

Housing and Property Chamber

First-tier Tribunal for Scotland



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

In an Application under section 48 of the Housing (Scotland) Act 2014

by

Dominic and Wendy Harborne, 12 Lanhill View, Chippenham, Wiltshire SN14 6XS
("the Applicants")

Stephen Estates Ltd, Unit 3 Waverly Street, Bathgate, West Lothian EH48 4JA
(Co. No. SC306637) (formerly known as Homes 4U (Scotland) Ltd)
("the Respondent")

Chamber Ref: FTS/HPC/LA/18/3269

Re: 7 Paxstone Crescent, Harthill ML7 5RU
("the Property")

Tribunal Members:

John McHugh (Chairman) and James Battye (Ordinary (Housing) Member).

DECISION

The Respondent has failed to comply with the Code.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner of a property at 7 Paxstone Crescent, Harthill ML7 5RU ("the Property").
- 2 The Respondent operated at the material times as a professional letting agent.
- 3 The Applicants and Respondent contracted for the Respondent to deal with lettings and management of the Property.
- 4 The contract between the Applicants and the Respondent persisted over a period of around eight years.
- 5 The Respondents had procured that a legionella test be carried out at the Property in May 2015.
- 6 On or around September 2018, the Property had been vacated by a tenant and the Respondents were instructed to market the Property and to find a new tenant.
- 7 The Respondent identified a suitable new tenant.
- 8 The Respondent advised the Applicants that by law a new legionella testing certificate must be obtained before the new tenant could move in.
- 9 The Respondents declined to agree to the obtaining of a new legionella testing certificate on the grounds that there was no legal requirement for it.
- 10 The Respondent was under a duty to comply with the Letting Agent Code of Practice contained in the Schedule to The Letting Agent Code of Practice (Scotland) Regulations 2016 from 31 January 2018.
- 11 By email dated 2 October 2018 the Applicants intimated their termination of the contract with the Respondent.
- 12 On 3 October 2018 the Respondent issued its invoice INV22630 to the Applicants which sought payment of the sum of £474.42 consisting of two months' management fees and fees concerned with marketing the Property and introducing the new tenant.
- 13 The Respondent has retained the previous tenant's deposit of £365.
- 14 The Applicants have, by their correspondence, including that of 12 October 2018, notified the Respondent of the reasons as to why they consider that the Respondent has breached its obligation to comply with the Code.
- 15 On 12 February 2019 the Respondent changed its name from Homes 4U (Scotland) Ltd to Stephen Estates Ltd.

Hearing

A hearing took place at George House, Edinburgh on 2 April 2019.

The First Applicant, Mr Harborne, was present at the hearing.

The Respondent was represented at the hearing by its director, Karen Stephen.

Neither party called additional witnesses.

Introduction

In this decision we refer to the Housing (Scotland) Act 2014 as “the 2014 Act”; the Letting Agent Code of Practice contained in the Schedule to The Letting Agent Code of Practice (Scotland) Regulations 2016 as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent (in the latter case these were only the documents lodged at the hearing).

Preliminary Matters

On the day before the hearing the Respondent had requested that the hearing be postponed by reason of the illness of Mrs Stephen. The Tribunal refused that application having regard to the fact that there had been two previous postponements and that the request came late in the day and was unsupported by medical evidence. The Tribunal also considered that a different representative might represent the Respondent in place of Mrs Stephen; the general need to make progress in an application of this kind; and the particular risk of prejudice to the Applicants who had made arrangements to travel some distance from their home to the hearing.

The Respondent made reference to various documents during the hearing which documents had not previously been lodged with the Tribunal. The Tribunal considered that the documents would be of assistance in determining the application and, accordingly, allowed the documents to be lodged although late. Any potential prejudice was dealt with by allowing a break during which Mr Harborne was allowed to check his email records to confirm whether he had received the documents in question previously.

Mrs Stephen indicated that there were further documents which she did not have access to and could not produce because of IT issues arising as a result of the sale by her of the assets of the business.

