Statement of Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland on an Application made under Section 48 of the Housing (Scotland) Act 2014

Property: 5 Roman View, Dalkeith, EH22 2QU ("the Property")

Chamber Reference: FTS/HPC/LA/20/0138

Parties:

Ms Susan Wright, 12 Beech Grove, Cousland, Dalkeith, EH22 2QP ("the Applicant")

and

CP Property, 15 Hardengreen Business Centre, Dalhousie Road, Eskbank, EH22 3NX ("the Respondents")

Tribunal Members:

Fiona Watson (Legal Member/Chairperson) and Greig Adams (Ordinary Member)

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 the application, determined that the Respondents had failed to comply with the Letting Agent Code of Practice.

Background

1. By application dated 10 January 2020, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland under Section 48 of the Housing (Scotland) Act 2014 ("the Act") for a determination that the Respondents had failed to comply with the Letting Agent Code of Practice ("the Code of Practice") as set out in the Letting Agent Code of Practice (Scotland) Regulations 2016, as amended.

2. The application stated that the Applicant considered that the Respondents had failed to comply with their duties under Paragraphs 112, 28, 102, 82, 48, 19, 38 and 31 of the Code of Practice.

3. A Hearing took place by tele-conference on 17 September 2020. The Applicant was personally present and represented herself. The Respondent was represented by an employee, Chris Duffy.

Findings of fact

4. The Tribunal makes the following findings of fact:

   (i) The Respondents are letting agents appointed by the Landlord of the Property to manage the letting of the Property on their behalf. Accordingly, their work falls within the definition of letting agency work in Section 61(1) of the Act and they are subject to the requirement to comply with the Letting Agent Code of Practice which came into force on 31 January 2018.
   (ii) The Applicant was a formerly a tenant in the Property, which tenancy the Respondents managed on behalf of the Landlord;
   (iii) On 30 December 2019, the Applicant notified the Respondents of her belief that they had failed to comply with the Code of Practice, as required by Section 48(4) of the Act.
   (iv) The Respondents were in breach of section 112 of the Letting Agent Code of Practice which states that "*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.*"

Reasons for the decision

5. The Tribunal dealt with each individual section of the Code which the Applicant alleged had been breached in turn.

6. Paragraph 112 of the Code provides that "*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.*"

7. The Applicant submitted that she had not been provided with a written complaints procedure. An email was lodged dated 6 December 2019 in which the request for a copy of the Respondents' complaints procedure was made. The Respondent's reply stated "*You are required to put your complaint in writing, either to our office address or via email at info@cp-property.co.uk. We shall then have 5 working days to investigate and respond.*" The Applicant submitted that it was not clear how she was to complain, nor was this a complaints procedure. The Respondent submitted that the reply given in their email sets out their procedure.

8. The Tribunal considered the content of the email and determined that this did not constitute a complaints procedure as required under section 112 of the Code. Any procedure should set out all steps that a complaint may go through, and therefore the step of raising an application with the First-tier

Tribunal if not satisfied with the outcome of the complaint should have been included here. Whilst it would be normal to see a separate document outlining the procedure, the Tribunal were satisfied that this isn't strictly necessary and the "procedure" could be provided in the body of an email. The Tribunal did note that in their response to the complaint, that the Respondents did set out that if the Applicant was not satisfied, she could refer matters to the First-tier Tribunal. The Tribunal did consider that the email issued by the Respondents with details of how to make the complaint was clear, despite the Applicant's submissions to the contrary. The Tribunal deemed the breach of section 112 to be a minor one, and one which did not cause any disadvantage to the Applicant.

9. Paragraph 28 of the Code of Practice provides that *"You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening."* The Applicant submitted that the Respondent had been intimidating and threatening in their communications with her. This was denied by the Respondent. The Applicant failed to lodge any documentation which set out abusive, threatening or intimidating communications from the Respondent. Reference was made to a chain of emails with the Respondent where access had been requested and which she claimed she found intimidating. The Tribunal did not find the tone or content of any of the emails or text messages lodged intimidating, threatening or abusive in their nature. The Tribunal accepted the Respondent's evidence in this regard. The Tribunal did not find that this paragraph had been breached. This was a unanimous decision.

