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

Decision on an application made under Section 48(1) of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/19/3272

24/2 Springwell Place, Edinburgh EH11 2HY
("the Property")

The Parties:-

Mr Gary McMillan, 40 Broomhall Crescent, Edinburgh EH12 7PF
("the Applicant")

D J Alexander, 1 Wemyss Place, Edinburgh EH3 6DH
("the Respondent")

Tribunal Members:
Graham Harding (Legal Member)
Ann Moore (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 Respondent had breached Section 2 - paragraphs 21, 24 and 27 and Section 5 paragraphs 74 and 75 of the Letting Agent Code of Practice and further determined to make a Letting Agent Enforcement Order.

The decision is unanimous

Introduction

In this decision the Housing (Scotland) Act 2014 is referred to as "the 2014 Act"; the Letting Agent Code of Practice is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Respondent's duty under section 48(1) of the 2014 Act to comply with the Code arises from the date it came into force namely 31 January 2018.

1. By Application dated 10 October 2019 the Applicant complained to the Tribunal that the Respondents had breached Section 2, paragraphs 21, 24,

26 and 27, Section 5, paragraphs 74, 75, 80 and 85 and Section 7, paragraph 108 of the Code.

2. The Applicant provided the Tribunal with copies of email correspondence between himself and the Respondent.

3. By Notice of Acceptance dated 30 October 2019 a legal member with delegated powers referred the Application to a Tribunal.

4. The Respondent submitted written representations to the Tribunal by email dated 21 November 2019 and the Applicant submitted further written representations dated 25 November 2019 in advance of the oral hearing which was held at George House, Edinburgh on 8 January 2020.

Hearing

5. The hearing was attended by the Applicant. The Respondent was initially not in attendance. The Tribunal administration contacted the Respondent by telephone and a representative, Mr Kevin Fraser did attend although the commencement of the hearing was delayed for almost one hour. Mr Fraser apologised to the Tribunal and to the Applicant for the oversight which was apparently due to a staff member leaving and failing to advise colleagues of the hearing date.

6. By way of a preliminary matter the Tribunal explained to the parties that as the Respondent's obligations in terms of the Code came into force on 31 January 2018 the Tribunal could not consider any allegations of breaches of the Code that may have occurred before that date.

Summary of Submissions

7. The Tribunal asked the Applicant to provide an outline of his complaint. The Applicant explained that no checks on the property had been carried out by the Respondent in 2018. He had understood that the Respondent ought to have inspected the property every six months. He had put his trust in the Respondent to look after the property on his behalf and they had failed to do so.

8. For the Respondent Mr Fraser said that they looked to carry out an annual inspection of the property and he accepted that no inspection had taken place in 2018. There had he said been an issue in gaining access to the property initially and this had not been followed up as it should have been and an inspection did not take place until January 2019. Although no inspection had taken place the necessary gas safety certificate had been obtained.

9. In response to a query from the Tribunal Mr Fraser confirmed that there would have been written terms and conditions setting out the agreement between the parties but he did not have a copy with him. The Applicant also

thought that at the commencement of the contract when the Respondent took over the management of the tenancy he had been given written terms but he did not have them either.

Paragraph 21

10. In light of the failure to carry out an inspection of the property throughout 2018 there was an acceptance by Mr Fraser that the Respondent had not carried out the service expected of it.

Paragraph 24

11. Again, there was a general acceptance by Mr Fraser that there had been a failure on the part of the Respondent to maintain appropriate records and this had led to the annual inspection not being carried out.

Paragraph 26

12. With regards to its complaints procedures Mr Fraser said that the Respondent did have a formal complaints procedure in place and would deal with any complaint within 15 days although it looked to respond as quickly as possible. He went on to say that there had been a delay in returning the keys to the Applicant following the termination of the tenancy on 7 August 2019. He said that the tenant had arranged for the property to be professionally cleaned at the end of the tenancy. Following an inspection after the cleaning had been done it had not been cleaned to an acceptable standard and the Respondent had arranged for the cleaners to return this had been completed by 23 August. The Tribunal was referred to the email chain between the parties contained in the Respondent's submissions.