REASONS FOR DECISION

The Legal Basis of the Complaints

The Code

The Applicant complains of failure to comply with Sections 17; 19; 21; 24; 26; 28; 29(a); 30; 32 (b),(c),(f),(j),(k),(l),(m),(o),(p),(q); 33; 34; 37(a); 108; 110; 111; 112; 113 and 129 of the Code.

The elements of the Code relied upon in the application provide:

"...17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants)...

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

... 21. You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way...

...24. You must maintain appropriate records of your dealings with landlords, tenants and prospective tenants. This is particularly important if you need to demonstrate how you have met the Code's requirements...

...26. You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement...

...28. You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening.

Before taking instructions

29. In your dealings with potential landlord clients you must:

Services provided and fee charges

a) provide clear and up-to-date written information about the services you provide and the charges (inclusive of taxes) for them;

Terms of business

30. You must agree with the landlord what services you will provide and any other specific terms of engagement. This should include the minimum service standards they can expect and the target times for taking action in response to

requests from them and their tenants...

...**32.** Your terms of business must be written in plain language and, alongside any other reasonable terms you wish to include, must clearly set out:

Core services

a) the services you will provide to that landlord and the property they relate to. For example, tenant introduction, lettings service and full management service;

Duration

b) the duration of the agreement and the date it commences;

Authority to act

c) a statement about the basis of your authority to act on the landlord's behalf...

...Fees, charges and financial arrangements

f) your management fees and charges (including taxes) for your services, and your processes for reviewing and increasing or decreasing this fee...

...Communication and complaints

j) that you are subject to this Code and give your clients a copy on request. This may be provided electronically;

k) how you will communicate (including the use of electronic communication) with landlords and tenants, and the timescales within which you could be reasonably expected to respond to enquiries;

l) your procedures for handling complaints and disputes between you and the landlord and tenants and the timescales within which you could be reasonably expected to respond;

m) how a landlord and tenant may apply to the Tribunal if they remain dissatisfied after your complaints process has been exhausted, or if you do not process the complaint within a reasonable timescale through your complaints handling procedure;...

...Professional indemnity insurance

o) confirmation that you hold professional indemnity insurance or equivalent protection through another body or membership organisation and that further details (such as the name of your provider, your policy number and a summary of the policy) are available from you on request;

Handling client money

p) if you hold client money, how you handle clients' money; confirmation that you hold client money protection insurance or equivalent protection through

another body or membership organisation and that further details (such as the name of your provider, your policy number and a summary of the policy) are available from you on request;

How to change or end the terms of business

q) clear information on how to change or end the agreement and any fees or charges (inclusive of taxes) that may apply and in what circumstances. Termination charges and related terms must not be unreasonable or excessive.

33. You and the landlord must both sign and date your agreed terms of business and you must give the landlord a copy for their records. If you and the landlord agree, this can be done using electronic communication including an electronic signature.

34. In line with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, in most cases you must give landlords 14 calendar days in which to cancel if the agreement is signed away from your premises...

...Ending the agreement

37. When either party ends the agreement, you must:

a) give the landlord written confirmation you are no longer acting for them. It must set out the date the agreement ends; any fees or charges owed by the landlord and any funds owed to them; and the arrangements including timescales for returning the property to the landlord – for example, the handover of keys, relevant certificates and other necessary documents. Unless otherwise agreed, you must return any funds due to the landlord (less any outstanding debts) automatically at the point of settlement of the final bill...

...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.

111. You must not communicate with landlords or tenants in any way that is abusive, intimidating, or threatening.

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.

113. The procedure must also set out how you will handle complaints against contractors and third parties; any recourse to the complaints procedures of a professional or membership body you belong to; whether you provide access to alternative dispute resolution services; if you are also subject to another regulatory body (for example the Scottish Legal Complaints Commission); and that a landlord or tenant (including former landlord or tenant) may apply to the Tribunal if they remain dissatisfied once your complaints process has been exhausted, or if you do not process the complaint within a reasonable timescale through your complaints handling procedure...