10. Paragraph 102 of the Code of Practice provides that "*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."* The Applicant submitted that the Respondent did not have a copy of the Inventory done when she moved into the property. They did not refer to this when they carried out their inventory upon her exit from the property. The Respondents had attempted to recover a deduction from her deposit for a mark on the carpet, but she had successfully disputed this with the deposit scheme arbiter and the deduction was not awarded to the landlord. The Respondent submitted that they had taken over management of the tenancy after it had commenced, following the landlord parting ways with the previous agent. The previous agent had failed to provide them with a copy of the inventory done. The outgoing inventory had been prepared by an independent professional inventory clerk and was compiled with photos and details of condition. The Applicant in her evidence confirmed that she had been given a copy of the inventory, but no explanation was given as to why she did not simply provide a copy of this to the Respondent to assist with matters. The Tribunal considered that it was not the fault of the Respondent that the previous agent had failed to provide them with a copy of the original inventory when they took over management. The Applicant could have assisted by providing a copy but failed to explain in her evidence why she failed to do so. The Tribunal noted that the deduction from the deposit was not awarded by the deposit scheme arbiter and therefore the Applicant had suffered no loss. The Tribunal did not find that this paragraph

had been breached. This was a unanimous decision.

11. Paragraph 82 of the Code of Practice provides that *"you must give the tenant reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006(**10**) specifies that at least 24 hours' notice must be given 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".* The Applicant submitted that there had been three occasions where the Respondent had failed to give sufficient notice of 48 hours when requesting access. The Applicant referred to an email exchange of 30 January 2019 when the Respondent had asked if they could attend at the Property on the Friday to address an issue with lack of hot water. In her reply, the Applicant agreed and said her daughter would be at the property. The Tribunal noted that firstly, the 30 January was a Wednesday and therefore 48 hours' notice had been given, and secondly that the Respondent had in fact agreed to access being taken. Reference was made to another email request for access and again the Applicant confirmed she had agreed to same. The Applicant submitted that she felt intimidated by the requests and that if she refused, she would be asked to leave. The Respondent denied that this was case and that they had never threatened the Applicant with removal from the property. They also submitted that they had never turned up at the property unannounced, and would, not do so with any tenant. This was not refuted by the Applicant in her evidence. On the basis of submissions made by parties and the documents lodged, the Tribunal did not find that this paragraph had been breached. This was a unanimous decision.

12. Paragraph 48 of the Code of Practice provides that *"in particular you must comply with section 82 of the Rent (Scotland) Act 1984(**7**), which prohibits any person, as a condition of the grant, renewal or continuance of an assured or short assured tenancy, from requiring a tenant or prospective tenant to pay any charges except rent and a refundable deposit of no more than two months' rent."* The Applicant submitted that on two occasions she had been forced to pay £30 for replacement of a plant pot belonging to her neighbour, which had been broken by a delivery driver who was delivering an item to the Applicant's property. She felt that she had been forced to pay the cost of the replacement or otherwise she would be evicted. The sum of £30 therefore was a condition of her tenancy being continued. The Respondent submitted that they had never threatened to evict the Applicant. An email exchange of 31 January 2019 was referred to in which the Applicant offered to pay the cost of the plant pot. When this happened a second time, an email exchange of 9 August 2019 was referred to in which again the Applicant offered to pay the replacement cost and also asked the Respondent to apologise to the neighbour on her behalf. The Respondent referred to text messages lodged which related to an incident between the Applicant and the neighbour in which the Police were called out. It was submitted that in that exchange it was the Applicant herself who first referred to service of a notice to quit, and the Respondent replied that he had not mentioned a notice to quit and was trying to resolve the situation. It was again submitted that the Applicant had not been threatened with removal and it was she who would bring up the issue of service of a notice to quit, as opposed to the

Respondent. The Tribunal was not satisfied that the Applicant was "forced" to meet the cost of the replacement pots for fear of eviction and that the documents lodged showed that on both occasions she had offered to meet the cost. The Tribunal was not satisfied that threats had been made to remove her from the property. The Tribunal did not find that this paragraph had been breached. This was a unanimous decision.