13. For his part the Applicant said that over the period from the end of the tenancy until the keys were returned at the end of August he had to chase up responses from the Respondent and had to point out to them that even after he had been told the property had been fully cleaned there were still boxes and mess everywhere that he could see through a window of the property.

Paragraph 27

14. The Applicant complained that the Respondent had not made him aware of any difficulties it had in accessing the property in 2018 and did not provide him with any evidence of attempts that were made to contact the tenant.

15. For his part Mr Fraser accepted that this had been the case in 2018.

Paragraph 74

16. Again, it was the Applicant's position that no routine inspection of the property had been carried out in 2018 and the Respondent had not made him aware of this. Once again this was accepted by Mr Fraser.

Paragraph 75

17. It was the Applicant's position that as the tenant had not allowed the Respondent access to the property this information should have been passed on to him by the Respondent. Mr Fraser accepted that for 2018 this was indeed the case.

Paragraph 80

18. The Applicant suggested that there had been no record kept by the Respondent of key usage and two of the four sets of keys returned to him did not fit the locks.

19. Mr Fraser advised the Tribunal that keys to all properties were kept securely in a locked cupboard and were coded so as not to be identifiable to third parties. Records were kept of when keys were booked in and out. He went on to say that the Respondent's were cautious about disposing of old keys. It was possible that the locks had been changed on the property at some point although there was no record of that taking place.

Paragraph 85

20. It was the Applicant's position that as a result of the failure to inspect the property in 2018 rising damp in the property had gone unnoticed until 2019. Furthermore, because the tenant had a large volume of personal effects in the property it had been difficult for the surveyor arranged by the Respondent to properly survey the property.

21. For the Respondent Mr Fraser said that it was accepted that the Tenant did have a lot of belongings in the property. However, the Respondent's property managers were not surveyors and were obliged to show respect for tenant's property. They could not move property without the tenant's consent or if the tenant was not present. If the property manager thought that the tenant was not properly looking after the property then this would be raised with the tenant. Mr Fraser said that if there was an issue with the property then this was raised with the landlord and if instructed would appoint an appropriate specialist to report. Mr Fraser said that following the inspection in January 2019 when damp had been noticed this had been brought to the Applicant's attention and a specialist report instructed.

22. The Applicant suggested more could have been done with the tenant as pictures taken showed how untidy the Tenant had been keeping the property. It was confirmed by Mr Fraser that the tenant had been in the property from 8 June 2016 until 7 August 2019.

23. The Applicant suggested that the Respondent had consistently missed dates and time-scales for replying to communications and in particular it had taken four weeks for the property to be returned to him following the end of the tenancy.

24. Mr Fraser explained that emails had been followed up promptly. The delay in returning the property had been as a result of organising the cleaners to complete the cleaning of the property prior to sending out the keys to the Applicant. The tenancy had ended on 7 August. A final inspection was carried out on 13 August but further cleaning was required. This was done by 23 August and it was thought that the keys could be handed back and an email was sent to the Applicant querying whether they were to be sent by post or collected. There was then a further email from the Applicant pointing out there was still rubbish in the property and the keys were finally sent out on 26 August. The Applicant confirmed he received the key on 29 or 30 August. It was also confirmed that he had agreed to the tenant having her whole deposit returned to her.

25. The Applicant explained that he had previously had specialist damp treatment work carried out at the property in about 2012 by a company called Kuritol Preservation Limited. The work carried a 30-year guarantee. Further work had been done at the property under the guarantee in 2016. However, the company had gone into liquidation in February 2019. The work was covered by an insurance policy but unfortunately, he had mislaid the drawing and without that the insurers would not meet the cost of the work under the guarantee. He had contacted the company's liquidators but they were of no assistance. It was the Applicant's position that if the Respondent had carried out an inspection in 2018 the damp issue would have been noticed then and the work would have been done by Kuritol under their guarantee or he would have been able to obtain a copy of the drawing from them before the company went into liquidation. Instead as a result of the Respondent's failure to inspect the property the Applicant said he had incurred the cost of having new specialist work carried out at a cost of £3268.40.

