following the same sub-paragraphs as in the preceding paragraph):
 - I. The Letting Agent had:
 - i. Sent the "ID and references" for the tenant at 12E Crieff Road, Perth.
 - ii. Included in the email a statement detailing the calculation behind a refund of management fees of £80.61.
 - II. Payment of £220.77 had been made to the Applicant.
 - III. Payment of £174 and £60 had been made to the Applicant.
 - IV. Payment of £200 had been made to the Applicant.

- V. Payment of £336.64 had been made to the Applicant. The Letting Agent agreed with the Applicant's calculations making up this amount (implicitly removing the need for any separate additional statement).
6. At the continued Hearing of 6 October 2021 we took the Applicant through the points in the Letting Agent's email of 29 September 2021. She confirmed that she had received the ID and the funds. In regard to the breakdown of the £80.61 she confirmed that the breakdown was received but that the calculation was incorrect. Nonetheless, the figure was accepted. By this she explained that the breakdown showed that, in the Applicant's view, the Letting Agent had failed to calculate the dates correctly as three of the four rental payment dates referred to in the calculation were incorrect. The Applicant further explained, however, that her figure of £336.64 took into account the correct dates so payment of that amount resulted in her having the full payment she thought due.
7. Notwithstanding that the Applicant confirmed to us that she had now received all that she had been seeking by way of orders from the Tribunal, she said that the application was still insisted upon. We discussed with her at some length what it was that she regarded remained unresolved. As we understood her, she sought for us to make an order to have the Letting Agent "demonstrate to [the Tribunal] that [the Letting Agent] knows how to end tenancies correctly". When asked which paragraph of the Code this would be under, the Applicant referred to paragraphs 18 and 19 (both of which featured in her Notification Letter and application) being:
18. You must provide information in a clear and easily accessible way.
19. You must not provide information that is deliberately or negligently misleading or false.

She explained that she believed the communications from the Letting Agent, including in their email of 29 September 2021, had not been clear or accurate. Therefore, even though the Applicant accepted that she had now received the information and sums requested, she saw that this all indicated a general failure by the Letting Agent to comply with the Code and she wished the Tribunal to take this further. We were not clear, however, as to what precisely the Applicant thought could be ordered by us in order to obtain the "demonstration" from the Letting Agent that they knew "how to end tenancies correctly". We spent some significant time seeking this further detail but did not receive it to our satisfaction.

8. The Letting Agent's position was that, aside from stating that they believed they were well aware how to end tenancies correctly, they wished the Applicant well with the properties in future but that the application should be brought to a conclusion. We took from that that the Letting Agent sought the application be refused on the basis that all matters were now addressed and that there were no further alleged outstanding failures to follow the Code. The Letting Agent confirmed that this was their position.

Reasons for Decision

9. The Tribunal's powers arise from 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.

...

(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.

10. The Letting Agent Code of Practice includes the following provisions:

Overarching standards of practice

...

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

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

...

Ending the tenancy

Bringing the tenancy to an end

...

98. You must have clear written procedures in place for managing the ending of the tenancy (including where the tenancy is brought to an end by the landlord, or by the tenant or joint tenant; the landlord intends to seek eviction and where a tenancy has been abandoned); the serving of appropriate legal notices; and giving the landlord and tenant all relevant information.

99. You must apply your policy and procedures consistently and reasonably.

...

Inventory/check-out

...

102. If you are responsible for managing the check-out process, you must ensure it is conducted thoroughly and, if appropriate, prepare a sufficiently detailed report (this may include a photographic record) that makes relevant links to the inventory/schedule of condition where one has been prepared before the tenancy began. “Section 7: Communications and resolving complaints

11. The Notification letter and application relied on a large number of paragraphs of the Code being: 18, 19, 21, 26, 29, 30, 32, 33, 37, 68, 73, 75, 102, 108, 119, 120, 124, and 125. (It did not rely on paragraph 98 or 99 which we quote above and shall return to.) We required to consider whether, given that the Letting Agent had now undertaken the steps that the Applicant would have had us order in a Letting Agent Enforcement Order (“LAEO”), we could consider the application any further.
12. Our decision was that we could not. To our reading, s48 of the 2014 Act sets out two aspects to our decision making:
 - I. “Decide... whether the letting agent has complied with the code of practice” (s48(6)); and .
 - II. “Where the Tribunal decides that the letting agent has failed to comply”, we “must by order [issue a LAEO]... require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure” (s48(7)).