...**129.** When you contact landlords, tenants or guarantors who owe you money, you or any third party acting on your behalf must not act intimidatingly or threateningly. Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position..."

The Matters in Dispute

Factual Background

The dispute between the parties concerns events which took place in September and October 2018. The existing tenant had left the Property and the Respondent was instructed to market the Property and find a replacement tenant.

There is no dispute that the Respondent identified a suitable new tenant. The Respondent advised the Applicants at that stage that it would be unable to allow the new tenant to move into the property unless an updated Legionella testing certificate was in place.

Correspondence took place between the parties. The Respondents insisted that a new certificate was a legal requirement. The Applicants insisted that it was not and would not authorise the obtaining of a new certificate.

No certificate was ever obtained. The new tenant did not move in. The parties reached an impasse and their contractual relationship was terminated. The Applicants instructed an alternative letting agent.

Post termination the Respondent issued an invoice to the Applicants. The Applicants dispute the invoice and have not paid it.

The Respondent has recovered the full amount of the former tenant's deposit from the approved deposit scheme and applied it to the invoiced amount.

The Respondent was previously called Homes 4U(Scotland) Ltd but changed its name in the context of a recent sale of its assets to a third party, which third party now uses that name.

Code Section 17

The Applicants complain that the Respondent has behaved unfairly by choosing not to allow the new tenant to move in without first having obtained an updated legionella testing certificate. This was against the background that the Respondent had been assured by the Applicants that they would meet all relevant legislative requirements.

We consider that the Respondent has behaved unfairly and that there has been a breach of Code Section 17. The facts surrounding this matter are more fully set out immediately below.

Code Section 19 & 21

The Applicants complain that the Respondent had failed to carry out its duties with reasonable care and skill and in a timely manner in relation to the Respondent's advice that a legionella testing certificate was required. Their complaint is both that the advice that this was required was incorrect and that, if it was required, the need for it to be obtained should not have been introduced at the last moment when the introduction of the new tenant was imminent.

There is no dispute that a testing certificate had been obtained in May 2015.

In her defence of this complaint, Mrs Stephen advised that she had taken advice from contractors and local authorities who had advised her that the certificate required to be renewed every two years. The Applicants had referred to advice from the Health and Safety Executive to the contrary. The Respondent had refused to accept that contrary advice. Mrs Stephen was concerned that there would be a personal liability upon the Respondent if it allowed the property to be re-let without a certificate being in place.

She produced at the hearing reports of inspections which referred to the certificate expiring in May 2017. Mr Harborne was unaware of having seen these reports. He advised that if any matter had been highlighted to him as needing attention, his default position would have been to accept the advice and instruct the work. His view was that if he had been asked in 2017 to agree to a new certificate being obtained, he would have agreed. He did not think he had ever been asked. The matter only came to light in the context of the imminently proposed new tenancy and he had then carried out his own enquiries which showed that the certificate was not required.

Mrs Stephen further produced at the hearing a document which she explained was a record of communications between the Applicants and Respondent. This recorded an email request in 2017 by one of the Respondent's staff to Mr Harborne indicating that the legionella testing certificate should be renewed. Mrs Stephen sought to use this to evidence that the Respondent had advised the Respondent of the issue in good time. We noted, however, that the same record contained a reply by Mr Harborne authorising the obtaining of the certificate. When asked why no certificate had then been obtained, Mrs Stephen sought to argue that Mr Harborne's response related to an earlier email within her communications record. She produced that earlier record which was from a different date and had no apparent connection to the first entry relating to the communications between the Respondent's employee and Mr Harborne regarding the certificate. We found Mrs Stephen's evidence in this regard to be unsatisfactory and find that Mr Harborne had, in fact, instructed the production of a certificate in 2017. Had the Respondent obtained the certificate at that time, there would have been no need (even on the Respondent's view) for any

further certificate to be obtained in September/October 2018 when the new tenant was due to move in.