26. The Applicant said that in addition to this he had incurred re-decoration costs amounting to £1940.00. he said the property had been decorated in 2012 and the front door had been re-painted more recently. He accepted that had the insurers met the cost of repairing the damp issue they would not have met the cost of re-decorating.

27. The Applicant also submitted that the dispute with the Respondent and making an application to the Tribunal had impacted on him both mentally and financially. It had been necessary for him to borrow money to get the work done. It had taken until now to complete the works and redecorate and throughout this time he had to pay the mortgage and council tax on the property. For the first month he had been unable to gain access to the property. He had been very stressed by the whole affair which had taken up

a great deal of his time. It was therefore appropriate that the costs he had incurred were reimbursed.

28. For the Respondent Mr Fraser offered an apology for the fact that the inspection had not taken place in 2018 and was also sorry for any impact that may have had on the Applicant. Having accepted that there had been a failure on the part of the Respondent Mr Fraser said that the Applicant had been offered an ex gratia payment of £500.00 but this had not been accepted. Mr Fraser said that the Respondent could not accept liability for the underlying damp issue or that Kuritol had gone into liquidation or that the Applicant had lost the paperwork that was necessary to validate the insurance guarantee. Mr Fraser's position was that had the inspection taken place in 2018 it may or may not have disclosed an issue with damp. There was no way of knowing. Furthermore, as the property had been tenanted since 2012 and not decorated during that time there would be wear and tear and it would not be unreasonable to expect that it would after such a period need to be re-decorated and, in any event, if there were damp issues re-decoration would be necessary.

29. The Applicant pointed out that initially the Respondent had offered to meet 10% of the cost of quote by the Respondent's timber specialist which had been estimated at £6500 - £7000 + VAT and Mr Fraser confirmed this was correct.

The Tribunal make the following findings in fact:

30. The Respondent acted as letting agent on behalf of the Applicant.

31. As part of its duties the Respondent ought to have inspected the property at least once in 2018. It did not do so.

32. The Respondent did not advise the Applicant that it had been unable to access the property in 2018.

33. The Respondent did not have any procedure in place at that time to ensure that a failure to gain access to a property was followed up.

34. The Respondent has a procedure for keeping keys secure and recording their use.

35. An inspection of the property by the Respondent in January 2019 disclosed evidence of damp in the property.

36. The Respondent obtained a timber specialist report from Create Group in February 2018 that noted damp in the lounge, hallway, bedroom and

bathroom. The estimated cost of repair was in the region of £6500.00 - £7000.00 + VAT.

37. The Applicant's previous contractors Kuritol Preservation Limited ceased trading and went into liquidation in February 2019.

38. The Applicant had carried out damp treatment to the property in about 2012 and obtained a 30-year guarantee from Kuritol Preservation Limited backed by insurance cover.

39. Additional work was done by Kuritol under their guarantee in 2016.

40. The applicant was unable to claim on the insurance provided with the Kuritol guarantee as he had misplaced the drawing of the work carried out by Kuritol Preservation Limited and was unable to obtain a copy once they had ceased trading and gone into liquidation.

41. The tenant in the property had a lot of belongings.

42. The tenant vacated the property on 7 August 2019.

43. The Tenant arranged for the property to be cleaned at the end of the tenancy.

44. Following an inspection by the Respondent on 13 August cleaners were instructed to return at the tenant's cost.

45. Further cleaning was completed by 23 August 2019 but some rubbish was still in the property at that time.

46. The keys to the property were sent by post to the applicant by the Respondent on 27 August 2019 and received by the Applicant by 30 August 2019.