13. Paragraph 19 of the Code of Practice provides that *"you must not provide information that is deliberately or negligently misleading or false."* The Applicant submitted that the Respondent had told her that her partner's taxi was not permitted to be parked in the driveway as the title deeds stated that commercial vehicles could not be so parked. It was submitted that this was not true and a taxi is not a commercial vehicle. She also submitted that she had been told that the mono-blocked driveway which had been damaged by the previous tenant would require to be repaired and that she would be liable to contribute, even though she had not caused the damage. The Respondent accepted that he had wrongly advised the Applicant that the taxi was a commercial vehicle and therefore was in breach of the title conditions by being parked in the driveway. However, he submitted that when he investigated and realised that it was not in fact deemed to be a commercial vehicle, he agreed this with the Applicant and she was able to park her taxi in the driveway again within two days. The Applicant had agreed to park the taxi parked around the corner for two days. Thereafter when it was agreed that it was permitted to be parked in the driveway, it returned. There was no further issue and no loss to the tenant. The Respondent admitted his mistake however he submitted that he considered it likely to be a common misconception that a taxi is a commercial vehicle. The Respondent denied that the Applicant had ever been told that she would require to pay for repair to the mono-blocked driveway and that would have been a cost to the landlord directly. The Tribunal did not find that this paragraph had been breached. The Tribunal was not satisfied that there was any evidence of deliberate or negligent information from the Respondent. This was a unanimous decision.

14. Paragraph 31 of the Code of Practice provides that "*if you know that a client is not meeting their legal obligations as a landlord and is refusing or unreasonably delaying complying with the law, you must not act on their behalf. In these circumstances, you must inform the appropriate authorities, such as the local authority, that the landlord is failing to meet their obligations."* The Applicant submitted that the boiler had broken down and she was left without heating or hot water for a week. This was reported to the Respondent on 30 January 2019 and they did not send out a contractor until a week later. The Landlord was therefore not meeting their legal obligations as regards repairs. The Respondent denied this. The Respondent referred to the email exchange again of 30 January 2019 in which the agent referred to the lack of hot water and asked if he could attend on the Friday with his colleague. He submitted that they attended at the property on the Friday and the heating and hot water were working fine. There was no record of any contractor having to be called out and no cost billed to the landlord for any such works. Therefore the Respondent's position was that the issue had been inspected within 48 hours and found to

be working fine. There was no breach by the landlord of his obligations. The Tribunal did not find that this paragraph had been breached. The Tribunal noted that there were no emails or text messages lodged which shows any further complaints having been made by the Applicant that the heating and hot water issue hadn't been fixed. The Tribunal would have expected that if the matter had gone on for more than 48 hours and certainly over a weekend in a house in which there were children, that the Applicant would have further complained and been able to produce evidence of same. The Tribunal was satisfied with the Respondent's evidence in this regard. This was a unanimous decision.

15. Paragraph 38 of the Code of Practice provides that "*your advertising and marketing must be clear, accurate and not knowingly or negligently misleading."* The Applicant submitted that when the property was readvertised for let prior to her departure, the Respondent's Letting Agent Registration Number (LARN) was not noted on the advert. The Respondent admitted this and submitted that this was an error which was rectified as soon as brought to their attention and that they had revised their internal processes to ensure this would not happen again. The Tribunal did not find that this paragraph had been breached. The absence of the LARN did not render the advert unclear, inaccurate or misleading. The Tribunal noted that this may be a separate breach of another part of the Code but as this was not founded upon by the Applicant, it would not be considered by the Tribunal. This was a unanimous decision.

16. Accordingly, the Tribunal upheld the Applicant's complaint under Paragraph 112 of the Code of Practice.

17. The Tribunal was not satisfied that there was sufficient evidence before it to find a breach of paragraphs 28, 102, 82, 48, 19, 31 or 38 of the Code of Practice.

18. The Tribunal determined that a Letting Agent Enforcement Order would be issued requiring the Respondent to produce a written complaints procedure within two weeks. The Tribunal refused the Applicant's claim for an award of compensation to the Applicant, as there was no evidence to suggest any loss or disadvantage had been incurred by the Applicant due to the breach of paragraph 112 of the Code.

19. 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.

Fiona Watson

Legal Member/Chairperson 17 September 2020