In any event, the Respondent's advice that a certificate was required every two years, although apparently given in good faith, was incorrect. The Respondent owed a duty to take reasonable care to provide accurate advice to the Applicants. We find that the advice provided was negligently misleading and not carried out in accordance with reasonable skill and care. We therefore find there to have been a breach of Code Sections 19 and 21.

Code Sections 26 & 108

The Applicants complain that the Respondent has failed to respond in a reasonable timescale to the Applicants' complaints regarding the disputed invoice INV22630; the request for signed terms of business; and the request for information regarding the deposit and its return. The Applicants have produced communications on these topics including their emails of 2 and 4 October 2018. Mr Harborne advised that he had received no communications from the Respondent in response to his email of 4 October 2018 until 25 October 2018. He had had no further correspondence since 9 October and the matter he had complained of had not been addressed. Mrs Stephen's response was that she had spoken to Mr Harborne by telephone after that date as she considered that they were still in a relationship and he was content for her to continue to deal with the complaint he had made.

Mr Harborne observes that he had terminated the contract on 2 October and does not accept that such telephone calls took place. We asked Mrs Stephen for evidence of these telephone calls from her communications record. She indicated that these records were among those which were not presently available because of IT issues surrounding the asset transfer.

The Respondent has produced no evidence of any meaningful attempt to address the Applicants' complaint. We prefer the evidence of Mr Harborne in this respect. We consider that there has been a breach of Code Section 26 and 108.

Code Section 24

The Applicants complain about the Respondent's failure to keep records relating to the Respondent having sent its terms of business to the Applicants in December 2016. As this complaint relates to a time before the requirements of the Code came into force, we find there to be no breach of the Code in this regard.

Code Section 29(a)

The Respondent has not in this process produced details of its charges. Mrs Stephen states that her charges have remained the same since she started the

business 13 years ago although there had been a change in the marketing fee. The Applicants advised that they had never seen the Respondent's charges. The Applicants had never been charged for void periods and consider that the two months' management fees charged on invoice INV22630 appear to be such. Mrs Stephen said that she regarded the former tenant as remaining in place during those months and so this was just the normal management fee.

The Respondent provided no evidence of ever having provided a note of her charges to the Applicants and we prefer the evidence of the Applicants that such information has never been provided. We accordingly find there to have been a breach of Code section 29(a).

Code Sections 30, 32, 33 & 34

The Applicants complain that the Respondent's terms of business do not, in many respects, meet the requirements of the Code. Mrs Stephen explained that her intention had been to introduce new terms and conditions for each landlord which was a customer of the Respondent when the tenants in the relevant properties changed. She had prepared new terms and conditions which were compliant with the Code and which she had intended to issue to the Applicants when the new tenancy commenced in October 2017. That had never happened as the new tenancy did not, in fact, commence.

The Tribunal had been provided by the Applicants with the Respondent's terms and conditions. These had been provided by the Respondent to the Applicants in October 2018. Mrs Stephen advised that these same terms and conditions had been issued to all landlord customers of the Respondent including the Applicants in December 2016. The Applicants, however, have no record of having received these (or any) terms and conditions prior to their request for same in October 2018.

The Applicants have, in making their application to the Tribunal, proceeded on the assumption that the December 2016 terms and conditions apply and we have proceeded on that same basis.

In most aspects of the complaint regarding the failure of the terms and conditions to apply, the Respondent had little answer. It is unsurprising that the terms and conditions dated December 2016 fail to comply with the requirements of the Code since they were not drafted with the Code in mind.

In relation to Code section 30, the terms and conditions fail to specify target times for undertaking work and so there is a breach of the Code. It is also evident from reading the terms and conditions that they do not contain the specific items required

by Code sections 32(b),(c),(f),(j),(k),(l),(m),(o),(p),and (q). In relation to 32(l) and (m) the Respondent advised that it had a separate complaints policy. However, this policy was not contained within the terms of business as required and was only available on the Respondent's website (and there was not even any direction within the terms and conditions that the complaints policy could be located on the website).