47. Between 13 August 2019 and 25 August 2019, the Respondent replied promptly to any communications from the Applicant.

48. The property was decorated in 2012. Other than the front door being repainted and some re-decoration following the damp repairs in 2016 no other decoration had been carried out to the property.

49. The Applicant has incurred costs amounting to £1940.00 in respect of re-decorating the property following the completion of damp treatment works and the termination of the tenancy.

50. The Applicant has incurred costs of £3268.40 in respect of specialist damp treatment works at the property following the end of the tenancy.

51. The tenant's deposit was returned to her in full at the end of the tenancy.

52. The Applicant has found the dispute with the Respondent and the issues associated with it stressful and time consuming.

Reasons for Decision

53. There was a frank admission from the Respondent that there had been a failure on its part to ensure that an inspection of the property was undertaken in 2018 and of course the Tribunal could not consider any allegations of earlier failures on the part of the Respondents prior to the Code coming into force on 31 January 2018. In the absence of the written agreement between the parties the Tribunal was unable to say whether the property ought to have been inspected once or twice per year but it was accepted that there definitely should have been one inspection in 2018 and it did not take place. There was therefore a clear breach of paragraph 21 of the Code.

54. It also appeared clear to the Tribunal and was accepted by the Respondent that there had been a breakdown in the Respondent's systems that permitted a failure on the part of a tenant to permit access to result in no inspection taking place at all throughout the year. This in the Tribunal's view was a breach of paragraph 24.

55. By not informing the Applicant that it had been unable to inspect the property after not gaining access in 2018 the Tribunal considered that the Respondent was in breach of paragraph 27 of the Code as by not permitting access the tenant was likely to be in breach of a term of her tenancy agreement.

56. As no inspection of the property was carried out in 2018 and this was at least initially due to the tenant not granting access this situation ought to have been brought to the Applicant's attention by the Respondent and its failure to do so was a breach of paragraph 74 of the Code.

57. As it was accepted that a failure on the part of the tenant to permit access to the property would have been a breach of her tenancy agreement it follows that this ought to have been reported back to the Applicant and the Respondent's failure to do so was a breach of paragraph 75 of the Code.

58. The Tribunal accepted the oral submissions of Mr Fraser that the Respondent did have in place a secure method of storing keys, keeping them separate from property information and recording when and to whom they were issued. The Tribunal did not consider the fact that the Applicant may have been given some old keys to the property to be relevant and did not find that the Respondent was in breach of paragraph 80 of the Code.

59. It was confirmed that the Respondent had in 2018 ensured that the necessary Gas Safety check was carried out. Whilst it was accepted that no inspection of the property had been undertaken in 2018 that in itself would

not constitute a breach of paragraph 85 nor would the fact that the tenant had an unusually large number of belongings in the property or that it was not in a tidy condition. The Tribunal therefore did not find that the Respondent was in breach of paragraph 85 of the Code.

60. The Applicant provided little by way of evidence to suggest that the Respondent had consistently missed dates and time-scales. The evidence submitted was principally around the delay in returning the property and keys back to him. The Respondent did in its written submission acknowledge that it should have made a set of keys available to the Applicant and the Tribunal is in agreement with this suggestion. It should be noted however that although the Applicant was pressing for the property to be returned to him, he did not in any of the emails suggest that he collect a set of keys in order to allow him to obtain access or to let contractors gain access. Whilst the Tribunal found that the time it took from the end of the tenancy until the keys were returned to the Applicant to be unacceptable it did not find that in doing so the Respondent had failed to deal with enquiries or complaints within reasonable timescales and therefore did not consider that there had been a breach of paragraph 108 of the Code.

61. Having been satisfied that the Respondent was in breach of paragraphs 21,24,27,74 and 75 of the Code the Tribunal had to consider the extent to which the Respondent could be said to be culpable in order to determine the extent of any monetary award that might be appropriate to be made to the Applicant. The Applicant in his submission was essentially looking for an award of damages to against the Respondent to potentially cover the cost of the damp treatment the decoration of the property and an award for the stress and inconvenience caused by the Respondents failings.