What is not clear is the point at which we are to make the assessment of “whether the agent has complied with the code of practice”. What is clear is that if we decide that there has been a failure to comply, we “must by order” issue an LAEO which will set out the steps necessary to rectify the failure. In this application, unless we allow the Applicant to add further requests to those points stated in her application and discussed at the first Hearing (which we discuss below), we cannot see any LAEO that we could now issue under s48(7). There are no steps remaining to rectify any alleged failure identified by the Applicant (whether that be practical steps for which a time-limit could be set under s48(8)(a) or compensation payments under s48(8)(b)). Read as a whole, the decision we are asked to make under s48(6) must be an assessment of matters as at today’s date and only in regard to matters that require future resolution under s48(7)-(8). If no future resolution is required, no decision of a failure to comply need be made under s48(6). The process under s48 simply stops once there is nothing more to resolve.

13. We acknowledge that this means that a Letting Agent who has failed to comply with the Code (perhaps in quite considerable ways) would never have an LAEO issued against them if they remedied matters before the date of a Decision being considered. In this case, by us continuing the first Hearing to allow steps to be taken by the Letting Agent, we created a situation whereby the Letting Agent would be able to avoid an LAEO being issued and also avoid any formal determination as to whether they have failed to comply with the Code. In our interpretation of s48 of the Act, this is appropriate. We do not think it inconsistent

with a clear intention in the Code that it be a tool for resolution of issues between Letting Agents and those whose interests are protected by the Code. Further, we do not see the 2014 Act as drafted so as to require an LAEO issued where resolution has already occurred.

14. We stress that we are thus not making a decision whether or not there has been any historic failure by the Letting Agent to comply with any part of the Code. As we say, we do not think we are required to make such a consideration as there is an acceptance by the Applicant that, at this time, there is no outstanding potential failure to comply and that brings the Tribunal process under s48 to an end.
15. We considered whether it was open to us to look beyond the orders that the Applicant had sought in her application (which we discussed at the first Hearing). There is a power in the Procedure Rules to amend applications on motion made by a party but, in terms of the 2014 Act, any amendment would require to be related to something which the Letting Agent had been asked to resolve in the Notification Letter.
16. We considered whether it was appropriate for us to allow the Applicant to amend her application to include seeking an order that would satisfy her wish that the Letting Agent “demonstrate to [the Tribunal] that [the Letting Agent] knows how to end tenancies correctly”. Leaving aside that we have not made any determination of a failure by the Letting Agent, and that the Applicant failed to explain what such an order might be, we declined to do so for two reasons. First, we were unable to conceive of steps that could be put within an LAEO in terms of any of the paragraphs relied upon by the Applicant that would satisfy her new request. We did think it was potentially relevant under paragraphs 98 and 99 to request a Letting Agent provide evidence of its policies and procedures for ending tenancies; to seek confirmation whether these were fully known within its employees; and to seek confirmation of the steps taken to ensure that they were applied “consistently and reasonably”. Paragraphs 98 and 99 were not, however, part of the Applicant’s Notification Letter or application. Second, even if it could be relevant to make an order that satisfied what the Applicant was seeking and could be tied to one of the paragraphs she already relied upon, we had proceeded at length at the first Hearing to ensure that parties were clear as to what the Applicant was seeking by way of resolution. No mention was made by the Applicant at that time requiring something over and above those steps listed at paragraph 5 above. In terms of Procedure Rule 2 (the “over-riding objective”) we decline to consider expansion of the orders sought at this time. We hold that such expansion would not “deal with the proceedings in a manner which is proportionate to the complexity of the issues”; and would not “avoid delay, so far as compatible with the proper consideration of the issues”.

Decision

17. The Tribunal refuses the application on the grounds that there is no power remaining for us to determine the application as lodged under section 48 of the 2014 Act, as all matters within the application are resolved at the date of this Decision.

Right of Appeal

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.

7 October 2021

Legal Member/Chair

Date