In relation to Code sections 33 and 34, again, it is evident that the terms and conditions do not meet their requirements and therefore that there is a breach of those sections.

There is no dispute that the Respondent never brought the Code to the attention of the Applicants and so the Respondent is in breach of Code Section 110.

There is no series of steps and timescales contained within the Respondent's complaints procedure and therefore there is a breach of Code section 112.

Code Sections 28 & 111

The Applicants complain that the Respondent was in breach of Code sections 28 and 111 in relation to both Mrs Stephen's threat to report the Applicants to the local authority in relation to the absence of a legionnaires testing certificate and in relation to her manner in a phone call with Mr Harborne on the same topic. Mr Harborne felt upset by the fact that he had indicated that he would meet all legal requirements incumbent upon him and that Mrs Stephen was still insistent upon making reports concerning the matter. He said that Mrs Stephen had been "short" with him on the phone. He had suffered some sleepless nights because of what Mrs Stephen had said.

Mrs Stephen was of the view that she had not been rude or aggressive towards Mr Harborne.

We consider that, although misguided, Mrs Stephen held the genuine view that there was a matter of concern worthy of report to the appropriate authorities and we do not find that her conduct in this regard was intimidating, threatening or abusive.

Code Section 37(a)

The Applicants complain that the Respondent failed to provide confirmation of the arrangements on termination of the contract including for the return of keys and the deposit. The Respondent has lodged no relevant documentation to answer this point. She maintains however that she had tried to compromise by suggesting that the Respondent keep the deposit and that the parties "agree to call it quits". Mr Harborne disagrees that this ever happened. Having reviewed the correspondence

we find the Applicants' complaint to be justified and that there has been a breach of Code Section 37(a).

Code Section 129

The Applicants consider that the Respondent has misrepresented the legal position by retaining the keys to the Property pending payment of the Respondent's invoice. The Respondent has offered no explanation for its retention of the keys in the face of the Applicants' requests for return of same. Mrs Stephen states that she was happy for the keys to be uplifted by the new letting agent once the former tenant's deposit had been recovered. As this took some time and Mrs Stephen did not highlight how the Respondent was in possession of a right to retain the keys, nor indeed to retain the deposit from the Applicants, we consider that the Respondent misrepresented that it had a right to retain the keys and was accordingly in breach of Code Section 129.

Observations

Mrs Stephen advised that the Respondent had not obtained registration as a letting agent. She advised that an application had been made some time previously but had not been progressed as she anticipated selling her business.

The Respondent had lodged no response of any kind nor any documentary evidence in advance of the hearing. During the hearing Mrs Stephen occasionally looked through her file and produced documents which she thought were relevant. This impeded progress of the hearing. There was little evidence of any preparedness for the hearing on the part of the Respondent. Much of Mrs Stephen's evidence was based on what she considered would or should have happened rather than offering first hand evidence of what actually did happen and there was an impression that she was offering answers to the Tribunal's questions without having a factual basis for those answers. We found Mr Harborne to be entirely credible and reliable.

LETTING AGENT ENFORCEMENT ORDER

In terms of section 48(7) of the 2014 Act we will make a letting agent enforcement order ("LAEO"). The terms of the proposed LAEO are set out in the attached document.

We have a wide discretion as to the terms of the LAEO we may make. In this case we consider it appropriate to order the Respondent to make a payment to the Applicant of £1500 and that the Respondent should not be entitled to be paid any

further sums by the Applicants. This reflects: that the Applicants have been denied their deposit of £365; that they incurred expenditure in fitting new locks; that there has been a delay in them being able to locate a new tenant for the property (Mr Harborne advises that the Property remains unlet); and that they have been caused significant distress and inconvenience by the Respondent's conduct in breach of the Code.

APPEALS

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 11 April 2019