62. On the other hand whilst accepting it had failed in its duty to carry out an inspection in 2018 the Respondent submitted it could not be held liable for the cost of repairs and decoration because it could not be said that even if an inspection had been carried out in 2018 it would have shown the presence of damp at that time. There had been no report of damp in the property from the tenant during that time. Furthermore, it was it was said not the Respondent's fault that Kuritol Preservation Limited had gone into liquidation or that the Applicant had mislaid the drawing required to validate the insurance claim. It was also said on behalf of the Respondent that given the number of years the property had been tenanted it would not be unusual for it to be needing re-decoration due to wear and tear and in any event after damp treatment decoration would be required.

63. The Tribunal must base its decision on evidence and not speculation. The Applicant may well believe that if the Respondent had inspected the property in 2018 it would have identified a damp issue at that time but he has not produced any evidence to support that belief. The Tribunal accepts that to do so may have been difficult perhaps even impossible but in the absence of any evidence it is impossible for the Tribunal to conclude that the failure of the Respondent to inspect the property in 2018 resulted in a failure to identify a damp issue in the property. Similarly whilst it is possible

that the Applicant may have been able to instruct Kuritol Preservation Limited to carry out remedial work under their guarantee or obtain a copy of the necessary drawing from them before they went into liquidation had he been aware of damp in the property in 2018 without any evidence to show that the damp would have been picked up by the Respondent had the 2018 inspection taken place it cannot be said that the Respondent can be held liable. Furthermore, it was apparent to the Tribunal that no fault could be placed on the Respondent for the Applicant mislaying the original drawing. If he had retained the drawing the Applicant would have been able to claim under the insurance policy at little or no cost to himself. With regards to the decorating costs the Tribunal took account of the fact that the property had been tenanted for some seven years and had not been re-decorated in that time other than following the damp repair in 2016 and the repainting of the front door. It therefore seemed likely that after such a lengthy period substantial re-decoration would be required and in any event as there had been a further damp issue it followed that there would be redecoration required as a result of that also. It therefore did not seem to the Tribunal that the Respondent should be liable for the cost of decoration. Nonetheless it did appear to the Tribunal that there had been a serious failing on the part of the Respondent. It was clearly an important part of the service it provided that it inspected the property on a regular basis in order that the Applicant was kept informed of any issues that could be seen to have arisen. The Respondent's failure may have contributed to a delay in the damp issue being identified or it may not, there is no way of knowing that for certain but not knowing is very unsatisfactory. It was also apparent to the Tribunal from the demeanour of the Applicant at the hearing that he had quite genuinely been affected by the failings on the part of the Respondent and the stress associated with that and the application to the Tribunal. The Tribunal considered that there had been serious breaches of the Code that merited a substantial monetary award and determined that the Respondent should make a payment of £1300.00 to the Applicant in respect of the various breaches of the Code and in respect of the stress, worry and inconvenience suffered by him. The Tribunal also determined that it would be appropriate for the Respondent to issue a written apology to the Applicant not only for its failure to carry out the inspection of the property, its breaches of the Code, the worry and distress but also for the inconvenience caused on the day of the hearing by failing to attend on time.

64. The Tribunal's decision was unanimous.

Decision

65. The Tribunal having carefully considered the evidence presented to it at the hearing and the written submissions of the parties finds that the Respondents are in breach of paragraphs 21, 24, 27 and 75 of the Letting

Agents Code of Practice and therefore will make a Letting Agent Enforcement Order (LAEO) obliging the Respondent :-

1. To make payment to the Applicant the sum of £1300.00 within 14 days of the date of service of the LAEO.
2. To make a written apology to the Applicant acknowledging the worry and distress caused by its failure to carry out an inspection of the property in 2018, the breaches of the Code and any inconvenience caused by its delay in attending the hearing and that also within 14 days of the date of service of the LAEO

Appeals

A homeowner or property factor 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.

Graham Harding Legal Member and Chair

20 January 2020 Date